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HISTORY AND DIGEST

OF THE

INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY,

TOGETHER WITH

APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND MODERN, AND ON THE DOMESTIC COMMISSIONS OF THE UNITED STATES FOR THE ADJUSTMENT OF INTERNATIONAL CLAIMS.

BY

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IN SIX VOLUMES.

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Alfred Barbour Hart

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CHAPTER XIX.

SPANISH SPOLIATIONS: COMMISSION UNDER ARTICLE XXI. OF THE TREATY BETWEEN THE UNITED STATES AND SPAIN OF OCTOBER 27, 1795.

Belligerent Spoliations.

In his message to Congress of December 5, 1793, touching the relations of the United States with the belligerent powers in Europe, Washington said:

"The vexations and spoliation understood to have been committed on our vessels and commerce by the cruisers and officers of some of the belligerent Powers appear to require attention. The proof of these, however, not having been brought forward, the descriptions of citizens supposed to have suffered were notified that, on furnishing them to the Executive, due measures would be taken to obtain redress of the past, and more effectual provisions against the future. Should such documents be furnished, proper representations will be made thereon, with a just reliance on a redress proportioned to the exigency of the case."[1]

In a report to the President of March 2, 1794, Edmund Randolph, then Secretary of State, referring to this passage, said that when he came into the Department of State he found a large volume of complaints, which the notification to persons to send in their proofs had called forth, in relation to attacks on the commerce of the United States by the British, French, Spanish, and Dutch. Against the Spaniards, said Randolph, "the outrages of privateers are urged." The cases of complaint against the British were 32; against the French, 26; against the Spanish, 10; against the Dutch, 1.[2] France declared war against Spain March 16, 1793. Spain issued a counter declaration March 23, in which it was stated that the two countries had really been at war since February 26, on

[1] Am. State Papers, For. Rel. I. 141, 142.
[2] Id. 423, 424, 461.

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which day a commission against Spain, found on board a French privateer, was dated. May 25, 1793, Spain entered into an alliance with Great Britain.[1] On May 26, 1794, Washington transmitted to Congress a copy of a certificate, communicated by the Spanish commissioners in the United States to the Secretary of State, without which American vessels could not be admitted to Spanish ports. This certificate was in the form of a sworn statement to be made by the shipper of the cargo that it was the growth or produce of the United States, and that no part of it was the produce of France or her colonies, or had received any advantage or improvement in France or any of her dependencies, or had in any manner contributed to her revenues.[2]

Thomas Pinckney's Mission to Spain.

On November 1, 1794, the President nominated Thomas Pinckney as envoy extraordinary and minister plenipotentiary to Spain, for the purpose of negotiating on the various questions pending between the two countries.[3] When Pinckney arrived at Madrid on June 28, 1795, he found that William Short, who had been acting as the diplomatic representative of the United States in Spain, had already been in communication with the court on the treatment of American vessels, and that the Duke of Alcudia, while stating that no general orders on the subject could be published, had on the 6th day of April assured him that American vessels would be treated by Spain in accordance with the stipulations of the treaty between the United States and France. This assurance the Duke repeated in a conference which he held with Messrs. Pinckney and Short jointly.[4]

Position of Spain.

This assurance involved a very considerable concession to the United States, and the duke was not disposed to construe it in as broad a sense as that which the American diplomatists ascribed to it.

[1] Am. State Papers, For. Rel. I. 277, 425.

[2] Am. State Papers, For. Rel. I. 463.

[3] Am. State Papers, For. Rel. I. 469, 533.

[4] Mr. Pinckney to the Sec. of State, July 21, 1795, Am. State Papers, For. Rel. I. 534. Of Manuel Godoy, Duke of Alcudia, afterward the Prince of Peace, it has been said that he "was a mild, enlightened, and intelligent minister, so far as the United States were concerned; capable of generosity and of courage, quite the equal of Pitt or Talleyrand in diplomacy, and their superior in resources." (Adams's History of the United States, I. 348.)

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By a decree issued by the King of Spain at the beginning of the war—a decree which the certificate of cargo heretofore mentioned was designed to enforce—it was ordained that French produce, and even that of foreigners if it had been landed in France and paid duty there, should not be admitted into Spanish ports, though laden in neutral bottoms. By a privateering ordinance (*ordenanza de corso*) of May 1, 1794, however, Spain in substance professed a willingness to act upon the principles of the armed neutrality, one of which provided that the neutral flag should cover enemies' goods;[1] but, being uncertain as to what course France would pursue, she deemed it prudent, before giving those principles full effect, to ascertain whether that power would adopt the same liberal policy. Spain therefore permitted her vessels of war and privateers to bring into her ports neutral vessels laden with French produce, till that point should be cleared up; and the Duke of Alcudia was inclined to construe what Messrs. Pinckney and Short deemed his assurance, as an "offer" to extend the principle of free ships free goods to American vessels, provided that France should, in conformity with her treaty with the United States, pursue the same course. Pinckney, however, contended that the statements made by the duke to Mr. Short constituted in effect an "agreement" to apply the principle of free ships free goods to American vessels, and insisted that, in view of the provisions of the treaty between the United States and France, and the assurances France had given the

[1] The declaration of the Empress of Russia of 1780, which formed the basis of the armed neutrality, announced the following principles: "Article I. That all neutral vessels ought to navigate freely from one port to another, as well as upon the coasts of the powers now at war. Art. II. That the effects belonging to the subjects of the belligerent powers shall be free in neutral ships, excepting always contraband goods. Art. III. That Her Imperial Majesty, in consequence of the limits above fixed, will adhere strictly to that which is stipulated by the tenth and eleventh articles of her treaty of commerce with Great Britain, concerning the manner in which she ought to conduct toward all the belligerent powers. Art. IV. That as to what concerns a port blocked up, we ought not, in truth, to consider as such any but those which are found so well shut up by a fixed and sufficient number of vessels belonging to the power which attacks it that one can not attempt to enter into such port without evident danger. Art. V. That these principles above laid down ought to serve as a rule in all proceedings, whenever there is a question concerning the legality of prizes." (Wharton's Dip. Cor. Am. Rev. III. 608. See, generally, Fauchille's La Diplomatie Française et la Ligue des Neutres de 1780.)

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United States that she would observe the treaty, orders should be given to Spanish vessels of war and privateers no longer to bring into Spanish ports American vessels laden with produce belonging to Frenchmen, so that the delays, waste, and annoyance resulting from turning vessels from their course, and from bringing them in only to be sent away, might be prevented.[1]

Particular Complaints.

In the course of his correspondence with the Duke of Alcudia, Pinckney particularly discussed several cases of capture. On August 6, 1795, he called attention to the case of the brigantine *Maria*, of Boston, laden with provisions belonging to France and taken into Santander on June 11, and to that of the American ship *Liberty*, of New York, which was freighted at Bordeaux by an American house to take a cargo, consisting partly of whale oil and dried codfish, to Bilbao. The *Liberty* was captured at sea and carried into Bilbao by a Spanish privateer, who had the cargo condemned as good prize, under the decree issued at the commencement of the war, by which it was ordained that French produce, as well as that of foreigners which had been landed in France and had paid duty there, should not be admitted into Spanish ports. Pinckney maintained that the decree could not have been intended to apply to a case like that of the *Liberty*, in which entrance duties were not paid to France, and in which the property had not changed. Moreover, said Pinckney, the decree was modified by the principles of the *ordenanza*, by which the cargo, even if the vessel had belonged to Frenchmen, could not have been condemned.[1]

On the 14th of August the duke replied that the King had directed the minister of marine to order the liberation of the *Maria* and *Liberty*, and that His Majesty had also directed "that the captain of the *Providence* be paid for the pitch, tar, and turpentine, taken from him at Santander, as contraband articles;" and that "in like manner restitution be made for the cargo of the American brigantine *Abigail*, of New York, consisting of iron, steel, boards, and paints, confiscated by the marine judge of Santander."[2]

On August 30 Pinckney called attention to the case of the ship *Betsey*, of Philadelphia, which, after being detained for

[1] Am. State Papers, For. Rel. I. 536. [2] Id. 537.

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more than two years, while the master was pursuing his suit against the captors, was still detained, though the master had obtained a favorable decree from the tribunal of appeal, who were to judge his process in the last resort, because the captors were trying to have more judges appointed to pronounce definitive sentence.[1] On the 3d of September he presented the case of the *Three Friends*, at Santander, and asked for the restoration of the vessel, on the strength of the *ordenanza* and the duke's statement of the 6th of April. "The circumstance," said Pinckney, "of this vessel having been found in the possession of Frenchmen can not change the case, because she would not have been deemed good prize if she had been carried into France; and even if all the cargo belonged to Frenchmen, it would be restored here, according to the last dispositions of His Majesty."[2] On September 13, he called attention to the case of the vessels *Rooksby* and *Greenway*, carried into Cadiz in 1793 by the Spanish frigate *Santa Cathalinda*. It was supposed that these vessels had been put in thorough repair at the royal dock yards, but an agent who had been sent to Cadiz found that the repairs had not been made. "As to what regards the freight and other demands," said Pinckney, "I have no doubt but we shall be able to arrange them amicably, at the same time we regulate the principles of several other claims of the same nature."[2]

On September 15, the Duke of Alcudia, who had now become the Prince of Peace, replied that orders had long since been given for the "repairing and refitting of the said vessels, agreeably to what has been proposed; but without attending to the pretended reclamations, for the reasons mentioned in my letters to Mr. Short upon this subject."[3]

On October 23, Pinckney wrote to the prince that his excellency apparently had not received correct information as to the immediate liberation of American vessels taken since the 6th of April, since, out of the five carried into Santander—the *Liberty* of New York, the *Maria* of Boston, the *Providence* of Philadelphia, the *Abigail* of New York, and the *Three Friends* of Salem—the *Liberty* was detained one hundred and ten days, the *Three Friends* was at last accounts still detained, and the three others put to sea without part of their cargoes, though

[1] Am. State Papers, For. Rel. I. 538. [2] Id. 539. [3] Ibid. 539.

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the latter had been ordered to be restored.[1] Though Pinckney did not admit any distinction between vessels taken before and those taken after the 6th of April, maintaining that the duke's assurance should operate retrospectively as well as prospectively, he referred to the date because the Prince of Peace in a note of the 18th of October had made such a distinction, saying that captures made before the date in question should be judged according to the general orders issued at the time; while vessels detained since that time should be treated "in the same manner as those which were then brought from the coast of Cantabria."[2]

Ultimate Disposition of Complaints.

Of the eight vessels particularly mentioned in the preceding correspondence, there certainly were four, and probably were five, in respect of which compensation was obtained through the international commission to which this chapter relates. Indeed, the first awards of the commission were made in the cases of the *Rooksby* and *Greenway*, which were taken into Cadiz in 1793.[3] It seems that an award was made also in the case of the *Betsey*.[4] In the five remaining cases—the vessels taken into Santander—awards were made in favor of the *Liberty* and the *Three Friends*.[5] Of the *Maria*, *Providence*, and *Abigail* no mention is made in the list of awards; though, in a note to a list of the awards transmitted by one of the commissioners to Mr. Pickering, Secretary of State, on January 2, 1800, it is stated that no papers had appeared in the case of the "schooner" *Maria*, which His Catholic Majesty had ordered to be restored.[4] This, probably, is the vessel mentioned in Mr. Pinckney's note of October 23 as having put to sea.

Proposal of Arbitration.

September 20, 1795, Pinckney addressed to the Prince of Peace a note in which he reviewed at length the whole subject of the claims against Spain for the capture of American vessels by her men-of-war and privateers. The war between Spain and France

[1] Am. State Papers, For. Rel. I. 545.

[2] Am. State Papers, For. Rel. I. 544.

[3] The awards in these cases were made December 27, 1797. In the case of the *Rooksby* the amount was $15,535.79; of the *Greenway*, $14,846.39. In each case interest at the rate of 6 per cent was allowed from a specified date on the amount awarded.

[4] Am. State Papers, For. Rel. II. 283.

[5] The award in the case of the *Liberty* was for $4,260.98; in the case of the *Three Friends*, $2,088.50. Each award bore interest.

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had then been brought to a close by the treaty which won for the Duke of Alcudia the title of El Principe de la Paz—Prince of Peace.[1] Pinckney declared that the principle on which the claims were based was that neutrals had the right to pursue their commerce unmolested, provided that they did not attempt to carry to either belligerent warlike stores or attempt to trade with places that were besieged or blocked up. This doctrine was, said Pinckney, founded on reason and supported by the most enlightened writers; it was embodied in late treaties; it was established by the armed neutrality of 1780, of which Spain approved, and its acceptance by all the nations of the two hemispheres, except one, had placed on a certain basis that which should thenceforth be the law of nations on the subject. Hence he proposed that the decisions upon the vessels that had been captured should be governed by the principles of the armed neutrality, and that commissioners should be named on both sides for the purpose of determining the reimbursements which might be due on this account. Moreover, by the fourteenth article of the *ordenanza de corso*, said Pinckney, His Majesty had declared that he would observe the same conduct in this respect as his enemies, and France was bound by her treaty with the United States to observe those principles, and had acted accordingly. If, as was alleged, a considerable number of American vessels engaged in lawful traffic had been seized and carried into Spanish ports, particularly in the West Indies, where their cargoes were ultimately carried off by force, without their proprietors knowing in many cases whether they were judicially condemned; if it were true that half of the crews of some of the vessels died in captivity, and the rest abandoned the vessels and cargoes rather than face the dangers of so destructive a detention, and if the sentences of condemnation in the islands were based on acts which were not offenses against the law of nations, it could not be doubted that His Majesty would order proper measures to be taken for repairing the wrongs done under color of his authority. If the facts alleged did not exist, the commissioners would demonstrate it.[2]

Discussion of Stipulations.

On September 23 the prince replied: "On the same terms as we have determined the American prizes in Europe, since the neutrality of the United States with France in the present war has

[1] Annual Register, XXXVIII. (1795) 297.

[2] Am. State Papers, For. Rel. I. 539.

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been known, shall be judged the prizes which may have been made in America. But this matter being very different from the system of a treaty stipulating positive regulations for the future, there is no necessity of including it therein."[1] On October 5, Pinckney, referring to this note, said it only remained to explain what the principles, on which the cases were to be decided, were. As objection was made to inserting the matter in the treaty, he had embodied the details in a separate convention, which he inclosed.[2] The prince thought the same objection would apply to inserting the matter in a separate convention as to inserting it in the general treaty.[3] Subsequently, however, he agreed to advise the King to conclude a separate convention; and with that view Pinckney submitted an article in the same sense as his prior arguments, the substance of it being that the claims should be decided in accordance with the rule in the treaty between the United States and France. On the 12th of October the prince declared that the King never would permit the matter to be included in a treaty or convention.[3]

Conclusion of a Treaty.

Further discussion ensued, and on the 24th of October, being unable to effect an arrangement either as to captures or as to a port of deposit on the Mississippi, Pinckney asked for his passports.[4] Three days later, however, on October 27, 1795, a treaty was signed, of which an eminent historian has said that it "never received the credit it deserved; its large concessions were taken as a matter of course by the American people, who assumed that Spain could not afford to refuse anything that America asked, and who resented the idea that America asked more than she had a right to expect. Fearing that the effect of Jay's treaty would throw the United States into the arms of England at a moment when Spain was about to declare war, Godoy conceded everything the Americans wanted. His treaty provided for a settlement of the boundary between Natchez and New Orleans; accepted the principle of 'free ships free goods,' so obnoxious to England; gave a liberal definition of contraband such as Jay had in vain attempted to get from Lord Grenville; created a commission to settle the claims of American citizens against Spain on account of

[1] Am. State Papers, For. Rel. I. 540. [2] Id. 542. [3] Id. 543. [4] Id. 545.

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illegal captures in the late war; granted to the citizens of the United States for three years the right to deposit their merchandise at New Orleans without paying duty; and pledged the king of Spain to continue this so-called *entrepot*, or 'right of deposit,' at the same place if he found it not injurious to his interests, or if it were so, to assign some similar place of deposit on another part of the banks of the Mississippi."[1]

Article XXI.

The provisions of the treaty for the settlement of the American claims for captures are to be found in the twenty-first article, by which the high contracting parties agreed to refer "all differences on account of the losses sustained by the citizens of the United States in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty during the late war between Spain and France," to three commissioners who were to sit in Philadelphia, and to examine and decide the claims in question "according to the merits of the several cases, and to justice, equity, and the laws of nations." The principle and mode of accommodation thus adopted were similar to those embodied in the seventh article of the Jay Treaty; but the stipulation in the latter treaty that governmental compensation should be made only where "adequate compensation can not, for whatever reason, be now actually obtained, had, and received, * * * in the ordinary course of justice," was omitted. "The proposal of the British principle of accommodation," said Pinckney, "came from the Spanish negotiator, and was urged on strong grounds. I trust, however, that this is, upon the whole, better than the British arrangement. There was, at first, a rooted repugnance here to insert this * * * article in the treaty, in which objection the national pride seemed most concerned."[2]

The text of Article XXI is as follows:

"In order to terminate all differences on account of the losses sustained by the citizens of the United States in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty, during the late war between Spain and France, it is agreed that all such cases shall be referred to the final decision of commissioners, to be appointed in the following manner. His Catholic Majesty shall name one commissioner, and the President of the United

[1] Adams's History of the United States, I. 348–349.

[2] Am. State Papers, For. Rel. I. 546.

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States, by and with the advice and consent of their Senate, shall appoint another, and the said two commissioners shall agree on the choice of a third, or if they cannot agree so, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners, and the person whose name shall be so drawn shall be the third Commissioner; and the three Commissioners so appointed shall be sworn impartially to examine and decide the claims in question, according to the merits of the several cases, and to justice, equity, and the laws of nations. The said Commissionsers shall meet and sit at Philadelphia; and in the case of the death, sickness, or necessary absence of any such Commissioner, his place shall be supplied in the same manner as he was first appointed, and the new Commissioner shall take the same oaths, and do the same duties. They shall receive all complaints and applications authorized by this article, during eighteen months from the day on which they shall assemble. They shall have power to examine all such persons as come before them on oath or affirmation, touching the complaints in question, and also to receive in evidence all testimony, authenticated in such manner as they shall think proper to require or admit. The award of the said Commissioners, or any two of them, shall be final and conclusive, both as to the justice of the claim and the amount of the sum to be paid to the claimants; and His Catholic Majesty undertakes to cause the same to be paid in specie, without deduction, at such times and places, and under such conditions as shall be awarded by the said Commissioners."[1]

Proceedings of Commission.

Of the proceedings of the commission under this article, only a meager outline can be given. On the supposition that the article was annulled by the twelfth article of the treaty between the United States and Spain of February 22, 1819, commonly called the Florida Treaty, the impression has very generally prevailed that it was never fully and finally carried into effect;[2]

[1] Treaties and Conventions between the United States and Other Powers, 1776–1887, pp. 1013–1014.

[2] In the volume of Treaties and Convention between the United States and Other Powers, 1776–1887, p. 1013, where Article XXI. is printed, it is stated, in a note to the article: "This article is annulled by Article XII. of the treaty of February 22, 1819." The statement is hardly correct. Article XII. declares that the treaty of 1795 "remains confirmed in all and each of its articles excepting the 2, 3, 4, 21, and the second clause of the twenty-second article, which, having been altered by this treaty, or having received their entire execution, are no longer valid." The history of this declaration is that the Spanish negotiator of the treaty of 1819 proposed that the treaty of 1795 should be confirmed. The American negotiator accepted the proposal, but adverted to the fact that some of its pro-

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and this impression was confirmed by the fact that the records of the commission were missing, and that there was no record in the Department of State of the payment of the awards. These circumstances are, however, capable of explanation. As to the payment of the awards, it is to be observed that His Catholic Majesty undertook "to cause them to be paid * * * at such times and places and under such conditions as shall be awarded by the said commissioners." As a matter of fact, the commissioners made the awards payable in Spain, usually or uniformly at Cadiz, directly to the claimant, his lawful attorney, executor, administrators, or assigns; and the awards were delivered by the commission to the claimant or his representatives, to be paid accordingly.[1] But where are the records

visions, such as those relating to boundaries, were to be altered by the new treaty, while others had been "fully executed." (Am. State Papers, For. Rel. IV. 530.) Article XII. was among the latter. It was not "annulled." It was only declared to have "received its entire execution."

[1] See Mr. Gresham, Sec. of State, to the Sec. of the Treasury, December 12, 1894; Mr. Adee, acting secretary, to Mr. Chester, April 24, 1895. (MS. Dom. Let.) Also, Report of the Register of the Treasury, April 28, 1800, Am. State Papers, Finance, I. 662. No record of the payment of the awards was made in the Treasury of the United States. In a letter to Mr. David Ingersoll of April 5, 1799 (MS. Dom. Let. X. 285), Mr. Pickering, Secretary of State, said:

"SIR: I enclose two copies of the award of the Commissioners under the Spanish treaty, allowing you 446.75 dollars for damages sustained by the capture of the sloop *Folly* whereof you were master. These you must forward to Madrid, to be presented at the Royal Treasury before they can be paid at Cadiz. The triplicate I shall myself forward to David Humphreys Esq. Minister Plenipotentiary of the United States at Madrid. Three copies of the award are given, to multiply the chances of its arrival. You can no doubt find some merchant who has a correspondent at Cadiz. You may address the two awards inclosed to Mr. Humphreys, or to Moses Young, esq., Consul General of the United States at Madrid, to be presented at the Royal Treasury. You will direct to whom the order for payment shall be sent at Cadiz."

The following instruction of John Marshall, Secretary of State, to Mr. Humphreys, of September 23, 1800 (MS. Instructions to United States Ministers, V. 383), discloses the fact that the awards were then in course of payment:

"The President has directed me to request your particular attention to the claim of Messrs. Gregorie & Scobie, on the Government of Spain. This claim is precisely stated in their memorial which is enclosed marked No. 1.

"The award made in their favor on the 28th day of May 1799 by Mr. Clarkson and Mr. Breck two of the commissioners appointed under the 21st article of our treaty with His Catholic Majesty for the sum of eight thousand four hundred and eighty-seven dollars and two and one half

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of the commission? They are not in the archives either of the United States or, so far as we have been able to ascertain, of Spain; but at least some of them were in 1823 in Philadelphia, in the possession of Peter Lohra, formerly secretary of the commission. In the Department of State, at Washington, there is an old volume which on examination was found to contain a copy of the awards of the commission; and at the end of the awards there is a certificate, dated December 29, 1823, and signed by Peter Lohra as "Notary Public and formerly Secretary of the Commission," in which it is stated that the awards were "faithfully copied from the several original statements and awards made by the said commissioners

cents will be transmitted by those gentlemen to their correspondent in Spain.

"As this award is made in conformity with the treaty between the two nations, the faith of the Spanish Government is pledged for its payment, and the President instructs you to claim a performance of the stipulation which has been entered into.

"We understand that the objection made by the Court at Madrid when this award was presented, was, that the Spanish commissioner had not signed it. The validity of this objection cannot be admitted. His Catholic Majesty has bound himself in the most solemn form to pay any award made by two of the Commissioners. The words of that part of the article are 'The award of the said commissioners or *any two of them*, shall be final and conclusive, both as to the justice of the claim and the amount of the sum to be paid to the claimants: And his Catholic Majesty undertakes to cause the same to be paid *in specie*, without deduction, at such times and places, and under such conditions as shall be awarded by the said Commissioners.'

"To refuse to pay in specie the sum thus awarded by two of the commissioners, is to violate the plain words of the article, and consequently to break the faith of the nation.

"We cannot admit that in such a case the award is to be revised and its merits reconsidered. But if even this might be done, still the decision ought to be in favor of the claim.

"The abstract herewith transmitted No. 2, from the proceedings of the commissioners, exhibits the motives which induced Don Joseph Ignatius Viar, the commissioner on the part of His Catholic Majesty, to withhold his signature.

"This is, that the claimants were not citizens of the United States at the time of the acknowledgment of our independence by Great Britain.

"The injury is admitted and its amount correctly ascertained. The persons who claim were, not only when the treaty was made, but also when the injury was sustained, according to our laws citizens of the United States. In this state of things the treaty stipulates, 'in order to terminate all differences on account of the losses sustained by the *citizens*

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by virtue and in pursuance of the said Treaty and remaining of record in my office." It appears, therefore, that these papers were then in Peter Lohra's possession. What afterward became of them it has not been possible certainly to ascertain. Lohra died in 1827, leaving no will. Some of his papers are now in the hands of his descendants, but they do not include any of the records of the commission. I am informed however by Mr. Stone, the late accomplished librarian of the Historical Society of Pennsylvania, that there is "undoubted evidence that Lohra's private papers, or a portion of them, were, about 1833–1835, in the hands of a person in New Orleans who died of the yellow fever."[1]

of the United States, in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty,' 'that all such cases shall be referred to the final decision of commissioners.'

"The right of naturalizing aliens is claimed and exercised by the different nations of Europe as well as by the United States. When the laws adopt an individual no nation has a right to question the validity of the act, unless it be one which may have a conflicting title to the person adopted. Spain therefore, cannot contest the fact that these gentlemen are American citizens.

"If this inadmissible power was to be set up by His Catholic Majesty, it ought to have been asserted when the treaty was formed. He ought then to have discriminated between our citizens. He ought then to have promised compensation only for the captured vessels and cargoes of those who were citizens of the United States when our independence was acknowledged by Great Britain; not having done so then, it is too late now to attempt this odious discrimination. He has promised in terms which expressly include Messrs. Gregorie & Scobie, and every principle of good faith and national honor requires that he should perform the promise thus made.

"We must suppose that this claim has been inadvertently rejected, and that on calling the attention of the Spanish Government to its real merits, it will, according to the stipulations of our treaty, be paid in specie. Payment in no other medium can be received."

[1] In the archives of the Department of State there is the following letter:

"DEPARTMENT OF STATE, *Trenton, Sept. 1st. 1798.*

"PETER LOHRA, Esq.

"SIR: By the direction of the Secretary of State, I enclose you his check on the Bank of the United States for one hundred and fifty dollars, on account of your salary as Secretary to the Commissioners under the twenty-first article of the Spanish treaty—agreeably to your request of the 28th ultimo.

"With respect, your obt. &c.

"HAZEN KIMBALL."

(MS. Dom. Let. X. 77).

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Results of Commission.

The names of the commissioners were Joseph Ygnat. Piarez,[1] Matth. Clarkson, and Sam'l Breck. In his speech to Congress of November 23, 1797, President Adams stated that the "commissioners appointed agreeably to the twenty-first article of our treaty with Spain met in Philadelphia, in the summer past, to examine and decide on the claims of our citizens for losses they have sustained in consequence of their vessels and cargoes having been taken by the subjects of His Catholic Majesty during the late war between Spain and France. Their sittings have been interrupted but are now resumed."[2] In his speech of December 8, 1798, he stated that the "commissioners had adjusted most of the claims."[3] The first award bore date December 27, 1797, and was as follows:

"*To all to whom these presents shall come Greeting*

"The Commissioners duly appointed for carrying into Effect the Twenty-first Article of the Treaty of Friendship, Limits and Navigation between His Catholic Majesty and the United States of America, dated at San Lorenzo Real the Twenty seventh day of October One thousand seven hundred and ninety five, having attentively examined the Claim of Abel Harris of Portsmouth in the State of New Hampshire Merchant a Citizen of the United States together with the several Accounts and Documents exhibited by him in support thereof for Detention Freight and Primage in the case of the Ship *Rooksby* whereof Nathaniel Jones was Master, captured on or about the Seventeenth day of August One thousand seven hundred and ninety three by His Catholic Majesty's Frigate *Santa Catalina* commanded by Don Diego Choquet do award that the sum of Fifteen thousand five hundred and thirty five Dollars and seventy nine Cents with Interest thereon at the rate of six per Centum per Annum from the Twentieth day of April One thousand seven hundred and ninety six until the same be discharged, shall be paid to the said Claimant his lawful Attorney Executors Administrators or Assigns in Specie without deduction at the City of Cadiz in the Kingdom of Spain within three months after this Award shall have been exhibited at the Royal Treasury at Madrid.

"Given under the hands and seal of the said Commissioners, at the City of Philadelphia in the State of Pennsylvania the

[1] In some places the name is written as if it were Diarez. The first Spanish commissioner was Señor Viar, who was succeeded by Señor Piarez. (See Mr. Pickering, Sec. of State, to the Chev. de Yrujo, Spanish minister, May 3, 1797, MS. Dom. Let. X. 38.)

[2] Am. State Papers, For. Rel. I. 45.

[3] Id. 48.

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twenty-seventh day of December One thousand seven hundred and ninety seven Having signed this award together with a Duplicate and Triplicate thereof either of which being paid the others to be void.

[L. S.] "JOSEPH YGNAT. PIAREZ
"MATTH. CLARKSON
"SAM'L. BRECK

"Attest
PETER LOHRA,
Secretary.
"Dollars 15535.79 Cents."

This award furnished the model, in point of form, for those that followed. The last one bears date December 31, 1799.[1] The awards were forty in number, and aggregated to the sum of $325,440.07½.[2]

Each award, however, bore interest at the rate of 6 per cent per annum from a date therein specified till discharged.[3]

[1] "The commissioners for executing the twenty-fifth article of the treaty between the United States and Spain:

"DEPARTMENT OF STATE, *Dec. 2, 1797.*

"Gentlemen: I have the honor to enclose the opinion of the Attorney-General of the United States on the question whether the commissioners for executing the twenty-first article of the treaty between the United States and Spain may lawfully make awards previous to the expiration of the eighteen months during which the claims are receivable; his opinion being that the treaty contains no limitations as to the time of making your award.

"TIMOTHY PICKERING."

(MS. Dom. Let. X. 257.)

[2] At p. 283, Am. State Papers, For. Rel. II., there is a list of the awards made by the commission up to November 16, 1799. This list embraces thirty-seven awards, amounting to $320,095.07½, exclusive of interest. Only three awards were afterward made, amounting to $5,345, exclusive of interest.

[3] Appropriations by Congress to defray the expenses of the United States in carrying the treaty of 1795 into effect may be found in 1 Stats. at L. 609, 723; 2 Stats. at L. 66, 120,269.)

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CHAPTER XX.

CASE OF THE "COLONEL LLOYD ASPINWALL."

Seizure of the Vessel.

On January 17, 1870, the *Colonel Lloyd Aspinwall*, an American merchant steamer of 71.46 tons register, left Port au Prince, in Haiti, for Havana. All her papers were in regular order, her manifest was legalized by the Spanish consul at Port au Prince, and in view of the fact that an insurrection prevailed in Cuba she was provided with an official letter or passport from the consul of the United States to commanders of Spanish men-of-war in the Bahama Channel. She was the bearer of important dispatches from the minister of the United States at Port au Prince to his government, as well as of dispatches from the commander of an American man-of-war to the admiral in command of the West India squadron. On the 18th of January the steamer encountered strong winds and high seas and began to leak, so that she was compelled to proceed slowly and change her course. On the morning of the 21st of January, when from four to six miles offshore and not far from the port of Nuevitas, she was hailed by a Spanish man-of-war. She replied by displaying the American flag, and continued on her course. About twenty minutes later however she was brought to by the firing of a shot by the man-of-war, and an officer and a boat's crew from the latter came on board and took possession of her. The master handed the steamer's papers to the officer in order that he might see that she was on a legitimate voyage. The officer declined to examine either the papers or the vessel, saying that he had orders to take her to Nuevitas. The master then protested against the vessel's detention, at the same time exhibiting the packages of official correspondence above described.

The Vessel's Detention.

On the arrival of the steamer at Nuevitas, at about 3 o'clock in the afternoon of the 21st of January, the master was ordered on board the Spanish man-of-war, which he found to be the *Hernan*

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Cortes. He took with him and exhibited to the commanding officer the ship's papers, and stated that he had on board of the steamer dispatches of importance for the Government of the United States. The commanding officer examined the ship's papers and said that he would send them ashore, but as to the official correspondence declared to be on board the steamer he made no response. Meanwhile she was left in charge of an armed force. On the 22d of January, however, some Spanish officials came on board and examined both the steamer and her crew, and sealed up the master's trunk, which contained the official correspondence in question as well as other papers. On the 27th of January the steamer was taken in tow by the Spanish man-of-war *San Francisco* for Havana, where she arrived on the 29th. At Havana no communication was allowed between the steamer and the shore till the 7th of February, when some officials came on board, accompanied by a delegate of the vice-consul-general of the United States, to be present at the breaking of the seals of the master's trunk. It was not however till the 13th of February that the master of the steamer was permitted to go ashore and see the American consul. On the 25th the master and crew entered a protest and demand for indemnity at the United States consulate. In this protest they declared that they had not up to that time been informed of the reasons for the seizure of the steamer or for their own detention as prisoners.[1]

Protest of Mr. Fish.

On March 5, 1870, Mr. Fish, who was then Secretary of State, made the seizure of the *Colonel Lloyd Aspinwall* and the detention of her master and crew the subject of an earnest note to Mr. Lopez Roberts, the Spanish minister at Washington. In a communication to Mr. Lopez Roberts of the 16th of the preceding July, Mr. Fish had declared that the "freedom of the ocean" could "nowhere and under no circumstances be yielded by the United States," and that the United States could not "allow their vessels on the high seas, whatever may be their cargo, to be embarrassed or interfered with," unless Spain should claim or be acknowledged to be at war with Cuba, and thus become entitled by public law to the rights of a belligerent.[2] Referring now to this declaration, Mr. Fish expressed the hope that the Spanish Government would, when the matter should have been brought to its attention, "offer to the

[1] S. Ex. Doc. 108, 41 Cong. 1 sess. 114–120. [2] Id. 51.

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Government of the United States a suitable apology for the indignity to the flag of the United States, and to the persons of the bearers of dispatches to this government, and for the interference with the dispatches of the officers of this government to this Department and to the admiral in command of the squadron of the United States in those waters." Mr. Fish also requested Mr. Lopez Roberts, in the exercise of the discretion with which he was understood to be invested, "to cause the *Colonel Lloyd Aspinwall* to be forthwith set at liberty, and a proper compensation to be made to the owners, and to all other persons who have suffered by the seizure or detention."[1]

Order of Release.

On the 6th of April 1870 Mr. Fish telegraphed to Mr. Sickles, then minister of the United States at Madrid, to whom a copy of the note to Mr. Lopez Roberts had been communicated, that the authorities at Havana still held the steamer; that no reply had been made to the demand for her release, and that the President was "not satisfied with this long delay." Mr. Sickles was therefore instructed to ask the Spanish Government for an answer, and for the release of the steamer.[2]

Mr. Sickles immediately sought an interview with Mr. Sagasta, the Spanish minister of state, who informed him that he had received a dispatch from Mr. Lopez Roberts inclosing a copy of Mr. Fish's note, and that he had also received a report from Havana announcing the capture of the steamer "under suspicious circumstances" and stating that the case was undergoing examination in the prize court. Mr. Sagasta said that immediately on receipt of Mr. Roberts's dispatch orders had been sent to the captain-general of Cuba to release the steamer, if it appeared on investigation that she was an American vessel, leaving the question of indemnity for further discussion; and that, in order to avoid delays, Mr. Roberts had been instructed to communicate directly with the Cuban authorities. Mr. Sickles replied "that the Government of the United States could not recognize the jurisdiction of a prize court" in the case; that "such jurisdiction could only exist in consequence of a state of war, and that the United States had received no notification that a state of war" existed; that "the *Lloyd Aspinwall* was an American vessel, and at the time of her capture engaged in the transport of dispatches of officers of the United States Government;" that "these facts

[1] S. Ex. Doc. 108, 41 Cong. 2 sess. 120–121. [2] Id. 122.

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could have been promptly ascertained by the executive authorities; that instead of this, nearly three months had elapsed since the seizure," and that he hoped Mr. Sagasta would see to it that peremptory orders were given for the vessel's release. Mr. Sagasta observed that the decision of the prize court would be given with all possible promptness; but, when Mr. Sickles insisted upon a prompt decision of the case by the executive, Mr. Sagasta assured him that, accepting his assertion of "the nationality of the vessel" and of the fact that "she was employed in carrying dispatches of the United States officers," orders would at once be telegraphed to the captain-general of Cuba to have the steamer immediately released, and that the question of indemnity would be considered promptly.[1] On the following day, April 9, Mr. Sagasta communicated to Mr. Sickles a copy of a telegram of that date from the minister of ultramar to the captain-general of Cuba, which read as follows: "As it appears to this government, by the official declaration of that of the United States, that the vessel *Aspinwall* was going on an errand of service, and with official dispatches, your excellency will order that she be immediately released, giving notice of this to this ministry and to the representative of Spain in Washington. Your excellency is authorized to resolve, in the most friendly and conciliatory sense, any question arising in the matter."

Delays in Execution of the Order.

When this order was received at Havana, the authorities replied that the steamer could not legally be given up without a document to go on file in the court in which the case was pending, as proof of the fact that she was an American vessel and at the time of her capture bearing dispatches. Mr. Sagasta, after consulting the council of ministers, requested Mr. Sickles to give him a statement in writing to that effect, saying that upon receipt of it orders would be issued for the release of the vessel, and that the statement would be sent to Havana as legal proof to justify the release. Mr. Sickles, while he did not object to making such a statement, declined to furnish a document to go on record as evidence in a case of which he claimed that the court had no jurisdiction. Mr. Sagasta replied that the statement would not be used as evidence in that sense, but that the government would make it the basis of a statement

[1] S. Ex. Doc. 108, 41 Cong. 2 sess. 122–123.

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of its own that it had learned from a diplomatic communication the facts asserted, which would justify the order of release. The discussion then assumed a wider range. Mr. Sickles represented to Mr. Sagasta that the fact that the steamer was "engaged at the moment of her capture in the transport of dispatches, though greatly aggravating the circumstances of outrage to the American flag, was not the essential point in the case;" that the demand of the United States was founded on the fact that a Spanish cruiser had in time of peace exercised authority that could belong to Spain only in time of war; and he intimated that the "assertion of belligerent rights by the judicial tribunals of Spain, with the concurrence of the government, might well be taken as a sufficient declaration to other nations that a state of war existed." Mr. Sagasta answered "that the question at issue might be divided into two parts: one, the question of the nationality and lawful errand of the *Lloyd Aspinwall*, which would be decided by the mere assertion" of the Government of the United States, through its minister; and "the other, the question of the right of the Spanish Government to make captures in given cases, which was a subject for full and deliberate discussion, upon which he was ready at any time to enter." He thought, however, that it would be well to settle the former question immediately in the manner he had suggested; that the case "could not be taken out of the court by a declaration of want of jurisdiction, because the Spanish Government sustained the right to capture in analogous cases, and in this case the officers who made the capture asserted that it was made, not on the high seas, but within the maritime jurisdiction of Spain."[1]

Final Arrangement for the Release.

After this interview Mr. Sickles telegraphed to Mr. Fish, stating that the authorities at Havana had reported that they had no power to take the case out of court, and that the council of ministers had decided to order the release of the vessel forthwith on receiving from him a "formal demand in writing for her surrender as an American steamer carrying official despatches." He inquired whether he should make this demand.[2] Mr. Fish immediately replied: "Make demand. Request orders to be sent by telegraph for immediate release."[3]

[1] S. Ex. Doc. 108, 41 Cong. 2 sess. 126–128.
[2] Id. 126.
[3] Id. 128.

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In accordance with these instructions Mr. Sickles addressed to Mr. Sagasta on April 15, 1870, the following note:

"Referring to our interview of yesterday, and in accordance with the request then made by your excellency, I have the honor to state that I am informed by my government that the United States steamer *Colonel Lloyd Aspinwall*, on the 21st of January last, while proceeding from Port-au-Prince to the Havana, on a legitimate and lawful voyage, and bearing official despatches of agents of the United States Government, was forcibly seized by the Spanish man-of-war *Hernan Cortes*, and taken to the Havana and placed under the guns of another Spanish man-of-war in that port, where she still remains, with all her papers detained by force.

"I have therefore to demand, in obedience to the instructions of my government, the immediate release of the steamer *Lloyd Aspinwall*, together with all her papers, officers, crew, and cargo; and this without prejudice to the further demands for reparation which the government of the United States has made or shall make by reason of this offence to its honor and dignity. And in view of the delay which has occurred in responding to the just reclamations heretofore made in this case, I have also to ask that the necessary orders for the release of the vessel and her appurtenances be sent by telegraph, and that your excellency will have the goodness to inform me of their execution."[1]

To this note Mr. Sagasta, on the 21st of April, replied:

"In view of the explicit declarations which have been made by the Secretary of State of the United States, Mr. Hamilton Fish, in his note of the 5th of March last, to the minister plenipotentiary of Spain at Washington, as well as verbally in various interviews held with that representative, showing that the steamer *Colonel Lloyd Aspinwall*, at present detained in *apostadero*[2] of Havana, belongs to the merchant marine of the United States, and was bound on a legal voyage, bearing important official despatches of the American minister in Hayti for the government, and from the commander of one of the war vessels of the same nation for the admiral of the West India squadron, the regent of the Kingdom has decided to accede to the desire manifested by you in the name of the Cabinet at Washington, and to give the requisite orders to the naval commander at the Havana, so that in virtue of the before mentioned declarations the vessel may be released, without prejudice to the question of right to which her capture has given rise, leaving the proceedings to continue and the question of indemnity to be settled hereafter.[3]

[1] S. Ex. Doc. 108, 41 Cong. 2 sess. 129.

[2] Dock yard.

[3] S. Ex. Doc. 108, 41 Cong. 2 sess. 130.

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Release of the Vessel.

On the 28th of April the marine court of Havana, before which the case was pending, "in obedience to the orders of the supreme government of the nation," formally delivered the steamer to Mr. Biddle, the consul-general of the United States, the master having, by direction of the owners, refused to receive her without a tender of damages. The master and crew were also placed at full liberty. On the 30th of April Mr. Biddle requested the delivery into his hands of the register and other papers belonging to the vessel, as well as the return to her of one of the crew, who was missing. The absence of the latter was satisfactorily accounted for, and on the 6th of May the Spanish admiral in command of the Havana station transmitted to Mr. Biddle what the latter, in his report to the Department of State, described as "all the detained papers and despatches." The admiral, in his letter of transmittal, described them as "seven parcels, which appear to be correspondence, the log-book and documents belonging to the American steamer *Colonel Lloyd Aspinwall*."[1]

On the 10th of May the steamer, a survey having previously been held to determine the extent of her damage, sailed for Key West.[2]

Arbitration as to Damages.

On the 25th of May Mr. Fish proposed to Mr. Lopez Roberts that "the claim of the owners of the steamer *Lloyd Aspinwall* for damages on account of the seizure of that vessel by a Spanish man-of-war, and her subsequent detention at Havana," be "referred to two commissioners, one to be selected by the Spanish and the other by this government, with power to both to name an arbiter in the event of their disagreeing, and that the place of their meeting be in the city of New York."[3] This proposition to submit to arbitration the question of damages growing out of the seizure and detention of the steamer was suggested by the owners, who stated that they had no authority to make any proposition on the part of the crew for their imprisonment and loss of personal effects.[4]

Arbitrators and Umpire.

On the 16th of June Mr. Roberts informed Mr. Fish of the acceptance by the Spanish Government of his proposition for an arbitration,[5] and on the 23d he acquainted Mr. Fish that Mr. Juan M.

[1] S. Ex. Doc. 108, 41 Cong. 2 sess. 133–138.
[2] Id. 138.
[3] Id. 139
[4] Id. 135–136.
[5] Id. 140.

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Ceballos, a Spanish merchant in New York, had been appointed as commissioner on the part of Spain. On the same day Mr. Fish notified Mr. Roberts of the appointment of Mr. John S. Williams, of the shipping firm of Williams & Guion, as commissioner on the part of the United States. In informing Mr. Williams of his appointment, Mr. Fish said:

"The minister of Spain has selected Mr. Juan Ceballos to act as the referee on the part of Spain. Your first duty will be to agree on some third party to act as the umpire on questions on which the referees fail to agree, and to report his name to this Department. You will then, at as early a date as possible, proceed to take proof of the damage in such form and under such conditions as may be determined by the referees. In case the referees agree upon an award you will sign it in duplicate, returning one copy to this Department and one copy to the minister of Spain at Washington. In case you do not agree you will certify to the umpire the points on which you fail to agree, together with all the evidence taken concerning the same.[1]

On the 1st of August the arbitrators informed the two governments that they had selected Mr. Johannes Rösing, consul of the North German Union at New York, as umpire.

Umpire's Award.

On the 15th of November 1870 Mr. Williams transmitted to Mr. Fish a copy of Mr. Rösing's decision and award. The total amount awarded was $19,702.50 in gold. The text of the award was as follows:

"To Messrs. JUAN M. CEBALLOS, Esqr.
JOHN S. WILLIAMS, Esqr.

"Referees in the case of the steamer *Col. Lloyd Aspinwall*, for damages consequent upon her detention by the Spanish Authorities in Cuban Ports. January 1870.

"GENTLEMEN: The minutes of your meetings for the settlement of this case with Exhibits annexed, together with your respective opinions expressed to me independently in writing, have been before me for some time. Apart from the circumstance that the crowded state of the business of my consular office, as I forewarned you, left me little time to reflect on the matter, I soon perceived that a case of considerable difficulty and delicacy was submitted to my decision, on which I was loth to pronounce.

"The very wide discrepancy in the respective awards is hard to conciliate; the remote and occult nature of the transactions upon which the computation must be based and the

[1] S. Ex. Doc. 108, 41 Cong. 2 sess. 140–143.

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imperfect state of the evidence before me have made me hesitate more than once. I might have asked for a completion of the evidence, but for remembering that to insist upon such a thing would have belonged to the respective Referees, and that as arbiter I was called upon simply to pronounce upon the case as it was laid before me.

"I miss particularly any statement as to the engagements the steamer in question was under when interrupted in her voyage, and every estimate of damages has therefore to be made on analogies and vague computations. While admitting that a government more even than an individual should be held to make most liberal compensation for an unwarranted interference with legitimate business, still the claims for damages would have to be circumscribed either as *lucrum cessans* or as *damnum emergens*. From this view I come to the following points for my guidance. I find that the steamer in question was interrupted in a voyage begun the 17th of January, and by consequence of this act prevented from engaging in any other pursuits till, after having been released, she was ready again to sail, which she did, leaving Havana the 10th of May, making, both days included, 114 days to be considered. As to the rate of compensation $300 and even higher sums per day have been mentioned as what she might earn under circumstances. It is not asserted, however, much less proved, that she did earn as much when her business was broken up; it seems hardly probable that so small a steamer of 71.40 tons, fit only for a despatch boat or tug, worth not more than $25,000, could expect such returns for any long period. In fact her owner and captain speak of round trips occupying 12 days, which she performed for $2,000. It is not shown that her trade was of any regular character, assuring earnings even at this rate for any length of time. It is claimed that in the eight months preceding the seizure the steamer had earned in gross $34,700, to which statement no exception is taken. Eight months comprising 240 days, she might have earned under similar favorable circumstances during the 114 days in proportion the sum of $16,482.50. Under this supposition the steamer would have earned in one year more than double her value. I will give her the benefit of these most favorable circumstances; no allowance however can be made at the same time for all ordinary expenses for running the ship and keeping her in proper condition.

"Therefore I cannot award the whole bill of repairs, made out at Havana, but only one half of the same which may be occasioned by the exposure of the ship in her protracted idleness, say $1,000. Other expenses I cannot recognize, as rather larger ones of similar character would have been occasioned by her being in service.

"Something would seem to be due to the crew of the vessel as indemnification for their imprisonment, as it were. For

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although the men may have received their full wages for no work, they have suffered wrong in their forced idleness. I would award to all of them as per list of Exhibit E, two months of their wages according to the amounts set forth by the master, including $175 per month for the latter, making an aggregate of $1,220.

"To the owners something is due for their trouble, expenses, loss of interest, etc., occasioned by this incident. One thousand dollars may be award on that account. To recapitulate I would determine the indemnification to be made by the Government of Spain for the seizure of the Steamship *Col. Lloyd Aspinwall* as follows:

"I. To the owners of the ship—	
1. For 114 days interruption of trade, gold	$16,482.50
2. For repairs of ship, gold	1,000.00
3. For expenses in prosecuting claim, gold	1,000.00
Total gold	$18,482.50
"II. To the crew of the ship as per list of, Exhibit E. annexed, gold	$1,220.00
Total awarded, gold	$19,702.50

"Very respectfully
"(Signed) JOHANNES RÖSING.
"NEW YORK, *November, 1870.*

"A true copy.

"ERWIN STAMMANN, M. D.,
Vice Consul North German Union."

"COPY OF EXHIBIT E.

"*Str. Col. Lloyd Aspinwall.*

KEY WEST, *May 23d, 1870.*

"List of Crew with wages per month:

Charles H. McCarty, master	$175 per month
George Shaw, mate	50 " "
John Burns, 2nd mate	40 " "
John Weeks, seaman	30 " "
Charles Wilson, seaman	30 " "
George D. Green, cook	30 " "
Hiram Wood, engineer	100 " "
Charles Palmer, 2nd engineer	75 " "
John Priest, fireman	40 " "
Anderson Douglass, fireman	40 " "

"(Signed)

"CHAS. H. MCCARTY, *Master.*"[1]

[1]An informal arbitration, such as that which has just been described, seems to have been contemplated by the United States and Spain in 1868 in the case of the *Nuestra Señora de Regla*, a Spanish vessel, in relation to which the President sent a message to Congress in January 1868. (H. Ex. Doc. 89, 40 Cong. 2 sess.) The *Nuestra Señora de Regla* was a side-wheel steamer of about 300 tons, built in New York in 1861 for a Spanish railway company in Cuba. While on her way to Havana, after delivery to an agent of the company, she put in at Port Royal, in South Carolina, where the

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Foot-note—Continued.

quartermaster of the United States at that point offered to purchase her for the government. The master declined to sell her; and on November 29, 1861, she was seized by order of General Sherman as a prize, on the ground that she had on board "a large number of letters, treasonable in their nature, written by insurgents to their confederates in other parts of the United States and in foreign countries." (Mr. Seward, Sec. of State, to Mr. Tassara, Spanish minister, December 10, 1861, Dip. Cor. 1862, 517.) No judicial proceedings however were then instituted for her condemnation, and on the 16th of December her master chartered her to the United States as a ferryboat for $200 a day. She was used in this way till about March 1, 1862, when she was sent to New York for trial. After she was libeled her owner filed a claim for her; but on August 22 Judge Betts, of the district court of the United States for the southern district of New York, entered an order setting forth that the Navy Department desired to obtain possession of the vessel, and directing her to be handed over to that Department whenever there should be deposited with the court, subject to its final decree, the amount at which she should be appraised. Three appraisers were appointed, two of whom valued the vessel at $28,000 and the other at $30,000; and she was immediately delivered to the Navy Department, though no deposit was ever made. On June 20, 1863, the district court entered a decree directing the vessel to be restored, but reserving all questions of costs and damages for further hearing; and on October 15, 1863, the court, on agreement of counsel, entered a stay of further judicial litigation, to the end that the question of damages might be adjusted by the United States and Spain.

On the 7th of January 1868 President Johnson recommended to Congress that an appropriation be made to enable the $28,000 at which the vessel was appraised to be drawn from the Treasury. At the same time he stated that it was "proposed to appoint a commissioner on the part of this government to adjust, informally, in this case, with a similar commissioner on the part of Spain, the question of damages; the commissioners to name an arbiter for points on which they may disagree. When the amount of the damages shall thus have been ascertained, application will," he said, "be made to Congress for a further appropriation toward paying them." (H. Ex. Doc. 89, 40 Cong. 2 sess.) January 15, 1868, Mr. Sumner, from the Committee on Foreign Relations, reported a resolution to carry the recommendation of the President into effect. The bill passed the Senate, and was sent to the House. On February 5 it was referred to the Committee on Foreign Affairs, but no further action upon it appears to have been taken.

On May 20, 1870, Mr. J. C. Bancroft Davis, Acting Secretary of State, informed the Spanish minister that it would be more satisfactory to the United States if the parties interested should apply to the court, which still retained jurisdiction of the case, for such further relief as justice demanded. On the 2d of the following June the case was referred to one of the commissioners of the court to ascertain the damages. On May 20, 1871, he reported that the amount due was $214,884, and a decree was entered accordingly. This sum included $200 a day for detention of the steamer from November 29, 1861, to June 20, 1863, the date of the decree

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Foot-note—Continued.

of restoration, with interest at 6 per cent; the value of the vessel, with interest from the latter date; the expenses of an agent who attended to the vessel; and $5,000 as counsel's fee for defending her. On appeal the Supreme Court of the United States, while declaring that the vessel was not lawful prize of war or subject to capture, doubted whether the case was not "more properly a subject of diplomatic adjustment than determination by the courts," and held that the amount decreed to be paid "was greatly excessive, and the allowance for counsel fees wholly unwarranted." The decree was therefore reversed (*The Nuestra Señora de Regla*, 17 Wall. 29), and the case again referred to a commissioner; and on March 8, 1879, another decree was entered for $308,932.38. This sum included no counsel fees, but, with this exception, comprised substantially the same allowances as the prior decree. An appeal was again taken to the Supreme Court, which allowed $35,000 for the detention of the vessel for 175 days, from the day of her seizure to June 9, 1862, when she was libeled and surrendered to the district court, and $30,000 for her value—in all $65,000; and on this sum allowed interest at the rate of 6 per cent per annum from June 20, 1863, the date of the order of restitution, till a new decree should be entered by the court below in accordance with this opinion. (*The Nuestra Señora de Regla*, 108 U. S. 92; Oct. term, 1882.) December 10, 1883, the district court entered a decree for $144,822.50, of which $65,000 represented principal, and $79,822.50 interest on the latter sum at 6 per cent from June 20, 1863, to the date of the decree. By an act of Congress of May 1, 1884 (23 Stats. at L. 15), the Secretary of the Treasury was authorized to pay to the owner of the vessel or its legal representative the amount named in the decree of the district court of December 10, 1883, with interest from the date of the decree.

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CHAPTER XXI.

SPANISH CLAIMS COMMISSION: AGREEMENT OF FEBRUARY 12, 1871.

Revolution in Spain.

The year 1868 was a year of revolution in the dominions of the Spanish Crown. Within two weeks after the 17th of September, when General Prim landed at Cadiz and the insurrection against the reigning dynasty began, Isabella II. was a fugitive in France, and the forces of the revolution were on their triumphant march to the capital. On the 3d of October Marshal Serrano, who in the preceding July fled to the Canary Islands in order to escape arrest at the hands of the government, entered Madrid with his troops and met with an enthusiastic reception. On the 7th of the same month the streets were thronged to welcome the entrance of General Prim. A provisional government was immediately formed, and was recognized by the representatives of various powers on the 25th of October.

Insurrection in Cuba.

On the 10th of October 1868, while these events were taking place in Spain, but without any concert of action, an insurrection broke out at Yara, in the Island of Cuba, and was quickly followed by risings at Manzanillo, Tunas, and Manibio. The forces of the government were immediately called into service by Captain-General Lersundi, but in spite of announcements of insurgent defeat, the movement rapidly spread in the eastern and central departments of the island, where the insurgents, though deficient in arms and in organization, were numerous and were favored by the wildness of the country. On the 11th of February 1869 Marshal Serrano, the president of the provisional government at Madrid, in his speech at the opening of the Constituent Cortes, referred to the insurrection in Cuba in the following terms: "The Revolution is not responsible for this rising, which is due to the errors of past governments; and we hope that it will speedily be put down and that tranquillity,

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based upon liberal reforms, will then be durable. Slavery will be abolished, but without precipitation and without compromising the prosperity of the Antilles."[1]

Captain-General Dulce.

Early in January 1869 a new captain-general, Domingo Dulce, who represented the ideas of the liberal movement in Spain, arrived in Havana. On the 12th of that month he issued a decree which began with the words "Oblivion of the past and hope for the future." In this decree he declared that he was inspired by a desire to enter on a course which should unite all causes and conciliate all ambitions. With reference to the insurrection that began at Yara, he proclaimed an amnesty to all political offenders and the termination of all prosecutions for political offenses; and he extended the benefits of this proclamation to all who should lay down their arms within forty days.[2]

The Spanish "Volunteers."

The liberal policy of Captain-General Dulce encountered an obstacle which he did not fully anticipate. The leaders in the insurrection represented the native Cuban or creole element of the population, and aimed at independence. On the other hand, there was a large Spanish and loyal element, of which the most conspicuous and most powerful component was the local militia organization known as the Spanish or "Catalan" volunteers. This organization, which was first formed early in the fifties for the defense of the island against the Lopez filibustering movements, was composed of Spanish residents, who, coming thither to secure their fortune by industry and commerce, furnished an unusually large proportion of young and able-bodied men fit for military duty. When the insurrection broke out in 1868 the volunteer organization had dwindled to comparatively small dimensions, but Captain-General Lersundi, who had only about five thousand regular Spanish troops, extended it by the creation of new regiments, until he had ten thousand volunteers in Havana and upwards of thirty thousand outside. In the haste of its augmentation, a different material from that of which it was originally composed was incorporated into the organization. Instead of the *élite* of the young Spanish residents, who formerly composed the body of it, there was incor-

[1] Ann. Reg. 1869, 255.

[2] A copy of this decree forms part of the record in the case of Miguel Zaldivar *v.* Spain, No. 127, Span. Com. 1871.

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porated a large, reckless, turbulent, and sanguinary element, over whom their officers, who were men of position and wealth, confessed that they could exert but little control.[1] Of this element Mr. Hall, consul of the United States at Mantanzas, said that it was composed of "the worst elements of the Spanish (peninsular) part of the population—men of brutal and sanguinary instincts, that would, if left to themselves, riot in fire and blood."[2]

Decrees as to Infidencia.

Between forces so antagonistic, so radically diverse in their aims, and at the same time so little subject to authority, the contest naturally developed great intensity of feeling and gave rise to frequent acts of cruelty and destruction. While many persons charged with disloyalty to Spain were shot, the insurgents destroyed towns and private dwellings and burned the crops on the plantations.[3] Under such conditions, Captain-General Dulce's attempt at conciliation, made three months after the insurrection began, utterly failed of its intended effect. In this predicament he found himself unable longer to resist the loud and urgent demands that were made upon him for the adoption of rigorous measures of repression; and on the 12th day of February 1869 he issued a decree in which it was declared that the crime of *infidencia*, as well as all aggressions by word or act against any of the representatives of the government, would be tried by court-martial. This proclamation was next day followed with another, denouncing as *infidencia* various acts tending to disturb public order and tranquillity, or to attack the national integrity.

Denunciation of Intercourse with Enemies.

On the 24th of March Captain-General Dulce issued another decree, in which it was declared that vessels captured in Spanish waters, or on the high seas near the Island of Cuba, having on board men, arms, and munitions of war, or articles that could in any manner contribute to promote or foment the insurrection, whatever their derivation and destination, should, after examination of their papers and register, *de facto* be considered as enemies of the integrity of the territory, and be treated as pirates in accordance with the ordinances of the navy; and that all persons captured in such vessels would, without regard to

[1] S. Ex. Doc. 7, 41 Cong. 2 sess. 83–86.

[2] Id. 26.

[3] Id. 10, 64–66; Appleton's Ann. Cyc. 1869, pp. 210, 211, 214, 216.

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numbers, immediately be executed.[1] Referring to this decree Mr. Fish, who was then Secretary of State, said that the captain-general of Cuba seemed to have "overlooked the obligations of his government pursuant to the law of nations, and especially its promises in the treaty between the United States and Spain of 1795." Under "that law and treaty," said Mr. Fish, the United States expected "for their citizens and vessels the privilege of carrying to the enemies of Spain," whether those enemies were "Spanish subjects or citizens of other countries, subject only to the requirements of a legal blockade, all merchandise not contraband of war." Articles contraband of war, "when destined for the enemies of Spain," were "liable to seizure on the high seas," but the right of seizure was "limited to such articles only, and no claim for its extension to other merchandise, or to persons not in the civil, military, or naval service of the enemies of Spain," would be "acquiesced in by the United States." The United States could not, Mr. Fish declared, "assent to the punishment by Spanish authorities of any citizen of the United States for the exercise of a privilege" to which he might be "entitled under public law and treaties;" and in conclusion he expressed the hope that the decree would be recalled, or that such instructions would be given as would prevent "its illegal application to citizens of the United States or their property."[2]

Decree as to Alienation of Property.

On the 16th of April a decree, dated the 1st of that month, was published in the *Official Gazette* at Havana, by which the alienation of property was forbidden, except under the supervision of certain officials, and all sales not so made were declared to be null and void. Mr. Fish asked that this decree also might be modified so that it should not be applicable to the property of citizens of the United States.[3]

[1] S. Ex. Doc. 7, 41 Cong. 2 sess. 12.

[2] Mr. Fish to Mr. Lopez Roberts, April 3, 1869, S. Ex. Doc. 7, 41 Cong. 2 sess. 12.

[3] S. Ex. Doc. 7, 41 Cong. 2 sess. 19–20. In a note to General Sickles, of September 12, 1870, Mr. Sagasta, then Spanish mininster of state, said that this decree, while it offered no obstacle to lawful transactions, and all manner of dealing had been carried on since its publication without hindrance, was a regulation demanded by the condition of affairs in the island, which made it important to prevent those in rebellion, including not only persons who had taken up arms, but also the *emigrés* who fomented the strife in foreign countries, from making simulated sales and contracts

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Proclamation of Count Valmaseda.

On the 4th of April Count Valmaseda, the commander of the Spanish volunteers at Bayamo, issued a proclamation by which it was declared that every man from the age of fifteen years upward, found away from his habitation and not showing a justifiable motive therefor, would be shot; that every unoccupied habitation would be burned by the troops, and that every dwelling not flying a white flag, as a sign that its occupants desired peace, would be reduced to ashes. Mr. Fish, in the name of the President, protested "against such a mode of warfare," and asked that such steps be taken that no person having the right to claim the protection of the United States should "be sacrificed or injured in the conduct of hostilities on this basis."[1]

Besides the decrees and proclamations that have been described, there were yet other measures adopted by the authorities in Cuba at this time, which, though they did not at once become the subject of diplomatic correspondence, have an important bearing on the agreement of arbitration subsequently concluded, and may now be referred to in their chronological order.

The Central Republican Junta.

Soon after the outbreak of the insurrection in Cuba, a large number of natives of the island, some of them representing the wealthier part of the creole population, came to the United States; and in the gloomy state of affairs that prevailed early in 1869, when all hopes of concilation disappeared, "the emigration of Cubans greatly increased."[2] On the 5th of April Mr. Roberts, the Spanish minister at Washington, attracted attention to the efforts which "disloyal Spaniards of Cuba" were making in the United States, not only to mislead public opinion, but also to fit out "piratical expeditions" against the legitimate government of the island. In this relation he particularly referred to

by which they might continue in the possession of their property, while they used the revenue from it for the support of the insurrection. (For. Rel. 1871, 710.) This decree was not withdrawn, nor was it modified, but it was followed by two circulars, prescribing the formalities of supervision and extending them to mortgages. The consul-general of the United States at Havana, nearly four months after the decree was issued, reported that, its execution being prompt, it gave to transactions an official character and countenance which, in those times, the merchants considered a desirable thing. (S. Ex. Doc. 7, 41 Cong. 2 sess. 62.)

[1] S. Ex. Doc. 7, 41 Cong. 2 sess. 20–21.

[2] Appleton's Ann. Cyc. 1869, p. 210.

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the proceedings of the organization known as the Central Republican Junta of Cuba and Puerto Rico, which had its headquarters in the city of New York, and which had "dared to send an agent to Washington" in the "vain hope" that he would be received by the government "as the representative of the rebels." "The rebels," said Mr. Roberts, "have no communication with each other; they occupy no place as a center of operations, nor have they in the whole island a single city, a single town, a single village or hamlet, nor even a point on the coast, where they might collect their forces and date their orders and proclamations; * * * and their only mode of warfare is to apply the incendiary torch to estates, thus reducing to ashes and ruins the whole wealth of the island, if not prevented by Spanish soldiers." In view of these circumstances, Mr. Roberts suggested that the time was opportune for the issuance by the President of a proclamation similar to that published by President Fillmore on the 25th of April 1851 in relation to Lopez's proceedings against Cuba, in which it was declared that all persons who should connect themselves with a hostile expedition, in violation of the laws and neutral obligations of the United States, would not only subject themselves to the heavy penalties denounced against such offenses, but would "forfeit their claim to the protection" of the government, or to "any interference on their behalf, no matter to what extremities" they might be "reduced in consequence of their illegal conduct."[1]

Replying on the 17th of April to the note of Mr. Roberts, Mr. Fish adverted to the fact that when President Fillmore's proclamation was issued in 1851 the internal peace and quiet of Cuba were undisturbed, and that the movement then on foot in the United States was designed to incite an insurrection. At the present time, said Mr. Fish, a portion of the people of Cuba had for more than six months been in arms against the government of Spain in the island, and they were seeking, as they alleged, relief from oppression. How just their complaints might be, it was not his purpose to discuss; he adverted to the fact merely with a view to illustrate the entire difference between existing circumstances and those that existed when President Fillmore issued his proclamation, and while the sympathy of the people of the United States

[1] S. Ex. Doc. 7, 41 Cong. 2 sess. 13–16.

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had ever manifested itself in favor of another people striving to secure for itself more liberal institutions and the right of self-government, and was, no doubt, strongly enlisted in favor of a more liberal government in Cuba, and while there pervaded the whole American people a special desire to see the right of self-government established in every region of the American hemisphere, so that it should be independent of transatlantic control, the Government of the United States did not intend to depart from its traditional policy, but would execute in good faith the laws that had been enacted for the observance of its international duties of neutrality and friendship.[1]

Embargo of Estates.

Meanwhile the authorities in Cuba, urged on by the more strenuous partisans of Spain, were adopting measures to bring under their control the property of the island and to cut off the sources of insurgent supplies. The representative of the insurgents in the United States, to whom Mr. Roberts referred, was José Morales Lemus, who was also the president of the Republican Junta in New York. On the 15th of April 1869 a decree was published by Captain-General Dulce in the *Official Gazette* at Havana, by which an embargo was placed on the property of the insurgent representative and fifteen other persons who were named in the decree. On the 17th another decree was published, by which an administrative council was created for the custody and management of embargoed property. But of more far-reaching importance was a decree issued on the 20th of April, by which it was declared that, in view of the losses caused by the insurgents, and in accordance with a system which it was indispensable to follow in order at once to terminate the insurrection, there should be comprehended in the decree of the 15th, relating to the embargo of the property of José Morales Lemus and others, all persons against whom it might be proved "that they had taken part in the insurrection, within or without the island, whether with arms in the hand or by aiding it with arms, munitions, money, and articles of subsistence."[2]

[1] S. Ex. Doc. 7, 41 Cong. 2 sess. 16–18.

[2] For text of this decree see *infra*, Digest: S. Ex. Doc. 108, 41 Cong. 2 sess., 223–229; Circulars and Decrees of the Captain-General of the Island of Cuba: New York, 1869.

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Proposals for Cuban Independence.

Against this decree the Government of the United States did not at once protest. A more comprehensive policy was then in contemplation, which, if it had been successful, would probably have resulted in the speedy incorporation of Cuba into the American Union. Not only was Spain at this time without a permanent government, but the Carlist conspiracies and republican uprisings in the peninsula caused many persons to believe that she would be unable to subdue the insurrection in her colony; and it was understood that there were persons in power at Madrid who did not regard the concession of Cuban independence as an impossibility.

Mission of Mr. Forbes.

In the spring of 1869 Mr. Paul S. Forbes, a citizen of the United States, had an interview with Marshal Prim, then president of the council of ministers and commander-in-chief of the army, as well as with "other leading personages in the Spanish capital," which led President Grant to send him as a special and confidential agent to Madrid, with a view to secure the termination of hostilities in Cuba and the independence of the island. Mr. Forbes's instructions were substantially the same as those subsequently given in the same year to General Sickles, the new minister of the United States to Spain, who was directed to offer to the cabinet at Madrid the good offices of the United States on the following basis: (1) The acknowledgment by Spain of Cuban independence. (2) The payment by Cuba to Spain of a sum of money as an equivalent for the relinquishment by the latter of all her rights in the island, including public property of every description, such payment to be secured by a pledge of the Cuban customs. (3) The abolition of slavery. (4) An armistice pending negotiations. General Sickles was also instructed, if the Spanish cabinet should make it a *sine qua non* that the United States guarantee the payment of the sum promised by Cuba, to say that the President would not object to the assumption of such a liability, should Congress assent to it. In the event of the good offices of the United States being accepted, General Sickles was directed to propose an early conference in Washington between the duly authorized representatives of Spain and Cuba, and in this relation it was intimated that the condition of the contest in Cuba might not justify a much longer withholding from the revolutionary party of the rights of belligerency.[1]

[1] H. Ex. Doc. 160, 41 Cong. 2 sess. 13–17.

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Arrival of General Sickles in Madrid.

When General Sickles arrived at Madrid toward the end of July, he found that Mr. Forbes had acquainted Marshal Prim with the purport of his instructions, and that the latter had not received them with favor. General Sickles therefore deemed it prudent to postpone formal action upon them; but he soon learned, in an interview with Marshal Prim, that Spain would not entertain the question of an armistice. Prim declared that he was disposed to meet the question frankly and practically, and that he was perhaps somewhat in advance of the views of his colleagues; but he also declared that Spain would not consider the question of independence while the insurgents were in arms, and that Cuba could be heard only through deputies elected to the Cortes.[1]

Conditions Proposed by General Prim.

The conditions on which, if offered by the United States, Marshal Prim was willing to treat, were: (1) That the insurgents should lay down their arms. (2) That Spain should grant a full and free amnesty. (3) That the people of Cuba should vote by universal suffrage on the question of their independence. (4) That the majority having declared for independence, Spain should grant it, the Cortes consenting, and that Cuba should pay an equivalent, guaranteed by the United States.[2] These conditions were not regarded by the United States as affording an acceptable basis of negotiation. The proposition that the insurgents should lay down their arms was, said Mr. Fish, "incapable of attainment as a preliminary." Nor was it prac-

[1] H. Ex. Doc. 160, 41 Cong. 2 sess. 19, 21.

[2] Id. 22–24. In a subsequent interview with General Sickles Marshal Prim said that some of his colleagues did not appreciate as he did the cost of carrying on the war in America; that they were greatly influenced by popular sentiment in Spain, which took no account of any sacrifice of life or money when the honor of the nation was believed to be involved; that Mr. Silvela, the minister of state, being a lawyer and a parliamentary leader, was naturally inclined toward a purely legal and legislative solution, while he himself, if he were alone, would say to the Cubans: "Go, if you will; make good the treasure you have cost us, and let me bring home our army and fleet, and consolidate the liberties and resources of Spain." He declared, however, that the great difficulty in the way was the defiant attitude of the insurgents, and that the United States made a mistake in proposing an armistice and asking Spain to treat with them on the basis of independence while they had arms in their hands. He was sure that no human power could obtain from the Spanish people the smallest concession so long as the rebellion maintained its footing. (Id. 25–27.)

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ticable, owing to the disorganization of society in Cuba, the terrorism that prevailed, and the violence and insubordination of the volunteers, to ascertain the will of the Cubans by a vote. As to the will of the majority, he declared that there could be no question; it had been recognized and admitted; and an armistice should immediately be agreed upon to arrest carnage and the destruction of property.[1]

Withdrawal of Offer of Mediation.

For a month negotiations proceeded informally, but as they yielded no result General Sickles, acting upon telegraphic instructions that the proposals of the United States, unless accepted by the 1st of October, would be withdrawn, on the 3d of September formally communicated them to the Spanish Government and asked for an early decision.[2] For several weeks the subject of Cuban independence had been mooted in the public press, and although General Sickles said he had reasons for suspecting that the discussion was "stimulated by agents of American parties," who had "undertaken to purchase Cuba from Spain as a private enterprise," it could not be asserted that the prospects of the detachment of the island had improved. After the communication of General Sickles's note of the 3d of September they rapidly declined. It seems that intimations of the purport of the note were given out, and that they were received by the public as indicating the purpose of the United States to recognize the insurgents as belligerents unless the offer of mediation was at once accepted.[3] Great excitement followed. The tone of the press became distinctly hostile, and the Spanish funds exhibited a sudden fall. Loud demands were heard on every hand that the forces in Cuba should be augmented. The Spanish cabinet, without in terms rejecting the good offices of the United States, asked that the offer of mediation be withdrawn. On the 28th of September General Sickles, acting under the instructions of his government, complied with this request, at the same time saying that if occasion should thereafter arise when the United States might contribute by their friendly cooperation to the settlement of the strife in Cuba, the President would be happy to assist in promoting a result so conducive to the interests both of Spain and of America.[4] It has been said that

[1] H. Ex. Doc. 160, 41 Cong. 2 sess. 25.
[2] Id. 25, 32-36.
[3] Id. 37.
[4] Id. 33, 37, 41, 42, 46, 48, 53, 56.

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there is reason to believe that Prim's subsequent assassination was due to the enmities excited by his views concerning Cuba.[1]

Spanish Forces in Cuba.

On the 28th of November 1869 General Sickles reported that the minister of the colonies had informed him that the government was about to adopt measures for Puerto Rico, which would include self-government, freedom of the press, public schools, and the gradual abolition of slavery, and that these reforms would in good faith be extended to Cuba when hostilities ceased and deputies were elected to the Cortes. In subsequent dispatches he stated that since the beginning of November 1868, 34,500 troops had been sent to the island, and that the army there numbered 107,400 men, including the 40,000 volunteers on garrison duty.[2]

Complaints of the United States.

The tender of its good offices having been unproductive of any result, the Government of the United States was left to pursue the various complaints to which the contest in Cuba had continued to give rise. It has been seen that, after the quick collapse of Captain-General Dulce's policy of conciliation, the fierceness of the conflict was greatly intensified. On the 2d of June 1869 Captain-General Dulce, because of his too liberal views, was forced by the volunteers to resign his post in favor of his

[1] Mr. Cushing to Mr. Fish, November 4, 1874, For. Rel. 1875, II. 1078.

[2] H. Ex. Doc. 160, 41 Cong. 2 sess. 64. When Mr. Fish read this account of the "army of Cuba" he said: "The public interest felt in the United States in the Cuban struggle has decreased since the flagrant violations of law by the agents of the insurgents became known and alienated the popular sympathy. Had the Cuban Junta expended their money and energy in sending to the insurgents arms and munitions of war, as they might have done consistently with our own statutes and with the law of nations, instead of devoting them to deliberate violation of the laws of the United States; and had they, in lieu of illegally employing persons within the dominion of the United States to go in armed bands to Cuba, proceeded thither unarmed themselves to take personal part in the struggle for independence, it is possible that the result would have been different in Cuba, and it is certain that there would have been a more ardent feeling in the United States in favor of their cause and more respect for their own sincerity and personal courage. You are yourself a personal witness of the strength of the sympathy which the President and all the members of the Cabinet felt for them before they made these unlawful demonstrations." Mr. Fish to General Sickles, January 26, 1870, H. Ex. Doc. 160, 41 Cong. 2 sess. 69.

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second in command, General Espinar. The example set at Havana was quickly followed by the volunteers at Matanzas, who on the 3d of June required Brigadier-General Lopez Pinto, the governor of the jurisdiction appointed by the provisional government of Spain, who was a friend of Captain-General Dulce, to surrender his command to Colonel Domingo Leon, of the regular cavalry. General Espinar was soon succeeded by General Caballero de Rodas, who had figured in the suppression of republican uprisings at Cadiz,[1] and who retained the post of captain-general till December 1870, when he in turn was succeeded by Count Valmaseda. These changes foreshadowed a continuance, rather than an amelioration, of the condition of affairs against which the United States had protested.

On the 9th of June 1870, Mr. Fish invited the earnest attention of Mr. Roberts "to the irregular and arbitrary manner in which the 'persons and properties of citizens of the United States" were "taken and held by the Spanish authorities in the Island of Cuba." He said that the Government of the United States was informed that the sweeping decrees of April 1869 had been put in operation against the property of citizens of the United States, in violation of the seventh article of the treaty of 1795, which provided that such property "should not be subject to embargo or detention for any public or private purpose whatever."[2] It was understood, said Mr. Fish, that by arbitrary and unusual proceedings, not prosecuted by order and authority of law, but "in the exercise of extraordinary functions vested in" or employed "for

[1] Appleton's Ann. Cyc. 1869, p. 214.

[2] The provisions of this article are as follows: "And it is agreed that the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatever, and in all cases of seizure, detention, or arrest for debts contracted or offences committed by any citizen or subject of the one party within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only, and according to the regular course of proceeding usual in such cases. The citizens and subjects of both parties shall be allowed to employ such advocates, solicitors, notaries, agents, and factors, as they may judge proper, in all their affairs, and in all their trials at law, in which they may be concerned, before the tribunals of the other party; and such agents shall have free access to be present at the proceedings in such causes, and at the taking of all examinations and evidence which may be exhibited in the said trials."

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the occasion by the supreme political authority of the island," citizens of the United States had been deprived of their property forcibly and without notice, and "without opportunity to them or their agents to be present at any proceedings in regard thereto, or at the taking of examination or evidence;" that they had not been allowed "to employ such advocates, solicitors, notaries, agents, and factors, as they might judge proper," and that, although in many instances their property had been taken when they neither were in the island nor had been within the jurisdiction of Spain since the outbreak of the insurrection, it was notorious that by going to Cuba "after the official denunciation of their alleged conduct, they would subject themselves to arbitrary arrest and summary military trial, if not to the uncontrolled violence of popular prejudice."

Mr. Fish also presented to Mr. Roberts a list of citizens of the United States who had preferred complaints "of arbitrary arrest, and of close incarceration without permission to communicate with their friends, or with advocates, solicitors, notaries, agents, and factors, as they might judge proper." In some of these cases, he said, the parties had been released; in others, they were understood to be still in custody. In some cases, also, arrest had "been followed by military trial without the opportunity of access to advocates or solicitors or of communication with witnesses, and without those personal rights and legal protections which the accused should have enjoyed;" and these "summary trials" when ending in conviction, had "been followed by summary execution." "What has been already done in this respect," said Mr. Fish, in concluding his specification of complaints, "is unhappily past recall, and leaves to the United States a claim against Spain for the amount of the injuries that their citizens have suffered by reason of these several violations of the treaty of 1795—a claim which the undersigned presents on behalf of his government with the confident hope that the Government of Spain, recognizing its justice, and making some proper and suitable provision for ascertaining the amount which should rightfully come to each claimant, will also order the immediate restoration to the citizens of the United States of their properties which have been thus embargoed, and the release of those citizens of the United States thus held, or their immediate trial under the guaranties and with the rights accorded by the treaty."[1]

[1] S. Ex. Doc. 106, 41 Cong. 2 sess. 239; For. Rel. 1871, 698.

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Demands for Redress.

When Mr. Fish addressed this note to Mr. Roberts, he supposed that the latter was still possessed of certain extraordinary powers with which he was invested by the Spanish Government in 1869, in relation to matters arising in Cuba; and when he found that these powers had been withdrawn, in view of the "favorable situation" in the island, he sent a copy of the note to General Sickles, with instructions "to bring the whole subject to the notice of the Spanish Government." General Sickles was particularly instructed (1) to say that the President hoped that immediate steps would be taken "for the release of all the citizens of the United States * * * held in custody in Cuba in violation of the provisions of the treaty of 1795, or for their immediate trial under guaranties, and with the rights secured by the treaty;" (2) to "ask for the restoration to the citizens of the United States of their properties and estates," so far as they had "been arbitrarily embargoed in violation of the provisions of the treaty;" (3) to "endeavor to secure some mode for the early indemnification and satisfaction to the several parties * * * of the amounts which should rightfully come to each claimant for the illegal detention of his property or his person;" and (4) to say that it was "extremely desirable" to have the investigation conducted in the United States. The President had, said Mr. Fish, "respected the Spanish claim of sovereignty over the Island of Cuba," during the pending contest, "against a strong sympathetic pressure from without;" and Spain owed it to the United States, as well as to her own traditional sense of justice, that her sovereignty should not be used "for the oppression and injury of the citizens of the United States."[1]

[1] S. Ex. Doc. 108, 41 Cong. 2 sess. 242-245; For. Rel. 1871, 697. In referring to the "strong sympathetic pressure from without," Mr. Fish doubtless had in mind the efforts that were made to induce the President to recognize the independence of the insurgent government. The insurgents looked to the United States for such recognition (Appleton's Ann. Cyc. 1868, 709; id. 1869, 212; S. Ex. Doc. 7, 41 Cong. 2 sess. 101-118); and an evidence of the "sympathetic pressure from without" may be seen in the fact that the House of Representatives, on April 9, 1869, by a vote of 98 to 25, adopted a resolution, which was offered by General Banks of Massachusetts, declaring that the people of the United States sympathized with the people of Cuba "in their patriotic efforts to secure their independence and establish a republican form of government," and pledging the support of the House to the President whenever, in his

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Negotiations of General Sickles.

General Sickles executed his instructions in a note to Mr. Sagasta, Spanish minister of state, of the 26th of July 1870.[1] Referring in the course of this note to the various proceedings of which Mr. Fish had complained as violations of the treaty of 1795, General Sickles observed that there was no allegation on the part of Spain "that the courts of law were closed in the Havana, where most of these proceedings occurred, or that the functions of the civil authority could not be performed in any of the principal towns of the island." He declared that by the seventh article of the treaty each of the contracting parties had "expressly renounced all right to embargo or detain the property of the citizens or subjects of the other," and that this renunciation included "every possible case in which the power could be exercised;" that "no exigency of war, no requirement of the public service, no civil disorder" was "permitted by the stipulations of the treaty to sanction or excuse these prohibited acts of spoliation," and that it was the plain purpose of the contracting parties to secure for their citizens

opinion, a republican government should in fact be established, and he should "deem it expedient to recognize the independence and sovereignty of such government." (Appleton's Ann. Cyc. 1869, 202; Ann. Reg. 1869, 282.) The President not only declined to take this step, but he also refrained from recognizing the insurgents as belligerents. At this time the controversy as to the *Alabama* claims was still pending, and one of the questions involved in it was that of Great Britain's recognition of the belligerency of the Confederate States. The views of Mr. Fish on this subject are set forth in this work, *supra*, I. 513. As to his attitude on the question of recognizing a state of belligerency in Cuba, Mr. J. C. Bancroft Davis, who was then Assistant Secretary of State, has made the following important historical statements: "There was a brief time when the President contemplated the possibility of such a solution. It was then that, taking a vacation from Washington, he left behind him such a proclamation, with his signature, but without directions to affix the great seal and the attest of the Secretary of State. Mr. Fish, while conceding that such a solution might become necessary, was of opinion that it was not so at that time. He regarded it as leading up to the acquisition of Cuba, to which he was opposed. Its inhabitants were one-half Spaniards, or of Spanish origin, not speaking our language and not familiar with our laws. The other half added to the disqualification of alienage and ignorance of our laws the fact that they were still in bondage, and would come to us freshly enfranchised, to increase the difficulties which the work of reconstruction was then imposing on the country." (The Atlantic Monthly, February, 1894, 217–218.)

[1] For. Rel. 1871, 701.

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or subjects "the protection of the laws of the land and of the courts of law, and of the essential safeguards for the administration of justice in all prosecutions for any offense alleged to have been committed against the good order, peace, and dignity of the commonwealth."

Statement of Mr. Sagasta.

To this note Mr. Sagasta on the 12th of September made an extended reply. While adverting to the fact that no complaint had ever been made to the Spanish Government of any foreigner having been injured by the enforcement of the earlier decrees against which the United States had protested—and particularly by the enforcement of the proclamation of Count Valmaseda of the 4th of April 1869, which was, said Mr. Sagasta, "doubtless a stratagem of war"—he declared that the Spanish Government was convinced that in the contest in Cuba it had not exceeded nor even fully made use of the rules laid down in the instructions for the armies in the field issued by the Government of the United States during the civil war.[1]

[1] Mr. Sagasta particularly referred to articles 15 and 85, which are as follows:

"15. Military necessity admits of all direct destruction of life or limb of *armed* enemies and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy and every enemy of importance to the hostile government or of peculiar danger to the captor; it allows of all destruction of property and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy." * * *

"85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising, or to armed violence."

General Sickles, in his note of the 14th of October, replied to Mr. Sagasta's observations on these articles as follows:

"The citations given by your excellency from the 'Instructions for the Armies in the Field,' issued by Mr. Stanton, Secretary of War during the conflict, do not in any manner justify the style of war embodied in Count Valmaseda's order. The fifteenth article * * * is a concise statement of the rights of armies in the field in time of war, which each party to the contest may lawfully exercise, subject to the reclamations of other nations when the persons of neutrals suffer injury or their property is appropriated or destroyed. The eighty-fifth article * * * applies to the inhabitants

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Question as to Embargoed Estates.

As to the protest against the embargoes, Mr. Sagasta complained that claims had been presented by the United States, without its first having been ascertained in each case whether the claimant was entitled to the privileges of a foreigner; but he also contended that Article VII. of the treaty of 1795 was inapplicable to the subject. It consisted, as he maintained, of three clauses, the first of which related only to the embargo or detention of vessels or effects, for the use of a military expedition, or for other public or for private purposes—in a word, the embargo commonly known by the name of *angaria*.[1] The second clause did not relate to estates or property, but only to the citizen himself, when apprehended or arrested either for debts or for offenses; and the third merely specified the rights of defense which should be guaranteed to him in that case. Mr. Sagasta argued that the embargoed estates had not been taken for any of the objects expressed in the first clause of the article, but solely for the purpose of preventing their proceeds from being applied to the sustenance and encouragement of the insurrection; and that the provisions of the treaty did not limit the right of either contracting party to take measures against those who were engaged in hostility and conspiracy against its security and public peace. By the fifth section of the act of July 17, 1862,[2] the Government of the United States, said Mr. Sagasta, made it the duty of the President, in order to insure the speedy termination of the rebellion, to cause the seizure of all the estates and property, money, stocks, and credits, of certain specified classes of persons, and to apply the proceeds of what was seized to the support of the army of the United States; and on the 22d of July 1862 the Secretary of War of the United States, by authority of the Presi-

of conquered territory, occupied by an invading army, who rise in arms against it or against the authorities it has established. If the American compilation is entitled to the honor your excellency accords to it of being the first codification of the laws of war, Count Valmaseda's order must have found its inspiration in another epoch, when public opinion had not imposed upon belligerents the amenities of civilization." (For. Rel. 1871, 724–725.)

[1] Hautefeuille's Des Droits et des Devoirs des Nations Neutres (Paris, 1868), chap. de l'Angarie; Block's Dictionnaire Général de la Politique, art. L'Angarie; Lawrence's Wheaton (1863), 512.

[2] 12 Stats. at L. 590.

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dent, issued an order directing the military commanders of Virginia, South Carolina, Georgia, Alabama, Mississippi, Louisiana, and Arkansas, to seize and appropriate all personal and real property in the districts under their command which might be necessary for the supply of their troops and for any other military purpose.[1]

[1] The act of 1862 applied to civil and military officers of the Confederacy, and to "any person who, owning property in any loyal State or Territory of the United States, or in the District of Columbia, shall hereafter assist and give aid and comfort to such rebellion." Replying to Mr. Sagasta's argument, General Sickles, in his note of October 14, 1870, said:

"Your excellency, in the course of some general observations on the subject of embargoes, appears to find an analogy between the decree promulgated by the Captain General of Cuba and the act of Congress approved July 17, 1862, for the confiscation of the property of persons in rebellion against the United States. To analyze these measures and point out the very numerous and essential particulars in which they differ as well in substance as in procedure, would extend this note to an inconvenient length, and it is believed that a brief reference to two or three of the many features which distinguished them will be sufficient. The act of Congress is a law, and is based on the precedents found in the legislation of constitutional governments; the decree of the superior political governor is the arbitrary act of an executive officer whose authority seems to be undefined. The act of Congress is executed only by the courts of justice, in conformity with the maxim of a humane code which declares that no person can be deprived of life, liberty, or property without the judgment of a judicial tribunal; the decree is enforced at pleasure, *ex parte*, by the governor and even by subordinate executive officers of districts, without the intervention of a court. The act of Congress applies only to the property of persons who commit within the territory of the United States the offenses denounced by the act; the decree is executed indiscriminately, as well for acts done beyond as within Spanish jurisdiction. And, finally, not to make the enumeration tedious, the act of Congress applies only to offenses committed after the enactment of the law, while the Spanish decree declares on its face that its penalties shall be visited retrospectively for acts done before its promulgation. Nor am I able to see the coincidence your excellency discovers between the decree of embargo and the order of the American Secretary of War dated June 22, 1862, directing the commanders of the armies to appropriate within the theater of operations whatever they found necessary for military purposes. This necessity of war is recognized by the usage of nations, and when the property of aliens is taken under such circumstances the right of idemnity is never denied. At the beginning of the American war the parties in the contest were formally recognized by Spain as belligerents, and in the order your excellency cites the United States Government only exercised a right belonging to a belligerent. When the conflict in Cuba, which began two years ago, shall acquire the same character, the parties to it may appeal to the laws and precedents of war to justify their acts." (For. Rel. 1871, 726-727).

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Cases of Arrest.

As to the cases of arrest and military trial, Mr. Sagasta asserted that there was not a single case, except where persons were apprehended with arms in their hands and shot, in which the penalty had not been commuted and the accused turned over to his consul, to be sent out of the country.

Conditions of Redress.

In conclusion, Mr. Sagasta said that, in order that the Spanish Government might do justice to the claims of American citizens, it would be indispensable, (1) "that they should prove their citizenship before the Spanish authorities," and "present their demands in due form in each particular case," and (2) that they should show that they had "appeared before some tribunal, or that the consul had made the proper reclamation in their name, and that the Spanish authorities had failed in making reparation."

Reply of General Sickles.

Replying to Mr. Sagasta's note, General Sickles argued that in the removal of the embargoes in certain cases there was an admission of a right to indemnity; that, in these cases at least, as well as in those in which persons had been released on proof of their citizenship, the formalities suggested by Mr. Sagasta had already been complied with; that if, as Mr. Sagasta had observed, property was embargoed in Cuba not pursuant to any law, but by the superior political authority as a military expedient, adopted for the purpose of diminishing the resources of a seditious combination, it was difficult to see on what ground or with what hope a citizen of the United States could appeal to the courts. The case seemed to be one requiring the action of the United States and Spain. He therefore stated that the conditions of arbitration proposed by Spain were objectionable to his government, which could address no other authority than that of His Highness the Prince Regent. The procedure indicated by Mr. Sagasta would, said General Sickles, require the President to inform the claimants that they could not be heard through their government—a conclusion that might be regarded as a rejection of the amicable means on which the President had relied for the arrangement of the pending differences. In conclusion, General Sickles said:

"I have, therefore, to submit for the further consideration of your excellency the proposition, that the representative of Spain in Washington be authorized to agree with the Secretary of State of the United States upon the several cases, together with the papers and proofs relating to them, that

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shall be submitted to the arbitrators; that the said arbitrators, one to be chosen on the part of the United States by the Secretary of State, and the other, on the part of Spain, by the Spanish minister in Washington, shall first select an umpire, to decide questions upon which they may differ, and thereupon proceed to determine the amount of indemnity to be paid to each claimant; and that, to facilitate the disposition of the business, the arbitrators be named on the part of the two governments without delay."[1]

Urgent Proposals for a Mixed Commission.

In his annual message to Congress of December 5, 1870, the President stated that he had made proposals to Spain for an arbitration, and that if the pending negotiations should unfortunately and unexpectedly be without result it would then become his duty to communicate the fact to Congress and invite its action on the subject. On the 12th of December Mr. Fish transmitted to General Sickles full powers to conclude a convention for a mixed commission, and in so doing mentioned the following points as being of importance: (1) That the convention should be received in Washington not later than the 1st of February, in order that it might be submitted to the Senate before adjournment. (2) That the commissioners should sit at Washington; that they should have full power to make rules as to the presentation and proof of claims, and that they should, before making such rules, agree upon an umpire, to whom all questions of difference should be referred. (3) That the commissioners should not have jurisdiction of claims growing out of contract. (4) That a reasonable time should be allowed for the presentation of proofs. (5) That claims, as well as the proofs in support of them, should be presented to the commission only through the Government of the United States, and that each government might employ one person as agent or counsel to represent it before the commission. (6) That, as all the claims were against Spain, that government should be responsible for the expenses of the commission; but that if persistent objection should be made to this course the expenses might be defrayed by a percentage to be deducted from the amount awarded.[2]

Difficulty as to Military Tribunals.

The chief point of difficulty in the negotiations related to the recognition which Mr. Sagasta sought to obtain for the military tribunals in Cuba. On one occasion he suggested that there

[1] General Sickles to Mr. Sagasta, October 14, 1870, For. Rel. 1871, 726.
[2] For. Rel. 1871, 740.

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should be two commissions, one to pass upon legal questions and the other to assess damages in cases in which the Spanish authorities should be adjudged to be in fault.[1] This suggestion, while it was not considered by the United States as insuperably objectionable, was thought to involve a course of procedure that was unnecessary, expensive, and dilatory;[1] and it was not renewed. But Mr. Sagasta insisted that no indemnity should be allowed either where the injuries complained of resulted from the judgment of a civil or military court or from other judicial proceedings prosecuted agreeably to Spanish law and procedure, or where the claim of American citizenship had been disallowed by a Spanish civil or military tribunal.[2] These conditions were regarded by the United States as entirely inadmissible.[3] General Sickles, while assuring Mr. Sagasta that the United States did not expect the Spanish Government to submit the adjudications of its courts to the review of a "foreign tribunal," maintained that the jurisdiction of an international commission rested upon a different principle. He argued that it was the duty of every nation to see that justice was done to its citizens by foreign nations; that if the foreign authorities failed to do justice in a particular case it was competent for the government of the party aggrieved to demand indemnity from the government in fault, and that if the two governments failed to agree it was the better practice of modern times, instead of resorting to reprisals, to refer the questions at issue to an international tribunal for final adjustment. He also objected to placing the adjudications of the civil and military tribunals on the same footing, saying that it could scarcely be expected that the decrees of courts-martial and military commissions proceeding summarily would be accepted by the United States as a compliance with the provisions of the seventh article of the treaty of 1795.

Mr. Sagasta replied that military courts had always held a recognized place in Spanish jurisprudence, and that, when acting within legal limitations, their jurisdiction should be recognized as valid. He admitted, however, that he would not claim for the acts of a military court, proceeding summarily and without regard to judicial forms, the same respect as was accorded to those of the regular tribunals; and he said that the judgments of the tribunals in Cuba, confiscating the property of

[1] For. Rel. 1871, 735, 741.
[2] Id. 743.
[3] Id. 748.

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citizens of the United States who were not at the time within the jurisdiction, were not considered in Spanish law as final, and would not be deemed to exclude the matter involved from the action of the commission.

Change in the Spanish Government.

These views were expressed by Mr. Sagasta in a conference with General Sickles on December 23.[1] On the 28th Marshal Prim, while driving in his carriage from the palace of the Cortes, was fired upon and dangerously wounded by a party of armed men who had placed themselves near the palace of the minister of war, where Prim resided.[2] He died on the 30th of December.[3] On the 2d of January 1871 the Duke of Aosta reached Madrid and took the oaths of office as Amadeo II. On the 5th of January the formation of a new cabinet was announced, in which Señor Don Cristino Martos succeeded Mr. Sagasta as minister of state, General Serrano succeeding Marshal Prim as president of the council, and Mr. Sagasta becoming minister of the home department.[4]

Conclusion of an Agreement.

The negotiations now proceeded rapidly to a conclusion. In an interview with General Sickles on the 25th of January Mr. Martos suggested that inasmuch as a formal treaty or convention would have to be laid before the Spanish as well as the American Senate, an arrangement might sooner be completed by following the plan adopted in the case of the *Colonel Lloyd Aspinwall*. As to the jurisdiction of the arbitrators he expressed certain views, which on the 30th of January he embodied in a formal note. In this note Mr. Martos said that the purpose of the Spanish Government "was solely to save the independence of the judicial power in all matters relating to the essential features of its judgments and the ordinary formalities of legal proceedings," but that if it appeared that the latter had not been observed, and especially that "the guarantees and stipulations in favor of the two contracting parties in the treaty of 1795" had been infringed, the decisions of the tribunals were "undoubtedly subject to arbitration," and would "have to be adjudged by the commission." "So that," said Mr. Martos, "if by chance any American citizen

[1] General Sickles to Mr. Fish, December 23, 1870, For. Rel. 1871, 748–749.
[2] For. Rel. 1871, 750.
[3] Id. 751.
[4] Id. 752–754.

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should present a reclamation against the sentence or decision pronounced by a tribunal or military commission of the Island of Cuba arising from the insurrection, and if it shall appear that in his case any of the ordinary proceedings were not observed in the judgment, or that the guarantees enumerated in the seventh article or in any other of the treaty were infringed, the arbitrators shall have power to invalidate such decision and to award, in consequence, the indemnity that may be equitably due." As to the effect of the decisions of the tribunals in Cuba on the question of citizenship, he declared that all the Government of Spain required was that American citizens against whom proceedings had been instituted or decisions pronounced by the authorities should at the time have alleged "their quality as foreigners" against the enforcement of such proceedings or decisions, and that those who, after having had the necessary opportunity, had omitted to comply with that requirement, should have no standing before the commission.[1]

With the communication of this note the essential differences between the two governments disappeared, and on February 12, 1871, an agreement was formally and finally concluded by executive authority for a mixed commission to sit in Washington, and to consist of two commissioners, one to be appointed by the Secretary of State of the United States and the other by the minister of Spain in Washington, and an umpire to be chosen by the commissioners.

The Naturalization Question.

In the digest of the decisions rendered by the commission that was organized under this agreement it will be found that in the course of its proceedings the power of the commission to inquire into the validity of the naturalization of various claimants of Spanish origin who appeared before it as naturalized American citizens became a subject of serious controversy. It is therefore a matter of interest, as bearing upon the views of the contracting parties, to examine the prior correspondence touching the stipulations that related to the determination of the question of citizenship.

Mr. Sagasta, in his note of the 12th of September, written in answer to General Sickles's first presentation of the claims, declared that the good faith of the United States had been imposed upon. He said that many of the persons whose

[1] For. Rel. 1871, 761, 765–768.

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claims had been laid before him had "never possessed a right to foreign nationality;" that a large proportion of the natives of Cuba who had given their allegiance to the United States had "done so with the studied intention of making use of it at some future day as a shield for their criminal designs," and that numerous instances might be cited of individuals who had "lived in the Island of Cuba as Spanish citizens and did not remember their American citizenship until affairs went against them." And in order that Spain might be protected against improper claims he proposed to require that the claimants "should prove their citizenship before the Spanish authorities."[1]

General Sickles, in his reply of the 14th of October, rejected this condition, but he said that the Government of the United States would not be disposed to extend its protection to persons who had not the right to invoke it. It was, he declared, to be presumed, until the presumption was "overcome by proof," that aliens who had "deliberately renounced, after an uninterrupted residence of five or more years within the territory of the Union, all allegiance to any other government," and had "thereupon become citizens of the United States," were "sincere in their solemnly avowed purpose;" and if it should be made to appear that any claimant in whose behalf the United States had intervened was not a citizen thereof, or "having been naturalized in conformity with its laws" had by his own act forfeited or relinquished his acquired nationality, his case would be dismissed by the American government.[2]

In an instruction to General Sickles of the 18th of November Mr. Fish, referring to this correspondence, observed that Mr. Sagasta might have misapprehended one point in the offer of the United States. It was, said Mr. Fish, contemplated that every claimant would be required "to make good before the commission his injury and his right to indemnity;" naturalized citizens of the United States would, if Spain insisted on it, "be required to show when and where they were naturalized;" it would "be open to Spain to traverse this fact, or to show that from any of the causes named" in his "circular of October 14, 1869," which related to the forfeiture of adopted citizenship by various acts inconsistent with its retention, the applicant had "forfeited his acquired rights," and it would be

[1] For. Rel. 1871, 708. [2] Id. 720.

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"for the commission to decide" whether "each applicant had established his claim."[1]

The substance of this instruction was communicated by General Sickles to the Spanish Government.[2]

In a note of the 30th of January 1871, Mr. Martos, Mr. Sagasta's successor as minister of state, submitted to General Sickles six bases for a convention, of which the second, relating to naturalized citizens, was as follows:

"Second. The commission of arbitration shall also take cognizance of the reclamations of those Spaniards naturalized as American citizens who, having asserted their acquired nationality before the tribunals or military commissions, have had their allegations disallowed. In these cases the commission of arbitration shall have full powers to decide whether the claimants possess the qualifications of American citizens or not. The commission having recognized the quality of American citizenship in the claimants, they will possess all the rights to which the first paragraph (the first basis) refers."[3]

All the bases proposed by Mr. Martos were communicated by General Sickles to Mr. Fish by telegraph on the day on which they were submitted.[4]

As to the second basis, the only suggestion Mr. Fish made was that it seemed to exclude naturalized citizens who had not "asserted their nationality before Spanish tribunals."[5] It is obvious that this suggestion related to the first clause, which purported to invest the arbitrators with jurisdiction of the claims of naturalized citizens only where such citizens had "asserted their acquired nationality before the tribunals or military commissions," and not to the second clause, conferring on the arbitrators "full powers" to decide whether the claimants possessed "the quality of American citizenship," or to the last clause, referring to the rights of the claimants when the arbitrators had "recognized" that quality in them. On the 7th of February General Sickles communicated to Mr. Martos a draft of articles of agreement, in which it was proposed that the arbitrators should have jurisdiction "of all claims presented to them by the Government of the United States

[1] For. Rel. 730.

[2] General Sickles to the Minister of State, January 8, 1871: For. Rel. 1871, p. 755.

[3] For. Rel. 1871, 767.

[4] Id. 763–764.

[5] Id. 764–765.

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for injuries done to citizens of the United States by the authorities of Spain in Cuba since the 1st day of October 1868;" and, in regard to the determination of the question of citizenship, there was the following provision:

"No judgment of a Spanish tribunal disallowing the affirmation of a party that he is a citizen of the United States shall prevent the arbitrators from hearing a reclamation presented in behalf of said party by the United States Government; nevertheless, in any case heard by the arbitrators, the Spanish Government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required."[1]

In a subsequent conference Mr. Martos informed General Sickles that he had found his draft "entirely satisfactory in all essential particulars," but that he had "noted a few slight amendments," to which he had no doubt General Sickles would assent.[2] One of these amendments was the insertion, after the sentence above quoted, of the words: "The commission having recognized the quality of American citizens in the claimants, they will acquire the rights accorded to them by the present stipulations as such citizens."[3]

All Mr. Martos's amendments were accepted,[4] and on the 11th of February General Sickles communicated to him the final text of the agreement,[5] which was formally concurred in by Mr. Martos on the following day.[6] The stipulation, as thus finally established and as it stood in the agreement, was as follows:

"No judgment of a Spanish tribunal disallowing the affirmation of a party that he is a citizen of the United States shall prevent the arbitrators from hearing a reclamation presented in behalf of said party by the United States Government. Nevertheless, in any case heard by the arbitrators, the Spanish Government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required. The commission having recognized the quality of American citizens in the claimants, they will acquire the rights accorded them by the present stipulations as such citizens."

It thus appears that in the development of these stipulations no proposition was made for the limitation or abridgment of

[1] For. Rel. 1871, 679.
[2] Id. 770.
[3] Id. 1871, 772.
[4] Id. 771.
[5] Id. 773.
[6] Id. 774.

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the power of the arbitrators to require "competent and sufficient proof," not merely, as Mr. Fish in his instruction of November 18 suggested, of the "fact" of naturalization, but, as provided in the final agreement, of the allegation of "American citizenship," whether such citizenship was claimed by birth or by naturalization.

Object of the Commission.

From the preceding review it will have been seen that the agreement of February 12, 1871, is to be considered, historically, as an incident of the Cuban insurrection of 1868. That character is yet more clearly indicated by the fact that the agreenment, while comprehending all claims for injuries inflicted since the 1st of October in that year, fixed no day beyond which claims might not be presented. It was evidently the intention of the contracting parties to establish a tribunal which should afford the means of settling the controversies continually arising. On January 12, 1877, Mr. Cushing, then minister of the United States at Madrid, and Mr. Calderon y Collantes, Spanish minister of state, signed a protocol concerning judicial procedure in the United States and in Spain, by which it was declared that no citizen of the United States residing in the Spanish dominions "charged with acts of sedition, treason, or conspiracy against the institutions, the public security, the integrity of the territory, or against the supreme government, or any other crime whatsoever," should be "subject to trial by any exceptional tribunal, but exclusively by the ordinary jurisdiction, except in the case of being captured with arms in hand;" and that those who might be taken with arms in hand should be tried by an ordinary council of war, under the provisions and guaranties of the law of April 17, 1821.[1] On the 7th of June 1878 Mr. Mantilla, the Spanish minister at Washington, announced that the insurgent chiefs in Cuba had accepted terms of peace, and that the pacification of the island was complete.[2] On the 23d of February 1881 an additional article to the agreement of 1871 was concluded at Washington, by which it was provided that no claims should be presented to the commission after the period of sixty days from that date unless reasons for delay should be established to the satisfaction of the arbitrators, who might in that case extend the period by

[1] Treaties and Conventions of the United States, 1776–1887, 1031.
[2] For. Rel. 1878, 815.

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not more than thirty days. It was also provided that the commission should determine all claims within a year from May 12, 1881, unless in a particular case justice should require an extension. In consequence of the death of the arbitrator as well as of the advocate of the United States, it became necessary for the two governments, by a protocol of May 6, 1882, to extend the existence of the commission till the 1st of the following January, though it was agreed that decisions rendered by the umpire after that date should be respected. The umpire found it necessary to avail himself of this stipulation. A final agreement for the closing up of the business of the commission was signed June 2, 1883.

Organization of the Commission.

The commission was organized on May 31, 1871, by William T. Otto and Señor Don Luis, afterward the Marquis, de Potestad, as arbitrators, respectively, for the United States and Spain.[1] Prior to his appointment as arbitrator on May 3, 1871, Judge Otto was Assistant Secretary of the Interior. His commission as arbitrator was signed by Mr. Fish as Secretary of State. The commission of Señor de Potestad, who was at that time secretary of the Spanish legation, bore date May 5, 1871, and was given by Mr. Roberts, the Spanish minister at Washington.

Judge Otto held the post of arbitrator for the United States till March 20, 1877, when he relinquished it for the position of reporter of the Supreme Court of the United States. He was succeeded on April 18, 1877, by Kenneth Rayner, of North Carolina, who had been a member of Congress and a judge of the first Alabama Claims Court. Mr. Rayner resigned on the 30th of June 1877, to accept an appointment as Solicitor of the

[1] The arbitrators made and subscribed the declaration required by the convention, as follows:

"We the undersigned Arbitrators, one appointed by the Secretary of State of the United States, and one by the Envoy Extraordinary and Minister Plenipotentiary of Spain at Washington, in pursuance of an arrangement of arbitration between the two Governments of February 12th, 1871, for the settlement of certain claims of citizens of the United States against Spain, do solemnly declare that we will impartially hear and determine, to the best of our judgment, and according to public law and the Treaties in force between the two countries, and the stipulations of said arrangement, all such claims as shall, in conformity therewith, be laid before us on the part of the Government of the United States.

"May 31, 1871.

WILLIAM T. OTTO,
"Arbitrator on the Part of the United States.
"LUIS DE POTESTAD,
"Arbitrator on the Part of Spain."

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Treasury, and was succeeded by Joseph Segar, of Virginia, who had been a Unionist member of Congress from that State, as well as an unsuccessful contestant for a seat in the United States Senate. Mr. Segar died suddenly on the 30th of April 1880, and his place was filled on the 17th of the following month by the appointment of Joseph J. Stewart. Mr. Stewart died on the 20th of January 1882, and was immediately succeeded by Mr. James Lowndes, of the District of Columbia bar, who appeared and subscribed the necessary declaration on February 4, and who continued in the discharge of the functions of arbitrator for the United States till the commission was dissolved.

On the 27th of May 1880 the Marquis de Potestad, owing to ill health, resigned his post. He was succeeded on the 5th of the following month by Count José Brunetti y Gayoso. On the 29th of January 1881, however, the latter resigned, and on the 5th of February the Marquis de Potestad again appeared as the arbitrator for Spain.[1]

The first umpire of the commission was Baron Lederer, envoy extraordinary and minister plenipotentiary of Austria-Hungary at Washington, who was appointed by the arbitrators at their first meeting. He appeared on the 10th of June 1871, signified his acceptance of the post, and subscribed the necessary declaration.[2] His recall compelled him on April 24, 1874, to resign. His successor was M. Bartholdi, the envoy extraordinary and minister plenipotentiary of France, who

[1] May 29, 1880, Señor Don Felipe Mendez de Vigo, Spanish minister, in a note to Mr. Evarts, Secretary of State, proposed the appointment of Count Brunetti y Gayoso as arbitrator *ad interim*, during the absence of the Marquis de Potestad on account of ill health. Mr. Evarts, replying on June 7, 1880, took the ground that the agreement of 1871 made no provision for temporary appointments, but only for filling a complete vacancy whenever it might occur. This position Mr. Evarts maintained in another note of June 14, 1880. July 4, 1880, Mr. Mendez de Vigo reported that his government had authorized him to appoint Count Brunetti permanently as arbitrator on the part of Spain. January 25, 1881, Mr. Mendez de Vigo informed Mr. Evarts that the King of Spain had appointed Count Brunetti as chargé d'affaires to Bolivia, and had designated the Marquis de Potestad to succeed him as arbitrator. Mr. Evarts acknowledged the reception of this note January 27, 1881; and the Marquis de Potestad resumed the post of arbitrator, as above stated.

[2] "I the undersigned Umpire appointed by the Arbitrators assembled at Washington in pursuance of an arrangement of arbitration between the Governments of the United States of America and Spain, of February 12th, 1871, for the settlement of certain claims of citizens of the United

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held the post of umpire from July 11, 1874, till January 10, 1877, on which date, having then ceased to hold his diplomatic office at Washington, he sent to the arbitrators from Paris his resignation of his position in the commission. M. Bartholdi was succeeded as umpire by Baron A. Blanc, envoy extraordinary and minister plenipotentiary of Italy, who, after retaining the post from February 20, 1878, till April 27, 1880, was succeeded on May 27, 1880, by Count Carl Lewenhaupt, the envoy extraordinary and minister plenipotentiary of Sweden and Norway.

The advocates for the United States were as follows: Caleb Cushing, appointed May 3, 1871, resigned November 22, 1871; Thomas J. Durant, appointed November 22, 1871, died February 3, 1882; Charles C. Suydam, appointed February 7, 1882.

The advocates for Spain were: James M. Carlisle, appointed May 5, 1871, died May 19, 1877; John D. McPherson, appointed February 8, 1878.

The secretaries of the commission were: George O. Moore, May 31, 1871, to July 12, 1873, when he resigned; George A. Matile, July 15, 1873, to April 27, 1876, when he also resigned; Eustace Collett, May 1, 1876. Mr. Collett was also disbursing agent of the commission.[1]

Taking of Testimony in Cuba.

In order to facilitate the business of the commission, the advocate for the United States on December 16, 1871, suggested the formation of a subcommission to take testimony in Cuba. On June 8, 1872, this suggestion was approved by the commission, and was then duly communicated to the governments of the United States and Spain. The subcommission was organized at Havana on the 30th of January 1873, as follows: Commissioner for the United States, Henry C. Hall, consul-general of the United States at Havana; commissioner for Spain, Don Antonio Batanero, who resigned December 31, 1881, and was succeeded by Don Juan Llasera y Garrido; secretary, Don José Amor.

States against Spain do solemnly declare that I will impartially hear and determine, to the best of my judgment, and according to public law and the Treaties in force between the two countries and the stipulations of said arrangement, all such matters as shall, in conformity therewith, be laid before me for determination by the said Arbitrators on behalf of the respective Governments.

(Signed) "LEDERER."

See Mr. Fish to Mr. Jay, MS. Instructions to Austria, II. 22, as to Baron Lederer's acceptance of the post of umpire.

[1] Mr. Fish, Sec. of State, to Messrs. Otto and Potestad, May 13, 1876, MS. Dom. Let. CXIII. 386.

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On the 10th of November 1874 the Department of State of the United States notified the commission that Ramon O. Williams had been appointed an acting member of the subcommission during the temporary absence of Mr. Hall.

Further information in relation to this subcommission and its proceedings will be found in the collection of rules governing procedure under the agreement of February 12, 1871.

Adjournment.

It has heretofore been stated that the arbitrators first met on the 31st of May 1871; and after effecting an organization they directed the secretary to inform the Secretary of State of the United States and the Spanish minister that they were ready to receive any communication from the respective governments. They adjourned December 27, 1882, *sine die*.[1] The last awards of the umpire were filed on February 22, 1883.

Results in Forty-two Cases.

Out of forty-two persons whose claims were presented by Mr. Fish in his note to Mr. Roberts of June 9, 1870, the names of eleven do not appear in the proceedings of the commission. Out of the remaining thirty-one who appeared before it, personally or by representatives, the claims of seven—Emilio F. Cabada, Rafael Estrado, Gregorio Gonzales, Manuel Ponce de Leon, Martin Mueses, Augustin Santa Rosa, and Emilio de Silva—were dismissed by the arbitrators without assignment of reasons. Another claim—that of Danford, Knowlton & Co.—was dismissed on the ground that a denial of justice was not shown. Two claims—those of A. T. Simons and Moses Taylor & Co.—were dismissed for noncompliance with the rules. Two other claims—those of M. C. Speakman and Albert Wyeth—were dismissed by the umpire on the ground that the claimants were engaged in a hostile expedition. One claim—that of José Govin y Pinto—was dismissed by the arbitrators because no damage was shown; but the good faith of the claimant's naturalization was attacked. The arbitrator for the United States said that the evidence raised a suspicion of fraud, but did not establish it; the arbitrator for Spain held that fraud was established. The evidence showed that the claimant declared his intention on August 2, 1852, and that he was naturalized August 12, 1867; it was not shown that he resided in the United States before his naturalization, though in the

[1] S. Ex. Doc. 86, 46 Cong. 2 sess., gives a detailed report of the sessions and work of the commission from May 31, 1871, to January 24, 1880. In 1871 there were 5 sessions; 1872, 15; 1873, 23; 1874, 23; 1875, 34; 1876 10; 1877, 3; 1878, 6; 1879, 21; in January, 1880, up to January 24, 3.

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summer he was accustomed to visit Saratoga. He lived in Cuba, where his property was. Three cases—those of José G. Angarica, Ramon F. Criado y Gomez, and José Maria Ortega—were dismissed on the ground of illegal or fraudulent naturalization. In fifteen cases—those of Joaquin Garcia Angarica, José Vicente Brito, Teodoro Cabias, Ynocencio Casanova, J. M. Delgado, James M. Edwards, Henry Fritot, Charles Jemot, John A. Machado, Cristobal Madan, Fausto Mora, Juan F. Portuondo, John E. Powers, Ramon Rivas y Lamar, and John C. Rosas—awards were made in favor of the claimants. But in three of the cases the following facts may be noted: In the case of J. M. Delgado the naturalization was contested, but was admitted by the umpire; the evidence tended to show that Delgado was absent from the United States most of the time from 1861 to 1866, the five years preceding his naturalization. In the case of Cristobal Madan the umpire, Count Lewenhaupt, admitted the claimant to appear as an American citizen, but it appeared that he was naturalized under the law relating to minors, without having resided in the United States the three years preceding his majority. Ramon Rivas y Lamar was charged with contributing money to aid the insurgents. There were various entries of money under his name in the books of the Cuban Junta in New York, but the umpire held that this was not enough to prove that the money was contributed by the claimant, though, if it were, it would be fatal to his claim.

Summary of Commission's Work.

The final report of Mr. Collett, the secretary of the commission, of March 31, 1883, gives the following summary of its work:

Dates.	Number of claims.				Amounts (exclusive of interest).	
	Filed.	Dismissed.	Allowed.	Total decided.	Claimed.	Awarded.
February 12, 1871, to June 30, 1872	96					
June 30, 1872, to June 30, 1873	10					
June 30, 1873, to June 30, 1874	8	43	2	45	$1,647,786.93	$6,200.00
June 30, 1874, to June 30, 1875	1	1	5	6	772,932.50	117,635.00
June 30, 1875, to June 30, 1876	3	9	3	12	3,216,832.39	756,180.00
June 30, 1876, to June 30, 1877	3	5	2	7	476,348.89	5,585.00
June 30, 1877, to June 30, 1878	2	9	1	10	1,147,092.98	500.00
June 30, 1878, to June 30, 1879	2	2	1	3	154,719.47	60,000.00
June 30, 1879, to June 30, 1880	8	6	2	8	416,258.24	15,100.00
June 30, 1880, to June 30, 1881	7	6	7	13	1,619,257.00	155,690.33
June 30, 1881, to June 30, 1882		14	1	15	8,038,910.10	34,000.00
June 30, 1882, to June 30, 1883		10	11	21	12,823,442.82	142,559.62
Total	140	105	35	140	30,313,581.32	1,293,450.55

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The whole number of cases, as appears from the docket of the commission, was 140, of which 35, or .25 per cent, were allowed, and 105, or .75 per cent, were dismissed. But, of these 140 cases, 3 (Nos. 51, 60, 122) were withdrawn by the advocate of the United States, and 7 (Nos. 3, 12, 33, 53, 70, 97, 100), after a first dismissal, were refiled under new numbers (Nos. 129, 125, 130, 115, 126, 131, 139), leaving thus 130 original cases, 35 of which, or .27 per cent, were allowed, and 95, or .73 per cent, were dismissed.

Of the 35 cases allowed, 11, or .31 per cent (.085 per cent of the total), were allowed by the commission, and 24, or .69 per cent (.185 per cent of the total), by the umpires, as follows:

Baron Lederer	1 or .03
M. Bartholdi	5 or .14
Baron Blanc	2 or .06
Count Lewenhaupt	16 or .46

Of the 95 cases dismissed, 67, or .70 per cent (.515 per cent of the total), were dismissed by the commission, and 28, or .30 per cent (.215 per cent of the total), by the umpires, as follows:

Baron Lederer	2 or .02
M. Bartholdi	11 or .12
Baron Blanc	5 or .05
Count Lewenhaupt	10 or .11

Of the 67 cases dismissed by the commission, 37 were dismissed for "noncompliance with the rules of the commission;" that is to say, on account of being entirely abandoned by the claimants from the first, and no effort made to prosecute them from the time they were filed. The remaining 30 cases were dismissed on various grounds after being completed and submitted to the commission.

Of the whole amount claimed ($30,313,581.32, exclusive of interest), the sum of $1,293,450.55, or .0426 per cent, was allowed; $38,785.60, or .03 per cent, being allowed by the commissioners, and $1,254,664.95, or .97 per cent, by the umpire, as follows:

Baron Lederer	$1,200.00 or	.001
M. Bartholdi	865,315.00 or	.669
Baron Blanc	73,600.00 or	.057
Count Lewenhaupt	314,549.95 or	.243
	1,254,664.95 or	.970
By the commissioners	38,785.60 or	.030
Total	1,293,450.55 or	1.000

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An analysis of a full tabular statement, given in Mr. Collett's report, of the disposition of each of the 140 cases that were filed, shows that the 105 that were dismissed were rejected on the following grounds:

Want of prosecution under the rules, 40; want of jurisdiction, 14; no title to recover, 13; identity with another claim, 7; forfeiture of citizenship, 6; citizenship denied, 4; no proof of injury, 4; want of evidence, 3; no proof of damage, 3; withdrawn, 3; not a citizen at time of injury, 3; no denial of justice, 1; citizenship not proved, 1; contract claim, 1; claim diplomatically settled, 1; noncompliance with order of commission, 1.

Expenses. Immediately after the conclusion of the agreement of February 12, 1871, Congress provided for its execution by appropriating $15,000 for the payment of the share of the United States in the expenses of the commission.[1] Appropriations were thereafter regularly made for that purpose.[2] The whole sum contributed by the United States for expenses was $126,324.59.[3]

The agreement stated that the expenses of the arbitration would be defrayed by a percentage to be added to the amount awarded; that the compensation of the arbitrators and umpire should not exceed $3,000 each, and that the same allowance should be made to the advocate of each government. These stipulations were not adhered to. The allowances actually made were sometimes more and sometimes less than those stated, according to the necessities of the case.

Payment of Awards. Spain began to pay the awards in 1877,[4] and when the money was distributed to the claimants 5 per cent was provisionally reserved by the Department of State till the commission should take the final step of adding a percentage to the amount of the awards in order to meet the expenses of the arbitration. The sums

[1] Act of March 3, 1871, 16 Stats. at L. 495.

[2] Acts of February 22, 1873, 17 Stats. at L. 474; February 18, 1875, 18 Id. 327; February 26, 1877, 19 Id. 238; June 4, 1878, 20 Id. 98; January 27, 1879, Id. 274; May 14, 1880, and February 24, 1881, 21 Id. 140, 345; July 1, 1882, 22 Id. 134.

[3] See Mr. Frelinghuysen to Mr. Reed, December 15, 1882; same to Mr. Foster, June 22, 1883; MS. Inst. to Spain. The Congressional printer printed numerous documents for the commission, the cost of which printing was borne equally by the United States and Spain. (Mr. Fish to Mr. Durant, January 21, 1873, MS Dom. Let. vol. 97, p. 369.)

[4] For. Rel. 1877, 497–503, 521–525, 777.

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so reserved were invested in United States bonds and were eventually paid to the claimants without interest. The claimant in one case demanded interest, and sought by mandamus to compel the Secretary of State to pay it. The writ was refused on the ground that the sum withheld by the Secretary of State must be considered as withheld by the United States, and that the government was not liable for interest.[1]

Concluding Details.

By an agreement of June 2, 1883, concluded by the Acting Secretary of State and the Spanish minister, provision was made for the winding up of the business of the commission and the disposition of its records.[2] In accordance with this agreement, the sum of $9,000 was appropriated by Congress for the purpose of uniting with Spain in the presentation of testimonials to the three umpires who successively served with the commission.[3]

[1] U. S. ex rel Angarica *v.* Bayard, Secretary of State, 127 U. S. 251, 8 Sup. Court Reporter, 1156.

[2] 23 Stats. at L. 732.

[3] Act of July 7, 1884, 23 Stats. at L. 236. This appropriation was based upon the expenditure of $6,000 for each testimonial, Spain contributing half that amount in each case. The agreement was duly carried into effect. (Mr. Bayard, Secretary of State, to Mr. Curry, minister to Spain, June 26, 1886, MSS. Dept. of State.)

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CHAPTER XXII.

CASE OF THE "MASONIC."

Seizure of the Masonic.

On May 16, 1878, the American bark *Masonic*, Nichols, master, sailed from New York for Nagasaki, Japan, with a cargo of 16,500 cases of petroleum. On the 5th of the following November she put into Manila, in the Philippine Islands, in distress; but on the 12th of December, her sails and rigging having been repaired, she sailed for her destination. She again encountered heavy seas and was obliged to put back to Manila, where she arrived January 12, 1879; and as she was too badly damaged to continue on her voyage, permission was obtained from the customs authorities to transfer her cargo to the British schooner *Mt. Lebanon*, for Nagasaki. The transfer was made while the vessels were anchored at a considerable distance from the shore and in rough water. The local officials who were put on board to supervise the transfer claimed that the cargo turned out to be 22 cases short of the 16,500 packages specified in the manifest, and for this deficiency a fine of $100 a case, amounting to $2,200, was imposed on the captain and denounced against the vessel. Having no funds, and deeming the fine to be wrongful, the captain made a protest to the chief officer of the customs. He was informed, in reply, that his protest could not be received till his fine was paid. The vessel was then seized and held in custody by five customs officers, though the American flag was kept flying at her mizzenmast. In course of time orders were received from her owners in New York to sell her, and the United States vice-consul informed the customs authorities that the bark would be sold at auction, at the same time handing them an inventory of everything on board. At first the customs authorities claimed a prior right to sell the vessel, but they subsequently informed the vice-consul that they would permit him to make the sale, holding him responsible for the

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proceeds. The vice-consul declined to assume any responsibility to the Manila officials, and on February 24 postponed the sale indefinitely, at the same time protesting to the governor-general against the whole proceeding. The authorities then sold the vessel themselves. On the unloading of the *Mt. Lebanon* at Nagasaki it was found that the Manila authorities had in reality made a mistake, and that there was no shortage in the number of cases.

Diplomatic Protests.

When the Department of State was informed of these facts, it laid them before the Spanish minister at Washington with a view to effect a prompt adjustment of the case. The minister, after reading the papers, replied that the certificate made at Nagasaki of the unloading of the *Mt. Lebanon* merely stated that there had been discharged from her 16,500 cases, and that it was to be supposed that the cases missing at Manila had been added after the transshipment of the *Masonic's* cargo at that port. There was no evidence, however, that the *Mt. Lebanon* had touched at any port between Manila and Nagasaki; and under the circumstances the Department of State instructed the minister of the United States at Madrid at once to bring the case to the attention of the Spanish Government, and to express an earnest desire for its early consideration and settlement.[1] Soon afterward he was informed that the United States consular officer at Manila had been directed to protest against all the proceedings;[2] and he was instructed to impress upon the Spanish Government not only the groundlessness of the particular prosecution, but also the principle "that vessels driven by stress of weather to seek refuge in Spanish harbors * * * should be exempted from the operation of the Spanish customs law except in so far as it is strictly necessary for the prevention of smuggling and the enforcement of sanitary regulations."[3]

Diplomatic Correspondence.

To the representations of the United States, the Spanish Government replied that, the governor of the Philippines having determined the case to be a proper one for legal proceedings, an investigation had been instituted by royal order before the council of

[1] Mr. Hay, Acting Sec. of State, to Mr. Fairchild, July 6, 1880, MSS. Dept. of State.

[2] Mr. Evarts, Sec. of State, to Mr. Reed, October 18, 1880, MSS. Dept. of State.

[3] Mr. Evarts, Sec. of State, to Mr. Fairchild, January 6, 1881, MSS. Dept. of State.

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administration, and was then pending, and that the continued delay in the disposition of the case was due to the refusal of the representatives of the *Masonic* to file a bond with sureties for the payment of any expenses which might be incurred by the board of examination.[1] The United States protested against the requirement of such a bond under the circumstances; and asked, besides, that the judicial proceedings in the Philippines be discontinued, and that the case be disposed of by the authorities at Madrid.[2] The Spanish Government, while waiving the execution of the bond, on legal grounds declined to order the discontinuance of the judicial proceedings, but directed the Manila authorities to hasten their conclusion.[3] The Government of the United States expressed appreciation of this action,[4] but instructed its minister at Madrid to say that an adverse decision by the authorities at Manila, after the incontrovertible evidence of innocence which had been produced by the United States, "would be regarded as so far a denial of justice to an American citizen as to require us to present an ultimate appeal in the premises directly to the supreme government at Madrid, claiming to be heard thereon, without prejudice, however, to such rights as the owner of the *Masonic* may have before the *Consejo de Estada*."[5]

Administrative and Judicial Proceedings.

On June 9, 1883, the section of contentious litigation at Manila pronounced a final sentence. The parties to the suit were, as stated in the sentence, the administration of the customs on the one hand and the Messrs. Ker & Co., of Manila, representing Captain Nichols, on the other. The sentence recited that the *Masonic* arrived at Manila in January, 1879, in distress; that on the 10th of the month the Messrs. Ker & Co., as agents of the bark, solicited from the board of the treasury authority to transfer the cargo without observing the usual formalities; that the board, deeming itself, after consultation with the customs authorities, incompetent to grant the request, resolved on the 11th of January to transmit it to the central

[1] Mr. Reed to Mr. Blaine, April 7, 1881, MSS. Dept. of State.

[2] Mr. Blaine, Sec. of State, to Mr. Hamlin, November 23, 1881, MSS. Dept. of State.

[3] Mr. Hamlin to Mr. Blaine, August 5, 1882, MSS. Dept. of State.

[4] Mr. Hunter, Acting Sec. of State, to Mr. Hamlin, November 8, 1882, MSS. Dept. of State.

[5] Mr. Frelinghuysen, Sec. of State, to Mr. Reed, November 17, 1882, MSS. Dept. of State.

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administration of customs; that on the 15th of January the Messrs. Ker & Co. presented a new petition, accompanied with a protest of the captain of the *Masonic* as to her enforced arrival, and with the report of two experts as to her unseaworthy condition, and asked for permission to transfer her cargo to the *Mt. Lebanon* by means of boats; that on January 17 the collector of customs authorized the transshipment under the supervision of a clerk of the customs and an officer of carbineers; that when on January 30 the transfer was complete it appeared by the report of those officials and the receipt of the master that 22 cases were missing; that on the 6th of February a fine of $2,200 was in accordance with the customs regulations imposed on the captain or agents of the vessel; that on the next day the captain gave notice of an intention to appeal to the general board of the treasury; that, the time for the payment of the fine having passed, the vessel was embargoed; that on the 11th of February the captain entered an appeal in due form to the central administration of customs, praying for the revocation of the fine and embargo and for indemnity for any losses which he had suffered or might suffer in consequence of those measures; that the case was then sent by the center of customs, with an adverse report, to the treasury board, and that on the 26th of March a decree was issued by the general superintendent of the treasury confirming the action of the customs administration.

The sentence recited that the Messrs. Ker & Co., as the representatives of Captain Nichols, presented a petition to the section of contentious litigation, praying for the judicial annulment of the decree of March 26, for the removal of the fine, and for indemnity. On this petition the court, as stated in the sentence, held that, although the customs laws of the Philippines (articles 161 and 176) exacted of all vessels compliance with the formalities therein prescribed, the requirement properly applied only to vessels destined for the ports of the archipelago; that it was clearly shown that the *Masonic* was not destined for Manila, but was forced in by stress of weather; that to ascribe the reported absence of 22 out of 16,500 cases of petroleum to the wrongdoing of the captain, which also implied negligence on the part of the authorities, rather than an error in the count, was under the circumstances of the case unreasonable, and that the provisions of the general laws of the peninsula (articles 207 and 217) to which the

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general superintendent of the treasury had appealed in his decree of March 26, 1879, were not in force in the islands. On these grounds the court revoked the decree, ordered restitution of the fine, and directed an indemnity to be paid to Captain Nichols for any loss and damage which he might prove that he had suffered.[1]

Discussions at Madrid.

On September 25, 1883, Mr. Frelinghuysen inclosed a copy of this sentence to Mr. John W. Foster, then minister of the United States at Madrid, with an expression of the hope that in view of the completion of the judicial proceedings at Manila the case would be speedily adjusted. The matter was duly presented to the Spanish Government, but the authorities in the Philippines had sought to obtain a review of the sentence at Madrid, and the diplomatic consideration of the case was again delayed. On the 19th of September 1884, however, Mr. Foster informed Mr. Elduayen, then Spanish minister of state, that he had been instructed to insist that the position originally assumed by his government might be accepted, and that steps might at once be taken to adjust the claim diplomatically, and he adverted to the fact that the case had been twice presented by the President to Congress.[2] On the 16th of October the council of state, having completed the examination of the case, rendered a definitive decision in favor of the vessel.[3] Mr. Elduayen thought that this should be accepted as a sufficient protection of the rights of the American claimants. They had, he said, been charged with violating the laws of Spain, to which they became subject on touching Spanish territory; the proceedings had followed the regular legal course, except that as a special favor to the United States the complainant was dispensed from giving bonds, and the case bore from the beginning to the end no indication of outrage.

[1] MSS. Dept. of State..

[2] For Rel. 1885, 679. President Arthur, in his annual message of December 6, 1881, referred to the case as one of great hardship, but expressed the expectation that the whole matter would be adjusted in a friendly spirit. Again, in his annual message of December 4, 1883, he referred to the fact that the Manila court had decided in favor of the vessel, and expressed the hope that the Spanish Government would not withhold the speedy reparation which its sense of justice should impel it to offer for the unusual severity of its subordinate colonial officials.

[3] The sentence of the council of state was published in the *Gaceta* of October 27, 1884.

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Agreement of Arbitration.

Mr. Foster replied that he could neither concur in nor accept these conclusions, but that instead of attempting an argumentative answer to them he would submit a suggestion in the interest both of justice and of harmony. The United States had awaited for nearly six years the result of the judicial proceedings, in which it had finally been decided that the authorities of the Philippines had acted without law or justice. It would add another wrong to the original injustice if the American citizen whose property had been seized and confiscated should be required to go to Manila and follow up the judgment by seeking to recover from those authorities the losses and injuries sustained by him. His means had been taken from him. Mr. Foster therefore suggested that as the decisions of the Spanish courts had established the injustice which had been done, the mode of settlement originally suggested by the United States should be adopted. Responding to this suggestion, Mr. Elduayen obtained from the minister of ultramar authority to settle the case in accordance with the decision of the council of state, leaving the amount of damages to be determined by an arbitrator named by common accord. Mr. Elduayen proposed that six months should be allowed for the rendering of a decision, and that the amount awarded should be paid at Washington within six months, with interest at 6 per cent from the day of the decision to the day of payment. The United States accepted this proposition, with the qualification that the award should be payable in American gold. This qualification was, however, subsequently waived, it being left to the arbitrator to determine in what money the award should be paid.[1]

Selection of an Arbitrator.

For the post of arbitrator Mr. Elduayen proposed Baron Blanc, then Italian minister at Madrid, who had at one time served as umpire in the then recent Spanish claims commission at Washington. This proposal the United States promptly accepted;[2] and on the 28th of February 1885 the Spanish minister of state and the chargé d'affaires *ad interim* of the United States addressed to Baron Blanc the following note:[3]

"MINISTRY OF STATE,
"*Palace, February 28, 1885.*

"EXCELLENCY: The Government of His Majesty the King, my august sovereign, and the Government of the United States

[1] For. Rel. 1885, 678, 687, 696.
[2] Id. 678–683, 687.
[3] Id. 1885, 699.

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of America have agreed to submit to the decision of an arbitrator the sum which, as indemnification, the Spanish treasury must pay to the owner of the North American bark *Masonic*, in virtue of the decreed sentence of the council of state of the 16th of October 1884, and both Governments, recognizing the gifts of rectitude and justice which adorn your excellency, have not hesitated a moment in indicating you as the most proper person for the discharge of that delicate commission.

"We therefore have the honor to invite your excellency to be pleased to accept the power which the Governments of Spain and of the United States grant you in order that, in a period which cannot exceed six months, you may examine the damages and injuries duly proved by the owner of the *Masonic*, and determine the pecuniary indemnification which you justly and equitably believe ought to be assigned to him, in view of the liquidation of the interested party and of the antecedents of the question, which will be furnished to your excellency in the ministries of ultramar and of state and in the legation of the United States at this court.

"We avail ourselves, &c.,

"J. ELDUAYEN,
"DWIGHT T. REED."

To this communication Baron Blanc made the following response:[1]

"LEGATION OF ITALY,
"*Madrid, March 2, 1885.*

"Mr. CHARGÉ D'AFFAIRES: I have the pleasure to acknowledge the receipt of your communication dated the 28th of February last, in which you inform me that the Government of His Majesty the King of Spain and the Government of the United States of America, having agreed to submit to the decision of an arbitrator the amount which the Spanish treasury must pay as indemnification to the owner of the North American bark *Masonic*, in virtue of the decreed sentence of the council of state, dated the 16th of October 1884, the two governments had done me the honor to invite me to accept their powers in order that within a period which cannot exceed six months, I might examine the damages and injuries duly proved by the owner of the *Masonic*, and determine the pecuniary indemnification which in justice and equity I believe ought to be assigned to him in view of the liquidation of the interested party, and of the antecedents which will be furnished me by the ministries of ultramar and of state and by the legation of the United States in Madrid.

"Believing it my duty to ask the Government of the King, my august sovereign, authorization to accept so honorable a charge, and it having conceded such authorization, I put myself at the disposition of the governments of Spain and of

[1] For. Rel. 1885, 700.

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the United States to fulfill in the most faithful manner possible the commission mentioned in the cited communication.

"In giving to you my sincere thanks for the flattering phrases with which you were pleased to inform me of a confidence for which I am profoundly obliged, I avail myself, &c.,

"BLANC.

"I have directed a similar communication to the minister of state."

The Award.

On the 27th of June 1885 Baron Blanc communicated to Mr. Foster and to the Spanish minister of state a copy of his decision. In acknowledging its receipt Mr. Foster expressed his high appreciation of the promptness and impartiality with which Baron Blanc had discharged his trust;[1] and on the 20th of July Mr. Bayard, then Secretary of State, sent to Mr. Foster for delivery to Baron Blanc a letter in which he said: "I take great pleasure in assuring you of the President's high appreciation of your services in this matter, which, as on a former well-remembered occasion, have been so effective in bringing to a prompt and satisfactory conclusion questions of controversy between the two governments."[2]

The award was as follows:

"ROYAL LEGATION OF ITALY.

"The undersigned, requested by a collective note of his excellency the minister of state of His Majesty the King of Spain and of the chargé d'affaires of the United States at Madrid, dated 28th February ultimo, in the name of the respective governments, to decide in justice and equity, as arbiter, within a period not exceeding six months, the amount of the pecuniary indemnity to be paid by the Spanish treasury to the owner of the North American vessel *Masonic* in virtue of the decreed sentence of the council of state of Spain of October 16, 1884, and in accordance with the damages and injuries duly proved by the claimant, has received from the high parties to form his decision the following documents:

"From his excellency the minister of state of Spain the note of 30th May ultimo, containing estimates in support of which are produced as proofs three documents, among which is an account of losses and damages claimed by the owner of the *Masonic* by way of compromise and without proofs, the 6th August 1883, and amounting, including interest, calculated up to August 7, 1883, to $49,256.59; which claim

[1] For. Rel. 1885, 725–726.

[2] Baron Blanc duly acknowledged the reception of this letter August 7, 1885. (For. Rel. 1885, 748.)

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his excellency the minister of state, in the same note of 30th May, taking as a basis the two other documents produced by him as proofs, that is to say, the *expediente* prepared in the ministry of state, and the sentence of the council of state of October 16, 1884, answers by an offer which he agrees to accept by way of equity, and notwithstanding the omission up to that time by the claimant of legal proofs with regard to the value and profits of the vessel, an offer amounting to $9,354.32, including interest calculated up to August 7, 1883.

"From his excellency the minister of the United States the notes of April 20, May 30, and June 11, containing estimates in support of which are produced as proofs seventeen documents, the knowledge of which has been offered at the same time to the Spanish Government; documents recapitulated besides in a memorandum which concludes with an account of the losses and damages claimed in strict right as being proved to have been suffered by the owner of the *Masonic* through the seizure and embargo of his vessel, this latter account amounting in all, with interest calculated up to the 15th June instant, to $64,639.78.

"From the conviction which the undersigned has acquired after a careful examination, the differences of estimate manifested in an equal spirit of equity and justice by the high parties, as to the amount of indemnity to be granted, originate almost entirely from the fact that by reason either of the distance or of the different jurisdictions through which the procedures and negotiations have been followed, the documents produced as proofs were not in their totality in the possession of each one of the high parties when their respective estimates were formed.

"The undersigned, to discharge in its entire integrity the commission with which both governments have honored him, had therefore to solve these differences of estimate by basing his decision upon the documents produced by both parties as proofs.

"The undersigned, having enlightened his conscience in the best possible way by the scrupulous verification of the proofs submitted in the arbitration, in virtue of the powers which have been conferred upon him by both governments, declares in justice and equity that in conformity with the letter and spirit of the decreed sentence of the council of state of Spain of 16 October 1884, according to his personal knowledge and estimation, the sum to be paid as an indemnity by the Spanish treasury to the owner of the *Masonic*, both as capital and interest up to the date of the present decision, is $51,674.07.

"Done at Madrid June 27, 1885.

"BLANC"

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Grounds of the Award.

The grounds of his decision were set forth by Baron Blanc in a memoir which he sent to his own government. He afterward gave a copy of the paper to Mr. Foster, with permission to communicate it to the Government of the United States. The paper, translated, is as follows:[1]

"*Memoir concerning the reasons for the decision rendered by the arbiter as to the indemnity to be paid by Spain to the owner of the 'Masonic.'*

"I.—VALUE OF THE VESSEL.

"In the account presented in 1883 by the claimant, without proofs and by way of amicable compromise, $14,500 are claimed as the value of the *Masonic* when seized.

"In the offers made by way of equity by his excellency the minister of state (note memorandum of May 30), the value of the *Masonic* is fixed at $6,000.

"In the account presented at the arbitration on the same date, of 30th May ultimo, by his excellency the minister of the United States, by way of strict right and the proofs, $22,000 are claimed as the value of the *Masonic* when seized.

"Among the documents in due form, according to the laws of the United States, presented to arbitration, those of disinterested origin in the claim prove that the building of the *Masonic*, done in 1864, cost, rigging and accessories not included, $41,000; that the ship, on her departure from New York, was worth from $23,000 to $25,000, and, according to the most precise estimate, $45 per register ton 539.80, viz, $24,291, the rigging and effects being by themselves worth $6,838.45, and the copper sheets covering the bottom, $2,000; that her conditions as to solidity were certified as good on the 16th of May 1878, on her departure from New York, by the Bureau Veritas, which classed her A1.1, the register of the American Shipmasters' Association classing her on its own part A1.1½.

"But after her forced detention at Manila (January, 1879) the *Masonic* had experienced damages which diminished her value. The cost of repairs of those damages was estimated by Captain Nichols (Blanchard?) and by the Mate Genn, in their affidavits, and without other proof, at $3,000, having reference to the current prices in the Hong-Kong docks; and by official information not produced at the arbitration, but stated by his excellency the minister of state to have been given by the *comandancia de ingenieros* of marine at Manila, where, according to the documents produced by the claimant, the repairs are more difficult and expensive, at $20,000.

"It appears that the vice-consul of the United States at

[1] For. Rel. 1885, 729.

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Manila proposed to sell the ship, but that this proposition was expressly occasioned, not by the seriousness of the damages, but by the wish to avoid her confiscation with the total loss of the value, on account of the refusal of the customs authorities to admit any protest or appeal before the fine should be paid, and on account of the inability on the part of the captain to pay the fine for want of money; besides, the proposition was not accepted by the captain, who affirmed, and the mate also, that there was no authority to sell.

"As to the appraisement of damages, the fact does not seem conclusive that after the seizure and the order of sale issued by the administration of the Philippines, and against which the consulate of the United States, supported by his government, openly presented a protest of nullity, the ship did not find a bidder at any price in the public auction which took place; besides, in regard to this transaction, no document was presented at the arbitration, nor were any documents so exhibited relative to the final sale by the Spanish administration of the ship as wreck for $1,141.90.

"An official report, not produced at the arbitration, but declared by his excellency the minister of state as having been given by the *comandancia de ingenieros* of marine at Manila, appraises the ship at $6,000, that is to say, less than a third of the sum appraised by the same *comandancia* for the repairs; however, this appraisement is expressly based upon the affirmation that the damages were not caused by bad weather, but by a condition of radical and actual decay of the vessel.

"The undersigned, in view of the above, unavoidably considers the offer of $6,000 as one of those which the Spanish Government makes upon general grounds and before the production of the contrary proofs which were subsequently presented at the arbitration.

"On the other hand, with respect to the claim of $22,000, based on the appraisement of the damages at $3,000, the opinion of the undersigned is that the proofs furnished by the claimant, not being unimpeachable as to the latter figure, and the claimant being liable to be considered as bound by the claim of $14,500 made by him in 1883, the only one, according to the declaration of his excellency the minister of state, of which the Spanish Government is officially aware, the appraisement of $14,500 made upon the investigation at the time the seizure took place, presented by the claimant in 1883 to the Spanish Government, and produced at the arbitration by his excellency the minister of state, remains a document for the benefit of Spain against the appraisement exceeding that amount.

"In view, therefore, of the principles of equity and of the sense of conciliation which ought to prevail in an arbitral decision, the undersigned reduces the indemnity for the value of the ship to $14,500. He does not adjudge any interest on that amount, for reasons to be set forth below.

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"II.—VALUE OF THE EARNINGS OF THE 'MASONIC.'

"The claimant appraises them at $5,000 annually net. Whilst refusing that indemnity, in consequence of the reports which represented the ship as not being worth being repaired and unable to render profitable service, yet the Spanish Government recognizes in principle the admissibility of proofs of ordinary and reasonable earnings of a vessel in good condition and ready to go to sea.

"The proofs produced in the arbitration having established that the *Masonic* was in a normal state, in good condition of service, and ready to go to sea after repairs which it has not been shown would have exceeded an ordinary character, the undersigned considers himself bound to determine the probable value of the earnings lost by the claimant on account of the seizure. It is certified by witnesses not interested in the claim that from 1874 to 1877 the net profits of the *Masonic* had not been less than $5,000 a year.

"The same valuation presented by the claimant has been incidentally discredited by the Spanish Government as exaggerated, noting that the rates of freight at the time of the seizure were lower than ever before, a remark which would give to the earnings of the *Masonic* in 1879 a decisive importance in the valuation of probable profits for subsequent years.

"The charter party, produced in authentic form by the claimant, proves that for the transportation by the *Masonic* from New York to Nagasaki, whither it was bound, of 7,500 (16,500?) cases of petroleum, there was paid 47½ cents per case, say $7,837.50. It is alleged, but not proved, that the claimant would have received, besides, a supplementary fee of 5 per cent, the customary commission, say $391.87.

"It is proved that Bursley, a New York merchant, declaring that he considered the *Masonic* as a ship of good service, was negotiating to charter the *Masonic* back from the Philippines to New York, offering $8 per ton of freight (50 per cent greater than the register tonnage), say about $6,500; it is alleged, but not proved, that the claimant would be entitled to the same 5 per cent customary commission.

"The voyage of the *Masonic* from New York to Nagasaki and back, feasible in one year, would therefore have paid, if the seizure had not intervened, from $14,000 to $15,000.

"The valuation of the expenses, for a sailing vessel of 540 tons register, it does not seem ought to exceed two-thirds of that amount.

"The documents produced do not furnish the undersigned with data to modify, by reason of the oscillations of the prices of freights after the year the seizure took place, the valuation which would result from the above of the probable earnings for the following years.

"In general, it does not appear unreasonable to admit that

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a well-classed vessel, which has not reached the end of her normal duration, produces annually 12 per cent of her cost of construction.

"The undersigned must therefore admit the annual payment of $5,000 as net earnings lost from the 7th of May 1879, that is to say, two months after the seizure, which took place on the 7th of March, a time deemed necessary for the repairs to be made at Hong-Kong, up to the date of the arbitral decision.

"With regard to the interest on the annual earnings asked by the claimant from the date of the expiration of each year, it is stated, in opposition to this demand among others, in the note memorandum of the Spanish Government of 30th May ultimo, that the delays which have occurred in the settlement of this matter are chargeable to the claimant, who, bound to submit himself in his petitions to the administrative jurisdiction to the Spanish laws, refused at first to give the legal bond required for the proceeding instituted by Kerr & Co., at Manila, in the name of the captain of the vessel, before the council of administration of the Philippines.

"On the other hand, it is established by the documents Nos. 1 and 2, produced by his excellency the minister of state—

"That the decision of the council of state of October 16, 1884, confirms entirely the decision given on the 9th of June, 1882, by the section of contentions of the council of administration of the Philippines, which had decided that, as the fact upon which the fine and seizure had been based, that is to say, the missing on board of 22 cases of petroleum mentioned in the manifest, should have been correctly ascertained, which was not the case (the cargo having been afterwards proved to be complete), the fine imposed and the seizure effected were in every case illegal, and that the owner of the *Masonic* was entitled to an indemnity for the damages and losses which he should duly prove to have been suffered by him.

"That the grounds upon which the two decisions above mentioned are based imply the entire confirmation of the proofs of the facts and reasons of right furnished through a diplomatic channel since 1879 by the Government of the United States against the fine and the seizure.

"That in 1882 the governor-general of the Philippines had officially acknowledged the reasons for the seizure to be unfounded; that excessive severity had been exercised towards a ship of a friendly nation bound to a port of a third power, and arrived by stress of weather without any intention of or attempt at a commercial operation at Manila.

"That an indemnity was unavoidable, which could but increase with the delays; that an immediate solution was desirable, which was within the power of the government; finally, that the refusal of the claimant to give a bond in the pending administrative procedure was admissible.

"That, in fact, by royal order of 19 July, 1882, the claimant was excused from furnishing the bond.

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"That by the resolution of the council of ministers of the same period, the minister of ultramar was authorized finally to settle the question as he might deem most opportune.

"In consequence, the undersigned—

"Considering the just regard due to the position of the claimant, represented by the Government of the United States as being a respectable citizen, almost ruined by the loss of his means of livelihood, who, however, does not ask for compensation for losses which are not correctly appraisable during the past six years.

"In conformity with the spirit of impartiality which has characterized the opinions of the government of the Philippines and of the two administrative councils which have given their decision in the matter in a contentious way;

"In conformity with the sense of high equity of the declarations of his excellency the minister of state, inasmuch as he admits in principle the 6 per cent interest from the 7th March, 1879, on the cash capital which in equity and justice may bear interest, and inasmuch as in the offer of total indemnity made by the note of 30th May he includes the interest on the total capital which he found then proved;

"Adjudges the interest asked on the net earnings capitalized at the end of each year from the 7th May, and therefore does not adjudge the supplementary interest for the value of the ship.

"III.—EXPENSES OF TELEGRAMS.

"The sum of $250, admitted by the Spanish Government, is adjudged, besides the interest for six years at 6 per cent.

"IV.—PAYMENTS MADE TO CAPTAIN NICHOLS.

"The claimant asks $3,443.41.

"The accounts signed by Nichols prove payments made of $1,967.20, of which $484 are for expenses of return from Manila to New York, which the undersigned acknowledges ought to be admitted, and $69 for wages, which must be excluded, as already embraced in the calculation of the net annual earnings. Neither does the undersigned deem recoverable an account signed Nichols, amounting to $1,258.20, for Nichols's journey from New York to Manila, made previous to the seizure, when Nichols was sent to take the place of the deceased captain.

"Finally, the balance of the amount claimed on this item is rejected, as it is not established by proofs, the claimant declaring he has lost the vouchers.

"On the other hand, the Spanish Government offers $500; but the undersigned, inasmuch as the Spanish Government embraces in that amount salary which becomes inadmissible after the adjudication by the arbiter of the net earnings, does not think he ought to allow the claimant the benefit of said offer, and reduces the indemnity for this item to $484, in addition to interest for six years at 6 per cent.

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"V.—EXPENSES PAID TO CAPTAIN GENN.

"The claimant asks $294 for wages and expenses incurred as a consequence of the seizure.

"The wages cannot be admitted as recoverable; but the seizure having prevented Genn from returning to New York on board the *Masonic*, the sum of $250, admitted by the Spanish Government for the journey back of Nichols, is adjudged by the undersigned for the return expenses of Genn; in addition 6 per cent interest during six years.

"VI.—CONSULAR FEES PAID.

"The claimant asks $83, an amount estimated by the minister of the United States not to be excessive, the consuls of the United States being authorized in such cases to charge for their services as notaries. However, as there is no proof that the whole of that amount was paid for the two consular documents produced before the arbitration, the indemnity is reduced by the undersigned to the $25 offered by the Spanish Government, in addition to 6 per cent interest during six years.

"VII.—FEES TO THE LAWYERS OF NEW YORK.

"The proof not being produced, the indemnity asked of $1,500 is reduced to the $500 offered by the Spanish Government. No interest has been asked.

"VIII.—TRAVELING EXPENSES BETWEEN NEW YORK AND WASHINGTON.

"In spite of the likelihood and moderation of the amount of $360 asked, of the difficulty of the proofs for such expenses, and of the assurance given by the Government of the United States as to the honesty of the claimant, the undersigned does not think that he can deviate from the principle not to admit what is not proved by formal documents. For this item, as it is not admitted by the Spanish Government, the undersigned does not adjudge any reimbursement.

"IX.—EXPENSES OF STAMPED PAPER AT MANILA.

"The demand of $25, admitted by the Spanish Government, is adjudged. No interest has been claimed."

Payment of the Award.

July 20, 1885, Mr. Elduayen formally notified Mr. Foster that the Spanish Government, considering the decision of the arbitrator as binding and without appeal, would take the necessary measures to pay the sum awarded in the manner agreed upon.[1] The money was duly paid. It was distributed by the Department of State.[2]

[1] For. Rel. 1885, 733.

[2] Mr. Bayard, Sec. of State, to Mr. Milliken, May 6, 1886, MS. Dom. Let.

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CHAPTER XXIII.

CASE OF THE BRIG "GENERAL ARMSTRONG": CONVENTION BETWEEN THE UNITED STATES AND PORTUGAL OF FEBRUARY 26, 1851.

Hostilities at Fayal.

About noon on the 26th of September 1814 the brig *General Armstrong*, an American privateer, Samuel C. Reid, commander, having seven guns and a crew of ninety men, put into the port of Fayal, in the Azores, within the jurisdiction of Portugal.[1] The object of the brig's entrance was to obtain a supply of fresh water, and for that purpose the governor of the islands, Elias José Ribeiro, readily granted permission, at the same time ordering the privateer to depart before noon of the following day. The crew were therefore employed during the afternoon in taking in fresh water, when, between the hours of 7 and 8 o'clock, as the sun was setting, a British squadron, consisting of the 74-gun ship *Plantagenet*, Capt. Robert Lloyd, the 38-gun frigate *Rota*, Capt. Philip Somerville, and the 18-gun brig-sloop *Carnation*, Capt. George Bentham, appeared in the roads. Of these vessels the *Carnation* was the first to enter the port. She anchored within pistol shot of the privateer, and

[1] Some of the English publications give the commander's name as Champlin. In fact, the brig was on a former cruise commanded by Guy R Champlin. Captain Reid was a native of Connecticut; he died in New York City in 1861. Lossing (Field Book of the War of 1812, p. 1001) gives an appreciative account of his life. Roosevelt (Naval War of 1812, p. 338) states that the brig had at Fayal one long 24 and 8 long 9s. According to Captain Reid's report she had only seven guns. Guernsey (New York City and Vicinity During the War of 1812–1815, II. 300) states that on her first cruise she carried nineteen guns and a hundred and fifty men, but on her second only seven guns—six long 9s and one "Long Tom," a "42-pounder"—and ninety men. The "42-pounder" seems to have been a 24. It was delivered by the Portuguese Government in 1892 into the custody of the United States. (Mr. Adee, Acting Secretary, to Mr. Reid, June 16, 1892, MSS. Dept. of State.)

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was soon followed by the *Plantagenet* and *Rota*. Escape being thus rendered impracticable, Captain Reid deemed it prudent to remain quiet, relying on the protection of a neutral port. His suspicions were however soon aroused by the exchange of signals between the ships, and in apprehension of an attack he cleared for action and ordered the privateer to be warped inshore, close under the guns of the castle. While he was thus employed he saw four boats approaching "well manned and apparently as well armed." Believing that they intended to board the brig, he hailed them and warned them to keep off, but as they continued on their course he ordered his men to fire, which they did, killing and wounding a number of the men in the boats. On the privateer a seaman was killed and the first lieutenant wounded. In his account of the affair, on which the foregoing narrative is based, Captain Reid states that the enemy, having met with a "warmer reception" than they expected, "soon cried out for quarters and hauled off."[1]

Intervention and Report of Governor Ribeiro.

Governor Ribeiro did not witness what had taken place; but soon after 9 o'clock in the evening he received a communication from Mr. Dabney, the American consul at Fayal, stating that an attempt had been made by "four or five armed boats to surprise and carry off" the privateer; that the boats had been repulsed, but that a new and more formidable attack was feared. "I therefore pray your excellency," said Mr. Dabney, "to protect this American vessel, as far as possible, either by force or by representations to the British commanders, to the effect that they should abstain from a conduct so reprehensible; and I also pray your excellency to allow the Americans on shore to go on board to aid in the defense of the said vessel in a contest so unequal, if the English should persist in attacking the vessel again." Governor Ribeiro refused to allow the force of the privateer to be increased, but he at once wrote to the commander of the British squadron, requesting him to abstain from any hostilities. He then repaired to the castle, where, as he reported to his government, he "learned that a boat had been sent from the British ships of war to examine the privateer, and on its return three others had been sent armed; and that, the captain of the privateer not wishing to allow them to come on board of his vessel, a fire was begun on

[1] S. Ex. Doc. 14, 29 Cong. 1 sess.; Am. State Papers, Naval Affairs, 495.

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both sides, the result of which was that the second officer of the privateer was wounded, and two English were killed and seven wounded." He then considered the affair terminated, and supposed his letter would receive the attention of the British commander. But about 11 o'clock he perceived by the light of the moon that the latter was "preparing new attacks and insults." About ten minutes past 12 o'clock a great number of boats, of which he could count twelve, attacked the privateer and a fight ensued, lasting twenty-eight minutes. The British forces, numbering about three hundred men, were "almost entirely destroyed." The British consul told him that the loss in killed and wounded amounted to a hundred and sixteen men, and it was generally believed to have been greater. He himself saw three of the boats without a single person in them. The total loss on the privateer was two killed and seven wounded.

Ten minutes after the fight was ended Governor Ribeiro received from the commander of the British squadron a note, which, though it did not mention the former's communication, evidently was written in reply to it. In this note the British commander declared that one of the boats of the *Plantagenet* "was, without the slightest provocation, fired on by the American schooner *General Armstrong*, in consequence of which two men were killed and seven wounded;" that "the neutrality of the port," which he had "determined to respect," had thereby been violated; that "in consequence of this outrage" he was "determined to take possession" of the vessel, and that he hoped the governor would order the forts "to protect the force employed for that purpose." At 1 o'clock on the morning of September 27 Governor Ribeiro answered that, from the accounts which he had received, the British boats made the first attack, and that the commander of the British forces should give public evidence of the good understanding existing between his sovereign and the Prince Regent of Portugal by putting an end to the hostilities begun at 8 o'clock on the preceding evening. At 2 o'clock in the morning Governor Ribeiro, no response to this letter having been received, wrote again, asking the British commander "to suspend hostilities" till he should have had a conference with him on the subject. He received a reply through the British consul to the effect that, as the Americans had been "the first to violate the neutrality" of the port, the commander of the British squadron would "send a brig to fire

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on the American schooner," and that if this brig "should encounter any hostilities from the castle," or the governor "should allow the masts to be taken from that schooner," he would "regard the island as an enemy" and "would treat the town and castle accordingly." Pursuant to this threat, an attack upon the privateer was begun at a quarter past 6 by the *Carnation*. At first it was repulsed, but Captain Reid, who had been informed by Mr. Dabney of the purport of the British commander's communication to Governor Ribeiro, perceived that further resistance was useless, and at half past 7, having scuttled the privateer, he and his crew went ashore, taking with them their baggage and part of the ship's provisions and rigging. At 8 o'clock the *Carnation* returned, and after cannonading the privateer, which was then fast on the rocks, for a quarter of an hour, sent boats to sack and burn her. At 9 o'clock her destruction was practically complete. On land some houses were damaged and three persons wounded by the British fire.

Such, in substance, was the report of Governor Ribeiro, made to his government on the 28th of December, of what he described as "a horrible and bloody combat, occasioned by the madness, pride, and haughtiness of an insolent British officer, who would not respect the neutrality maintained by Portugal in the existing contest between His Britannic Majesty and the United States of America."

Report of Mr. Dabney.

The report of Mr. Dabney, made to his own government October 5, 1814, was to the same effect. "In the face of the testimony of all Fayal and a number of respectable strangers who happened to be in this place at the moment, the British commander," said Mr. Dabney, "endeavors to throw the odium of this transaction on the American captain, Reid, alleging that he sent the boats merely to reconnoiter the brig, and without any hostile intentions. The pilots of the port did inform them of the privateer the moment they entered the port. To reconnoiter an enemy's vessel in a friendly port at night with four boats, carrying, by the best accounts, one hundred and twenty men, is certainly a strange proceeding."[1]

[1] The French journals of October 22, 1814, published extracts from Mr. Dabney's report. A letter published by Cobbett, which was signed "H. K. F.," and was said to be from "an English gentleman at Fayal," gave an account somewhat similar to that of Mr. Dabney. (Cobbett's

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Protest of Captain Reid.

September 27 Captain Reid entered before Mr. Dabney a protest, which was sworn to by himself and by the first and third lieutenants and the sailing master, surgeon, captain of marines, and four prize masters of the brig. This protest, after describing the arrival of the brig at Fayal, runs as follows:

"That during the said afternoon his crew were employed in taking on board water, when about sunset of the same day, the British brig of war *Carnation*, Captain Bentham, appeared suddenly doubling round the northeast point of this port. She was immediately followed by the British ship *Rota*, of 38 guns, Captain P. Somerville, and the seventy-four gun ship *Plantagenet*, Captain Robert Lloyd, which latter, it is understood, commanded the squadron; they all anchored about seven o'clock, p. m., and soon after, some suspicious movements on their part indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle; that, in the act of doing so, four boats approached his vessel, filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man, and wounded the first lieutenant; they then fled to their ships, and prepared for a second and more formidable attack. The American brig, in the meantime, was placed

Letters on the Late War between the United States and Great Britain [New York, 1815], 286.) Mr. Dabney's report appeared in the New York *Evening Post* of December 12, 1814. The first news of the affair seems to have been brought to New York by a passenger on the ship *Isaac Chauncey*, which arrived November 25. (*Evening Post*, November 26, 1814.) The most satisfactory historical account is that given in Adams's History of the United States, VIII. 202, in which the report of Captain Lloyd is reproduced from the manuscript in the British archives. Accounts may be found in Coggeshall's History of American Privateers, 370; Roosevelt's Naval War of 1812, 338; McMaster's History of the People of the United States, IV. 118; Perkins's History of the Political and Military Events of the Late War between the United States and Great Britain, 356; Ingersoll's History of the Second War between the United States and Great Britain, second series (Philadelphia, 1852), I. 43, 44. Ingersoll says: "The privateer certainly fired first and drew the first blood. But who was the aggressor became a question which is not yet determined. Truth, always difficult of ascertainment, is hardly ever discovered by human testimony where passions are excited by bloodshed between armed foes." The arbitration was pending when this statement was published. In 1833 there was printed in New York "A Collection of Sundry Publications and Other Documents in Relation to the Attack made During the late War upon the private armed brig *General Armstrong*."

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within half cable's length of the shore, and within half pistol shot of the castle. Soon after midnight, twelve, or, as some state, fourteen boats, supposed to contain nearly four hundred men, with small cannon, swivels, blunderbusses, and other arms, made a violent attack on said brig, when a severe conflict ensued, which lasted near forty minutes, and terminated in the total defeat and partial destruction of the boats, with an immense slaughter on the part of the British. The loss of the Americans in the actions was, one lieutenant and one seaman killed, and two lieutenants and five seamen wounded. At daybreak the brig *Carnation* was brought close in, and began a heavy cannonade on the American brig, when Captain Reid, finding further resistance unavailing, abandoned the vessel, after partially destroying her, and soon after the British set her on fire. The said Captain Reid, therefore, desires me to take his protest, as he by these presents does most solemnly protest against the said Lloyd, commander of the said squadron, and against the other commanders of the British ships engaged in this infamous attack on his said vessel, when lying in a neutral, friendly port; and the said Captain Reid also protests against the Government of Portugal, for their inability to protect and defend the neutrality of this their port and harbor, as also against all and any other State or States, person or persons, whom it now doth or may concern, for all losses, costs, and damages that have arisen, or may arise, to the owners, officers, and crew of the said brig *General Armstrong*, in consequence of her destruction and the defeat of her cruise, in the manner aforesaid."[1]

Report of Captain Lloyd.

In a report to Rear-Admiral Brown, made on the day after the destruction of the privateer, Captain Lloyd gave the following version of the beginning of hostilities:

"On the evening of the 26th instant I put into this port for refreshments, previous to my return to Jamaica. In shore was discovered a suspicious vessel at anchor. I ordered Captain Bentham of the *Carnation* to watch her movements, and sent the pinnace and cutter of this ship to assist him on that service; but on his perceiving her under way, he sent Lieut. Robert Faussett in the pinnace, about eight o'clock, to observe her proceedings. On his approaching the schooner, he was ordered to keep off or they would fire into him, upon which the boat was immediately backed off; but to his astonishment he received a broadside of round, grape, and musketry, which did considerable damage. He then repeatedly requested them to leave off firing, as he was not come to molest them; but the enemy still continued his destructive fire until they had killed

[1] S. Ex. Doc. 14, 29 Cong. 1 sess.

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two men and wounded seven, without a musket being returned by the boat."[1]

Affidavit of Lieutenant Faussett.

In an affidavit made before the British consul at Fayal September 27, 1814, and confirmed by the oaths of the master and first seaman of the pinnace, Lieutenant Faussett declared:

"That on Monday, the 26th instant, about eight o'clock in the evening, he was ordered to go in the pinnace or guard-boat, unarmed, on board Her Majesty's brig *Carnation*, to know what armed vessel was at anchor in the bay, when Captain Bentham of said brig ordered him to inquire of said vessel (which, by information, was said to be a privateer). When said boat came near the privateer, they hailed (to say the Americans), and desired the English boat to keep off, or they would fire into her; upon which Mr. Faussett ordered his men to back stern, and with a boat-hook was in the act of so doing, when the Americans, in the most wanton manner, fired into said English boat, killed two and wounded seven, some of them mortally; and this notwithstanding said Faussett frequently called out not to murder them; that they struck and called for quarters. Said Faussett solemnly declared that no resistance of any kind was made, nor could they do it, not having any arms, nor, of course, sent to attack said vessel. Also, several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, it seems, were said to be armed."[2]

Both the report of Captain Lloyd and the affidavit of Lieutenant Faussett confirmed the statement of Mr. Dabney that information had been obtained from the pilots as to the character of the privateer; and, although the affidavit seems to imply that this intelligence had not reached Captain Lloyd, the latter's report refutes the implication. His situation after the fight was one of great difficulty. Deprived of the support which success even in wrongdoing often brings, and forced to explain a disastrous defeat incurred in what the friendly Portuguese governor as well as the enemy denounced as a flagrant breach of neutrality, he would hardly have omitted by inadvertence what was not only an obvious proof but an almost essential condition of innocence; and his failure to state that he was ignorant of the character of the privateer may therefore be accepted as an admission that he knew it. All he could say was that on putting into port a "suspicious vessel"

[1] Captain Lloyd's Report, Adams's History of the United States, Vol. II. 202.

[2] Br. and For. State Papers, XLV. 494.

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was "discovered." Nor did he explain why it was necessary to reinforce the boats of the *Carnation* with two from his own ship in order to "watch" the privateer; nor why one of those boats, if their only object was merely to "observe her proceedings," was so near when last warned off as to be able to back astern with a boat hook. It does not imply any doubt of the truth of Lieutenant Faussett's statement as to the object of his approach, to say that the information he sought to obtain evidently was of a very accurate kind, and precisely such as would have been useful, not to the Portuguese boats which were going ashore, but to the British armed boats which were close by "observing the proceedings" of the privateer. The privateer was seeking to avoid a conflict, not to provoke one. It was a natural supposition on the part of Captain Reid that the British boats were engaged in an attempt to board him; and, being indisposed to submit without resistance to capture, he fired.

Captain Lloyd's Account of the Brig's Destruction.

Captain Lloyd stated in his report that "this conduct" on the part of the privateer, in "violating the neutrality" of the port, left him, as he conceived, "no alternative but that of destroying her," and that he ordered that step to be taken immediately. His report narrates what ensued:

"Finding the privateer was warping under the fort very fast, Captain Bentham judged it prudent to lose no time, and about twelve o'clock ordered the boats to make the attack. A more gallant, determined one never was made, led on by Lieutenants Matterface, of the *Rota*, and Bowerbank of this ship; and every officer and man displayed the greatest courage in the face of a heavy discharge of great guns and musketry. But from her side being on the rocks (which was not known at the time), and every American in Fayal, exclusive of part of the crew, being armed and concealed in these rocks, which were immediately over the privateer, it unfortunately happened when these brave men gained the deck they were under the painful necessity of returning to their boats, from the very destructive fire kept up by those above them from the shore, who were in complete security,—and I am grieved to add, not before many lives were lost exclusive of the wounded."

According to some reports at the time the British loss was 63 killed and 110 wounded. According to the official report, it was 34 killed and 86 wounded.[1]

[1] James, Naval History of Great Britain (Chamier's ed.), VI. 349; Allen, Battles of the British Navy (ed. 1853), II. 487. *Bell's Weekly Messenger*, London, October 23, 1814, p. 343, announced that "the American privateer

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Defenseless Condition of Fayal.

We have seen that Mr. Dabney, in his first communication to Governor Ribeiro, requested him to protect the privateer "as far as possible, either by force, or by representations to the British commanders." In his report of the 5th of October he stated that the governor, "indignant at what had passed, but feeling himself totally unable, with the slender means he possessed, to resist such a force" as that of the British, "took the part of remonstrating, which he did in forcible but respectful terms." Governor Ribeiro, in his report of the 28th of September, said that although he was "perfectly aware that force should be repelled by force," and that this was "permitted by right," yet "the unfortunate and miserable condition" of the island's defenses prevented him from protecting its neutrality by arms. On the 27th of September Captain Reid protested "against the Government of Portugal for their inability to defend the neutrality of this their port and harbor," and for the resulting loss of the privateer. It was conceded on all sides that the authorities of the island were not in a position to make effective resistance to the force of the British squadron, not only because the number of soldiers on the island was small, but also because the artillery in the castle of Santa Cruz and the other forts was in a ruinous condition.

Claim Against Portugal.

The agents of the privateer, Messrs. Havens and Jenkins, of New York, on December 19, 1814, transmitted to Mr. Monroe, then Secretary of State, a copy of Captain Reid's protest and certain other papers, and, saying that they believed themselves to have "an equitable claim on the Government of Portugal for the damages sustained" by the loss of the vessel, stated that her cost and outfit amounted at the time of her sailing to $30,000. They expressed the hope that the United States would "demand compensation for the damage." They also

General Armstrong, of eighteen guns, was destroyed at Fayal the end of last month by the boats of His Majesty's ships *Plantagenet*, *Rota*, and *Carnation*, after a great resistance, in which our loss was 135 men killed and wounded." An extract from a Kingston, Jamaica, newspaper, published in the New York *Evening Post*, December 12, 1814, stated that the fight was begun by the firing on a boat that was "going ashore." Marshall, in his Royal Naval Biography, III. 243, says of Captain Lloyd: "During the late war with the United States we find him commanding the *Plantagenet*, 74, on the American station, where he captured a great number of coasting vessels. He has not been employed since the peace." This is all; the affair at Fayal is not mentioned.

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inclosed Mr. Dabney's account of expenditures for the brig, amounting to $700, chiefly for supplies for the crew and for their passage to the United States.

At this time the Portuguese Court, temporarily driven from Europe, was at Rio de Janeiro. Mr. Monroe therefore addressed to Mr. Thomas Sumter, then minister of the United States at that capital, the following instruction:

"DEPARTMENT OF STATE,
"*Washington, January 3, 1815.*

"SIR: You will receive herewith a protest and certain other documents (Nos. 1 to 5) concerning the destruction of the American private armed vessel *General Armstrong*, which was effected, after a gallant resistance, by a vastly superior British naval force, in the port of Fayal, in violation of the neutrality of Portugal. The growing frequency of similar outrages on the part of Great Britain renders it more than ever necessary for the Government of the United States to exact from nations in amity with them a rigid fulfillment of all the obligations which a neutral character imposes. The President does not, however, entertain a doubt of the promptitude which the Prince Regent will manifest, particularly when he is informed of the aggravated nature of this case, to maintain the relations of justice between the two countries, by asserting the rights of his own dominion, and those of a belligerent power in friendship with him, founded, as they are, on the plain and acknowledged principles of public law. You are requested to bring all the circumstances of the transaction distinctly to the view of the Portuguese Government, and to state the claim which the injured party has to immediate indemnification."[1]

Correspondence at Rio de Janeiro.

Ten days before this instruction was sent the Portuguese Government, having received Governor Ribeiro's report, to which was annexed his correspondence with Mr. Dabney and the British commander, had voluntarily entered into correspondence with

[1] S. Ex. Doc. 14, 29 Cong. 1 sess. 20. In an instruction to Mr. Sumter of November 13, 1815, Mr. Monroe said: "It is hoped that a sense of what is due to their own dignity, as well as a sense of justice to the citizens of the United States who have suffered by the lawless capture and destruction of their vessels and property by British cruisers within the territorial jurisdiction of Portugal, will induce the Portuguese Government to adopt effectual measures to cause reparation to be made. This point should be pressed as far as it may be useful or proper to do so. I shall cause a statement of the various cases transmitted to this Department to be made out and forwarded to you, and I will take that occasion to write you more fully on the subject." (MS. Instructions to United States Ministers, VIII. 2.)

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Mr. Sumter on the subject. In communicating to the latter on the 23d of December 1814 a copy of Governor Ribeiro's report and its accompaniments, the Marquis d'Aguiar, then minister for foreign affairs, said that His Royal Highness the Prince Regent, having adopted a system of strict neutrality in the contest unhappily raging between the Unites States and Great Britain, had heard with the greatest grief "of an occurrence so repugnant to his sentiments and so contrary to established principles," but that he flattered himself that the citizens of the United States would "not have reason to complain of the Portuguese governor in that conflict, having used his utmost power to prevent the evil that occurred." His Royal Highness could not, said the Marquis d'Aguiar, "avoid viewing this affair in the light it is represented, as attacking his sovereignty and independence, by the manifest violation of his territory in the infringement of its neutrality;" and he had therefore immediately caused a note on the subject to be addressed to the British minister at Rio de Janeiro, and had at the same time "directed his minister in London to make the reclamation so serious an offence requires."[1]

Besides giving Mr. Sumter a copy of the report of Governor Ribeiro, the Marquis d'Aguiar also communicated to him, confidentially, a copy of his note to Lord Strangford, the British minister. In this note the Marquis d'Aguiar commented upon "the outrageous manner" in which the commander of the British squadron had violated the neutrality of the port of Fayal by "audaciously attacking" the *General Armstrong* under the guns of the castle, notwithstanding the remonstrance of the governor; upon the "base attempt" of that commander to ascribe his violent measures to the Americans, by pretending with "the most manifest duplicity" that the latter, in "repelling the British armed barges," "were consequently the aggressors;" and upon his "arrogance" in threatening to consider the port as enemy's territory if the governor should attempt to prevent him from taking possession of the American privateer. The "censurable moderation" of the governor during these outrages would, said the Marquis d'Aguiar, have induced His Royal Highness to punish him if it had not appeared that he was governed by a wish to save the inhabitants of the island from the ravages which the British com-

[1] S. Ex. Doc. 14, 29 Cong. 1 sess. 22.

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mander had threatened to commit. In conclusion, the note stated that the Prince Regent had directed the Portuguese minister at London "to require satisfaction and indemnification not only for his subjects, but for the American privateer, whose safety was guaranteed by the protection of a neutral port."[1]

In 1818 Mr. John Quincy Adams, then Secretary of State, addressed a note to the Portuguese minister concerning the claim, concluding as follows: "It is hoped that your government will, without further delay, grant to the sufferers by that transaction the full indemnity to which they are by the law of nations entitled."

Revival of the Claim.

With this communication the diplomatic correspondence was closed for a period of nearly twenty years; and in the meantime claims in behalf of the owners, officers, and crew of the privateer were presented to Congress. On June 30, 1834, an appropriation was made of $10,000 to be distributed as prize money among the officers and crew and the legal representatives of such as might be dead.[2] Shortly before this appropriation was made Captain Reid presented a memorial to the Department of State touching the claim against Portugal; but Mr. McLane, who was then Secretary of State, replied that the situation of that country was "such as to render the present an unsuitable time for presenting any claim, however just, upon the government." Mr. McLane added, however, that when the political affairs of Portugal became settled the memorial would "receive all proper attention," and that such measures would be adopted "as the circumstances of the case may appear to justify."[3]

In the following year Mr. Asbury Dickins, as Acting Secretary of State, writing to Mr. Kavanagh, minister of the United States at Lisbon, in relation to claims, said that "another claim" which "appeared to the Department of State, upon the statement submitted in behalf of the parties interested, to be well founded," and which he was "accordingly instructed to present to the Government of Portugal," was that of the

[1] The Marquis d'Aguiar to Lord Strangford, December 22, 1814, S. Ex. Doc. 14, 29 Cong. 1 sess. 21.

[2] 6 Stats. at L. 603.

[3] Mr. McLane, Sec. of State, to Captain Reid, June 2, 1834, S. Ex. Doc. 14, 29 Cong. 1 sess. 23.

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brig *General Armstrong*. "The Portuguese authorities at that place having failed," said Mr. Dickins, "to afford to this vessel the protection to which she was entitled in a friendly port, which she had entered as an asylum, the government is unquestionably bound by the law of nations to make good to the sufferers all the damages sustained in consequence of the neglect of so obvious and acknowledged a duty. Captain Reid, who commanded the privateer, and who represents himself to be the agent for the parties concerned, will be requested to transmit to you the necessary documents to establish the claim and to show the amount of damages to which the persons interested are entitled. The opinion given by the Department has no reference to the amount demanded, but only the principle upon which the claim is asserted."[1] On May 26, 1835, Mr. Forsyth, who was then Secretary of State, acquainted Captain Reid with the purport of these instructions, and informed him that any papers which he might wish to send to Mr. Kavanagh as evidence in the case would be forwarded by the Department, if he should prefer that mode of transmission. In response to this invitation Captain Reid sent to the Department of State certain documents which Mr. Forsyth, on October 22, 1835, transmitted to Mr. Kavanagh "without examination," at the same time observing that the Department was not to be understood "as expressing any opinion in respect to their sufficiency for the purpose for which they were designed" or as to "the amount of the claim" which he was to make; and that it was not thought necessary to add anything to the instructions already given.

Mr. Kavanagh duly acknowledged the receipt of the documents, but after examining them decided, before presenting the claim, to ask for further instructions. He observed that the estimate of the value of the brig and her outfit rested solely on the testimony of Mr. Havens, one of her agents; that on January 23, 1817, a committee of the Senate reported adversely a petition in behalf of the owners, officers, and crew for remuneration for the brig's destruction; that on March 4, 1818, the Committee on Naval Affairs of the House reported a bill to grant the officers and crew $10,000, but that it did not appear why it did not pass; and that, while the affidavit of Mr. Havens valued the brig and her outfit at $42,000, Captain

[1] S. Ex. Doc. 14, 29 Cong. 1 sess. 23–24.

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Reid's estimate of the loss and damage to the owners, officers, and crew was $200,800. He had therefore delayed the presentaion of the claim for the reason (1) that he desired to obtain such instructions as the Department of State might deem it proper to give on a full view of all the evidence which the parties had transmitted; (2) that it appeared that a correspondence took place at Rio de Janeiro in 1814, but that there was nothing in his legation to show the result; and (3) that he was fearful that the presentation of the claim under these circumstances might afford a pretext for postponing the settlement of other claims "the validity of which had been already admitted before the receipt of Captain Reid's documents." The Department of State refrained however from giving further instructions, beyond directing Mr. Kavanagh to use his best judgment. "As it is well understood," said Mr. Forsyth, "that after asking the interference of their government to procure redress for the injuries they suppose themselves to have sustained, the parties must abide by such settlement as that government may make, you will, after a careful examination of the evidence, demand from the Portuguese authorities the highest amount of damages which in your judgment a prudent and conscientious man would feel himself justified in asking were he prosecuting his own claim."[1]

February 17, 1837, Mr. Kavanagh presented the claim to the Portuguese Government, inclosing with his note three documents, marked A, B, and C, consisting, respectively, of Mr. Dabney's letter to Governor Ribeiro of September 26, 1814, requesting his interposition; Captain Reid's protest of September 27, 1814, and Mr. Dabney's letter to Governor Ribeiro of September 30, 1814, inclosing a copy of the protest. On the 4th of September 1837 Mr. Kavanagh reported that, while he had had no written answer to his note, the minister for foreign affairs had told him that, although he was not yet prepared to give a definite decision, the claim appeared to be "inadmissible; that the Portuguese force at Fayal was at the time of the destruction of the privateer totally incompetent to resist the assailing British squadron; and that the commander of the fort had done all in his power to dissuade the assailants from their threatened attack." Mr. Kavanagh also stated that the minister for foreign affairs had on two or three occasions referred "to the great damages sustained by Portuguese com-

[1] Mr. Forsyth, Sec. of State, September 21, 1836, S. Ex. Doc. 14, 29 Cong. 1 sess. 31.

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merce from armed vessels sailing under the flag of Artigas, whose prizes were all alleged to have been taken into the ports of the United States, and there wasted or destroyed without any indemnity to the sufferers."

In March 1840 a letter was addressed by a representative of the claimants to President Van Buren.[1] It was answered by Mr. Forsyth with the statement that the case had been repeatedly presented to the Portuguese Government, but without success, "the claim having been deemed inadmissible, on various grounds;" but that the instructions of the chargé d'affaires of the United States at Lisbon required him to urge the matter whenever there was room to expect a favorable result.

Instructions of Mr. Webster.

In March 1841 Mr. Webster succeeded Mr. Forsyth as Secretary of State, but, although letters in regard to the claim were addressed to him in the ensuing June and November, it was not till January 15, 1842, that he sent instructions to the legation at Madrid on the subject. In these instructions he directed Mr. Barrow, who had succeeded Mr. Kavanagh as chargé d'affaires at Lisbon, to make himself "acquainted with the circumstances, and address a note to the minister of foreign affairs on the subject." Continuing, he said:

"The amount of the claim the department will not attempt to fix; but its justness, I believe, has not been denied. If, in the course of your discussion of the claim, there should arise a disposition on the part of the Portuguese Government to compromise the claim, you will inform this department immediately of it. If the inadmissibility of the claim is made to depend upon the defect of evidence, or upon any other cause, you will ascertain precisely what further evidence is required in addition to that which has already been communicated by Captain Reid, and will be found on file in your legation; or in what manner the difficulties, whether real or assumed, that have so long delayed the settlement of what appears to be a just demand, may be removed."[2]

Mr. Barrow duly executed his instructions and received from the minister for foreign affairs a promise of consideration; but, owing to a change in the foreign office, the fulfillment of the promise was delayed. On August 3, 1843, however, Mr. Gomes de Castro, who had then become minister for foreign affairs, made a formal reply. After expressing surprise that the claim

[1] Samuel C. Reid, jr., to President Van Buren, March 29, 1840, S. Ex. Doc. 14, 29 Cong. 1 sess. 37.

[2] S. Ex. Doc. 14, 29 Cong. 1 sess. 40.

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should have been revived after a silence of so many years, he said that all accounts agreed that the American brig, under the pretext that four boats from the British vessels were approaching her, fired upon them, killing some of the men and wounding others. The United States alleged that the boats contained armed men who had a hostile intention. Great Britain affirmed that they carried only inoffensive men, who were going ashore from their ships on duty, and that they casually met the American brig when she was preparing to leave the port of Fayal. It was undeniable, said Mr. Gomes de Castro, that the first shot came from the privateer, thus constituting her the aggressor. Nevertheless, although the Portuguese authorities were utterly unable to prevent hostilities, the governor had employed every means of persuasion to attain that end. The British Government had subsequently apologized to that of Portugal for the rashness of its officers, and had indemnified the inhabitants of Fayal for the damages inflicted upon them by the British fire; although, by the course of reasoning employed by the United States, the British Government might rather have expected an apology for the attack made by the privateer in the Portuguese territory. In conclusion Mr. Gomes de Castro expressed the hope that the United States would perceive that no just ground existed for demanding an indemnity from Portugal.[1]

Decisions of Mr. Upshur and Mr. Calhoun.

When the note of Mr. Gomes de Castro was received in Washington, Mr. Upshur, who had then become Secretary of State, communicated a copy of it to Mr. Samuel C. Reid, jr., a son of Captain Reid, who had succeeded the latter as the active agent of the claimants. Mr. Reid in reply contested the conclusions of the note, and expressed confidence that the government of the United States would "feel it incumbent and due to its own honor to make a peremptory demand for satisfaction in the premises." Mr. Upshur, answering this solicitation, said:[2]

"DEPARTMENT OF STATE,
"*Washington, January 10, 1844.*

"SIR: At the repeated instance of yourself and others interested in the case of the privateer *General Armstrong*, this government has again and again instructed its representatives at Lisbon to bring the claim to the notice of the Government of

[1] S. Ex. Doc. 14, 29 Cong. 1 sess. 48. [2] Id. 54.

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Portugal. This has been done, and every argument has been employed to induce Portugal to acknowledge the justice of the claim, and to make due reparation. All these efforts, of which you are well aware, have proved unavailing, and the Department of State is unwilling, under all the circumstances, to renew the application, having every reason to believe that all future applications will prove as fruitless as those that are past. Argument and importunity have been exhausted, and this government can see nothing in the circumstances to justify or warrant it in having recourse to any other weapons.

"I am, sir, respectfully, your obedient servant,

"A. P. UPSHUR.

"SAMUEL C. REID, Jr., Esq., *New Orleans.*"

Of this decision the agent of the claimants sought to obtain a reconsideration both by Mr. Upshur and, after his death, by Mr. Calhoun, but without success. Mr. Calhoun, in a letter to Senator Johnson of Louisiana of August 4, 1844, said:

"The case of the *General Armstrong* was disposed of by my predecessor upon grounds which appeared to me to be judicious and proper. Of this Mr. Reid had been duly informed; and I can see no good reason under the circumstances for renewing the claim or for continuing a correspondence on the subject."

Action of the Senate.

In consequence of this action of the executive department of the government the matter was brought by the claimants to the attention of the Senate, by which a resolution, offered by Mr. Johnson, was on January 8, 1845, adopted requesting the President "to cause to be communicated to the Senate copies of all the correspondence, evidence, and papers on file in the State Department in the case of the brig *General Armstrong* against the Government of Portugal, and to communicate to the Senate the causes which have retarded an adjustment of the said claim, and of the proceedings still in progress to effect the object." President Polk, December 15, 1845, communicated to the Senate the "correspondence, evidence, and papers" embraced in the resolution.[1] On the 19th of the following May Mr. Atherton, from the Committee on Foreign Relations, to whom the President's message was referred, submitted a report, which, after describing the engagement at Fayal and particularly referring to the communication of Mr. Dabney, the report and correspondence of Governor Ribeiro, the diplomatic correspondence of the United States, the note

[1] S. Ex. Doc. 14, 29 Cong. 1 sess.

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of Mr. Gomes de Castro, and the decision of Mr. Upshur as affirmed by Mr. Calhoun, concluded as follows:[1]

"The committee, as has been previously intimated, do not suppose it is expected that they should express an opinion on the decision of the State Department, as indicated in the letters of Mr. Upshur and Mr. Calhoun. They suppose this decision must be founded rather on the inability of the Portuguese force at Fayal to protect themselves and others against British insolence and aggression, and an unwillingness on the part of the United States Government to interrupt friendly relations with a government like that of Portugal, by pressing a claim to extremity, however abstractly just, which arose under circumstances like those attending this case, than on any facts or arguments contained in the letters of Señor de Castro. * * *

"The subject has only during the present session been brought to the notice of the committee. Taking into view the assumptions contained in the letter of Señor de Castro, which they cannot but regard as entirely gratuitous and unfounded, and adverting to the fact that no reply has been made to that letter, the committee would suggest the subject for the consideration of the Department of State to decide whether further proceedings may not be called for in the case.

"2d. Although no memorial or petition has been referred to the committee, written arguments and statements having been submitted in behalf of those interested, the committee infer that the main object of the call for the documents under consideration was to make them the foundation of a claim against the United States.

"In entering on the second aspect of the case, it is proper to remark that the gallantry of Captain Reid and his crew are duly estimated by the committee. Their heroic conduct has received the meed of their country's approbation. So highly has it been appreciated by Congress, that an act passed in 1834 to distribute ten thousand dollars among the officers and crew of the *General Armstrong*. This donation is believed to be without precedent in similar circumstances, and marks the peculiar sense entertained by Congress of their deserts. But in relation to the claim of the owners of the *General Armstrong* on the Government of the United States, the committee concur in the report of the naval committee of the Senate, made January 20, 1817, and are not aware of any principle on which it can be allowed. If such a precedent were admitted, all claims, by our citizens, against foreign nations for spoliations must, at once, be satisfied from our national treasury. When indemnity for spoliations is obtained by our government from a foreign nation, the government becomes liable to the citizens who are interested, but not before. And although it is undoubtedly the duty of government to prosecute the claims of its citizens against foreign nations, and to seek redress by all prudent

[1] S. Report 349, 29 Cong. 1 sess.

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and proper means, yet it must be left to its discretion to judge what those means shall be. Nor does their failure impose any obligation on the government to assume the office of redressing the wrong by recompense from its own coffers.

"Besides, this is a claim on the United States, not on account of spoliation committed by Portugal, but on account of a violation by Great Britain of the neutral rights of Portugal, which Portugal, a third party, failed to enforce. And whether this violation of neutral rights arose from the weakness or the connivance of the Portuguese authorities, the Government of the United States must decide as to the time and the method of demanding, and especially as to the propriety of enforcing redress. In no event—neither by the probability nor improbability of obtaining redress from Portugal—can the duty be imposed on the Government of the United States of indemnifying the claimants out of our own treasury.

"The committee, therefore, recommend the adoption of the following resolution:

"*Resolved*, That the Committee on Foreign Relations be discharged from the further consideration of the message and accompanying documents in the case of the *General Armstrong*, and that the same be laid upon the table."

Course of Mr. Clayton.

The adverse rulings of Mr. Upshur and Mr. Calhoun remained undisturbed till 1849, when Mr. Clayton became Secretary of State. Mr. Clayton reopened the case, and on the 28th of April instructed Mr. G. W. Hopkins, the new chargé d'affaires at Lisbon, to give it his "earliest attention." In obedience to this command Mr. Hopkins, on June 28, 1849, addressed to the Conde de Tojal, then Portuguese minister for foreign affairs, an extended note in which he reviewed the whole case. He quoted at length from Governor Ribeiro's report, and from the notes of the Marquis d'Aguiar to Lord Strangford and Mr. Sumter, and, after repelling by these evidences the charge that the privateer was the aggressor, maintained that Portugal was bound to make indemnity for her destruction, both on the ground that the government was under a positive obligation either to enforce its neutrality or to afford compensation for any injury resulting from its failure to do so, as well as on the ground that the governor had not used all the means he possessed for requiring the neutrality of the port to be respected. Mr. Hopkins also argued that the liability of Portugal was recognized in the note of the Marquis d'Aguiar to Lord Strangford.[1] In conclusion, Mr. Hopkins said that, unless further negotiation should promise something else than delay, he must insist on

[1] Br. and For. State Papers, XLV. 465; *supra*, 1081.

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being informed of the Portuguese Government's final decision at least as early as the 1st of the next October, in default of which the President would be justified in regarding further delay as a denial of justice and in taking such steps "as the rights of his injured fellow-citizens may require."

The Portuguese Government's reply was made on the 29th of September. The Conde de Tojal, referring to the occurrences at Fayal in 1814, argued that Governor Ribeiro wrote his report under great excitement; that he was not present at the commencement of the hostilities, but based his statements on the information given him by the American consul; and that the note of the Marquis d'Aguiar to Lord Strangford could not have any greater force than the report on which it was founded. He also pointed out that, according to the governor's report, the British barge which approached the American privateer was unarmed; and he declared that this fact was affirmed by Captain Lloyd, and supported by the deposition of Lieutenant Faussett.[1]

The argument of the Conde de Tojal was reenforced by Mr. De Figanière, the Portuguese minister at Washington, who on the 9th of November 1849 presented to Mr. Clayton an argumentative memorandum in which he contended that Captain Reid's allegation that the movements of the British vessels were suspicious did not justify his beginning hostilities, nor overcome the unqualified allegation of the British commander that his boat had no hostile intention. Portugal was, declared Mr. De Figanière, the victim of both belligerents. She was not bound to have every place in her dominions so fortified as to enforce her neutrality upon any belligerent who might disregard it. Moreover, after 1843, the Portuguese Government had reason to think that the claim would not be renewed.

The Portuguese Government afterward offered to arbitrate all the claims of the United States.

[1] In a subsequent note the Conde de Tojal stated that in 1814 Lord Bathurst directed the British minister at Lisbon "to give the Portuguese Government a verbal satisfaction" for the destruction of the *General Armstrong*, "justifying at the same time the conduct of Commodore Lloyd, in regard to the provocation given by the American privateer, which was the first to fire upon the English;" and that finally Lord Castlereagh, in 1817, sent £319 to the inhabitants of the village of Horta, "refusing, at the same time, in the most positive manner to indemnify the owners of the privateer, on the ground that the latter had been the aggressor." (Br. and For. State Papers, XLV. 505.)

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On March 8, 1850, Mr. Clayton instructed Mr. James B. Clay, who had succeeded Mr. Hopkins at Lisbon, that the President would not refer the claims to arbitration. He further instructed Mr. Clay that this answer would be sent by a man-of-war, and that if, after waiting a reasonable time for an adjustment of the claims of the United States, none should be made, he would demand his passports; but that he might await the decision of the Portuguese Government for twenty days, or even longer if necessary.[1]

Portugal's Final Offer of Arbitration.

Upon the receipt of these instructions, which were borne to him on a man-of-war, Mr. Clay at once renewed his correspondence with the Portuguese Government; and on the 6th of July 1850 the Conde de Tojal, after several notes had been exchanged, said that—

"yielding to the force of circumstances, and without entering anew into the question of the justice or injustice of the claims presented by the Government of the United States, and solely for the preservation of peace, the Government of Her Most Faithful Majesty is ready to pay the mentioned claims to the amount of 91,727 dollars, according to the account of Senhor Clay, with the sole exception of the first to which he alludes—that of the privateer *General Armstrong*. As to this claim, the undersigned cannot depart from the proposition which, in this respect, he has already made to Senhor Clay, that so important a claim should be submitted to a third Power."[2]

On the 11th of July Mr. Clay replied that all the claims were "believed by his government to be entirely just, and none more so than that of the privateer *General Armstrong*," and that his instructions did not allow him to entertain any proposition which had not for its object "the adjustment and final settlement of every claim, without exception." He therefore demanded his passports, which were sent to him on the 13th of July, with an expression of regret that the offer of arbitration had been declined. "No government," said the Conde de Tojal, "could pretend to infallibility in respect of its own opinions, and the refusal to submit the case of the privateer to arbitration, as proposed by the weaker party, was calculated to produce the impression that there were doubts as to the justice of the claim presented by the stronger."[3]

[1] Br. and For. State Papers, XLV. 506.
[2] Id. 550.
[3] Id. 551.

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Mr. Webster's Acceptance of Arbitration.

When this correspondence was received in Washington President Taylor was dead, and Mr. Webster had succeeded Mr. Clayton as Secretary of State. On September 5, 1850, Mr. Webster wrote to Mr. De Figanière, and after quoting the offer contained in the note of the Conde de Tojal to Mr. Clay of the 6th of July, said that the President, sincerely wishing to preserve relations of amity with Portugal and to bring pending questions to an immediate close, accepted it.[1] In execution of the agreement thus concluded, Mr. Webster and Mr. De Figanière signed, February 26, 1851, a treaty by which provision was made for the settlement of all the claims but that of the *General Armstrong* by the payment of $91,727, the sum offered by the Conde de Tojal, and for the submission of that claim to arbitration. The stipulations in regard to the arbitration were as follows:

"Art. II. The high contracting parties, not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig *General Armstrong*, destroyed by British vessels in the waters of the island of Fayal, in September, 1814, Her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American Government, in behalf of the captain, officers, and crew of the said privateer, should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties.

"Art. III. So soon as the consent of the sovereign, potentate or chief of some friendly nation, who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig *General Armstrong*, copies of all correspondence which has passed in reference to said claim between the two Governments and their respective representatives shall be laid before the arbiter, to whose decision the two high contracting parties bind themselves to submit."[2]

Award of the Arbitrator.

As arbitrator under this agreement the contracting parties, on the suggestion of the United States, chose the President of the French Republic, Louis Napoleon. On April 3, 1852, Mr. William C. Rives, then minister of the United States at Paris, and the Count Azanhaga, Portuguese minister at the same capital,

[1] Br. and For. State Papers, XLV. 552.
[2] Treaty Volume, 897.

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communicated to the Marquis de Turgot, minister of foreign affairs, twenty-one documents, embracing the correspondence referred to in the treaty.[1] November 30, 1852, the arbitrator rendered the following award:

"Nous Louis Napoléon, Président de la République Française:

"Le Gouvernement des Etats Unis et celui de Sa Majesté la Reine du Portugal et des Algarves, nous ayant, aux termes d'une Convention, signée à Washington, le 26 Février, 1851, demandé de prononcer comme arbitre sur une réclamation relative au corsaire Américain, le *Général Armstrong*, détruit dans le port de Fayal, le 27 Septembre, 1814:

"Après nous être fait rendre un compte exact et circonstancié des faits qui ont causé le différend et après avoir mûrement examiné les documents duement paraphés, au nom des deux Parties, qui ont été mis sous nos yeux par les Représentants de l'une et de l'autre Puissance:

"Considérant qu'il est constant, en fait, que les Etats Unis étant en guerre avec Sa Majesté Britannique, et Sa Majesté Très Fidèle conservant la neutralité, le 26 Septembre, 1814, le brick Américain, le *Général Armstrong*, commandé par le Capitaine Reid, légalement pourvu de lettres de marque, et armé en course, étant sorti du port de New York, jeta l'ancre dans le port de Fayal, l'une des îles Açores, faisant partie des Etats de Sa Majesté Très Fidèle:

"Qu'il est également constant que, le soir du même jour, une escadre Anglaise commandée par le Commodore Lloyd, entra dans le même port:

"Qu'il n'est pas moins certain que, durant la nuit suivante, sans respect pour les droits de souveraineté et de neutralité de Sa Majesté Très Fidèle, une collision sanglante éclata entre les Américains et les Anglais, et que, le lendemain, 27 Septembre, un des vaisseaux de l'escadre Anglaise vint se placer auprès du corsaire Américain pour le canonner; que cette démonstration, accompagnée d'effet, détermina le Capitaine Reid, suivi de son équipage, à abandonner son navire et à le détruire:

"Considérant que, s'il parait constant que, dans la nuit du 26 Septembre, des chaloupes Anglaises commandées par le Lieutenant Robert Fausset de la marine Britannique, s'approchèrent du brick Américain, le *Général Armstrong;* il ne l'est pas que les hommes qui les montaient fussent pourvus d'armes et de munitions:

"Qu'il résulte, en effet, des documents produits que ces chaloupes s'étant approchées du brick Américain, l'équipage de ce brick, après les avoir hélées et sommées de s'éloigner, fit feu incontinent et que des hommes furent tués sur les chaloupes Anglaises, et d'autres blessés, dont quelques uns mortellement,

[1] S. Report 347, 46 Cong. 2 sess. 24.

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sans que l'équipage de ces chaloupes ait tenté de repousser immédiatement la force par la force:

"Considérant que le rapport du Gouverneur de Fayal établit que le Capitaine Américain ne recourut à la protection du Gouvernement Portugais qu'après que le sang avait déjà coulé, et lorsque le feu ayant cessé, le brick le *Général Armstrong* vint se mettre à l'ancre sous le château, à la distance d'un jet de pierre; que ce Gouverneur affirme n'avoir été informé qu'alors de ce qui se passait dans le port:

"Qu'il est intervenu à plusieurs reprises auprès du Commodore Lloyd pour obtenir la cessation des hostilités et se plaindre de la violation du territoire neutre:

"Qu'il s'est efficacement opposé à ce que des matelots Américains qui étaient à terre s'embarquassent dans le brick Américain pour prolonger une lutte contraire aux lois des nations:

"Que la faiblesse de la garnison de l'île et le délabrement constant de l'artillerie qui garnissait les forts rendaient impossible de sa part toute intervention armée:

"Considérant, en cet état de choses, que le Capitaine Reid, n'ayant pas recouru, dès le principe, à l'intervention du souverain neutre, et ayant employé la voie des armes pour repousser une injuste agression dont il prétendait être l'objet, a ainsi méconnu la neutralité du territoire du souverain étranger, et dégagé ce souverain de l'obligation où il se trouvait de lui assurer protection par toute autre voie que celle d'une intervention pacifique

"D'où il suit que le Gouvernement de Sa Majesté Très Fidèle ne saurait être responsable des résultats d'une collision qui a eu lieu, au mépris de ses droits de souveraineté, en violation de la neutralité de son territoire, et sans que les officiers ou lieutenants locaux eussent été requis en temps utile et mis en demeure d'accorder aide et protection à qui de droit:

"Pourquoi, nous avons décidé et nous déclarons que la réclamation formée par le Gouvernement des Etats Unis contre Sa Majesté Très Fidèle n'est pas fondée, et qu'aucune indemnité n'est due par le Portugal, à l'occasion de la perte du brick Américain, armé en course, le *Général Armstrong*.

"Fait et signé en double expédition, sous le sceau de l'Etat, au Palais des Tuileries, le 30 jour du mois de Novembre de l'an de Grâce 1852.

[L. S.] L. NAPOLÉON."

"Par le Prince Président:
"DROUYN DE L'HUYS."

[Translation.]

"We, Louis Napoleon, President of the French Republic:

"The Government of the United States and that of Her Majesty the Queen of Portugal and of the Algarves, having, by the terms of a Convention signed at Washington on the 26th of February, 1851, asked us to pronounce as arbiter upon a

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claim relative to the American privateer *General Armstrong*, which was destroyed in the port of Fayal, on the 27th of September, 1814.

"After having caused ourself to be correctly and circumstantially informed in regard to the facts which have been the cause of the difference, and after having maturely examined the documents duly signed, in the name of the two parties, which have been submitted to our inspection by the representatives of both Powers:

"Considering that it appears as a fact that, the United States being at war with Her Britannic Majesty, and Her Most Faithful Majesty preserving neutrality, the American brig *General Armstrong*, commanded by Captain Reid, legally provided with letters of marque, and armed as a privateer, having sailed from the port of New York, did, on the 26th September, 1814, cast anchor in the port of Fayal, one of the Azores Islands, constituting part of Her Most Faithful Majesty's dominions;

"That it is equally clear that, on the evening of the same day, an English squadron commanded by Commodore Lloyd, entered the same port;

"That it is no less certain that, during the following night, without respect for the rights of sovereignty and of neutrality of Her Most Faithful Majesty, a bloody encounter took place between the Americans and the English, and that, on the 27th September, one of the vessels belonging to the English squadron ranged herself alongside the American Privateer, for the purpose of cannonading her; that this demonstration, accompanied by the act, caused Captain Reid, together with his crew, to abandon his vessel and destroy her;

"Considering that, if it be clear that, on the night of the 26th of September, some English longboats, commanded by Lieutenant Robert Fausset, of the British Navy, approached the American brig, the *General Armstrong*, it is not clear that the men who manned the boats were provided with arms and ammunition;

"That it appears as a fact, from the documents which have been produced, that, those longboats having approached the American brig, the crew of the latter, after having hailed them and summoned them to haul off, immediately fired upon them, and that some men were killed on board the English boats, and others wounded, some of them mortally, without any attempt having been made on the part of the crew of the boats to repel, immediately, force by force;

"Considering that the report of the Governor of Fayal proves that the American Captain did not apply to the Portuguese Government for protection until blood had already been shed, and that when the fire had ceased the brig *General Armstrong* came to anchor under the castle, at the distance of a stone's throw; that the governor affirms that it was only then that he was informed of what was passing in the port;

"That he several times interposed with Commodore Lloyd,

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with a view to obtain a cessation of hostilities and to complain of the violation of neutral territory;

"That he effectively prevented some American sailors, who were on land, from embarking on board the American brig, for the purpose of prolonging a conflict which was contrary to the law of nations;

"That the weakness of the garrison of the island, and the undoubted decay of the guns in the forts, rendered all armed intervention on his part impossible;

"Considering, in this state of things, that Captain Reid, not having applied, in the beginning, for the intervention of the Neutral Sovereign, and having had recourse to arms for the purpose of repelling an unjust aggression of which he claimed to be the object, thus failed to respect the neutrality of the territory of the foreign sovereign, and released that sovereign from the obligation to afford him protection by any other means than that of a pacific intervention;

"From which it follows that the Government of Her Most Faithful Majesty cannot be held responsible for the results of a collision, which took place in contempt of her rights of sovereignty, in violation of the neutrality of her territory, and without the local officers or lieutenants having been requested in proper time and warned to grant aid and protection to those to whom it was due;

"Therefore, we have decided and we declare that the claim presented by the Government of the United States against Her Most Faithful Majesty has no foundation, and that no indemnity is due by Portugal, in consequence of the loss of the American brig, the privateer *General Armstrong*.

"Done and signed in duplicate, under the seal of the State, at the Palace of the Tuileries, on the thirtieth day of the month of November, in the year of grace one thousand eight hundred and fifty two.

[SEAL.] "L. NAPOLEON.

"By the Prince President:
DROUYN DE L'HUYS."

It has generally been stated that by this award the arbitrator found that the privateer was the aggressor. This understanding does not, however, appear to be correct, though it derives much support from a very literal or rather alliterative English version of the award, which was used as the basis of most of the subsequent discussions, judicial as well as legislative. In this version the arbitrator is represented as saying that Captain Reid resorted to force to repel an aggression of which he "pretended" to be the object. But the use of the word "pretended" as the equivalent of the French "*pretendait*" misrepresented the arbitrator's meaning. The arbitrator said, merely as a matter of fact, that Captain Reid

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"*pretendait*," i. e., "claimed," "alleged," or "stated," himself to be the object of an unjust aggression. The arbitrator did not discredit this allegation, but he held that Captain Reid, by resorting to force, without having "at the beginning" invoked the protection of the neutral sovereign, released that sovereign from the obligation to protect him otherwise than by good offices.[1] What was meant by the phrase "at the beginning" the award does not explain, but it evidently referred either to the arrival of the British squadron or to the time when suspicions first arose as to its intentions. It could not have referred to the moment when the attack was made, for then there would have been no opportunity to apply to the authorities.[2]

Protest on Behalf of the Claimants.

On August 17, 1852, the Senate adopted a resolution requesting the President to lay before it all correspondence touching the case of the *General Armstrong* since President Polk's message of 1845.

[1] Hall, while he does not comment upon the decision, discloses by quotations, made with his usual intelligent discrimination, the real ground of the award. (Int. Law, 4th Ed. 648–649.)

[2] The view that a belligerent by failing to observe neutrality forfeits his claim to neutral protection is sustained by a dictum of the United States Supreme Court. Early in 1815 the British ship *Anne* was captured near the Spanish port of Santo Domingo by the American privateer *Ultor*, before the close of hostilities between the United States and Great Britain in that quarter. The ship was brought to New York and libeled, and the Spanish consul put in a claim for restitution. A question was raised as to the place of capture, but the court thought that it was within territorial waters. The demand for restitution was, however, rejected on the ground that the Spanish consul had not, *virtute officii*, authority to make it. But the court observed that there was another point in the case: "It is a fact that the captured ship first commenced hostilities against the privateer; * * * and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters she was bound to abstain from all hostilities except in self-defense. * * * When, therefore, she commenced hostilities she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign." (The Anne, 3 Wheaton, 435, 447.)

A Portuguese armed merchant vessel, having on the high seas mistakenly attacked as a piratical cruiser a United States man-of-war, was captured by the latter and libeled under the act of March 3, 1819, for a piratical aggression. She was restored, but the American commander was held exempt from costs and damages for subduing her and bringing her in for adjudication. (The *Marianna Flora*, 11 Wheaton, 1.) See Calvo, Le Droit Int. (4th ed.), IV. 535.

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Owing to the pendency of the arbitration no answer to this resolution was made, but on January 24, 1853, the President communicated to the Senate a copy of the award.[1] On the 23d of February, however, the Senate made another request for the correspondence. President Pierce on the 12th of the next December answered it by transmitting a report of Mr. Marcy, Secretary of State, saying that it was not deemed necessary "to make a formal reply." "The decision of the arbiter," declared the report, "was unfavorable to the claim, and therefore it is clear that all liability on the part of Portugal to pay the same is, by the stipulations, express and implied, of the convention, entirely at an end."[2]

The Secretary of State, in advising the President to withhold the correspondence, and in insisting on the finality of the award, acted upon the assumption that the proceedings in Congress were due to the renewal in that quarter of an effort which had previously been made before the Department of State by Mr. Samuel C. Reid, jr., to have the award set aside. On January 8, 1853, Mr. Reid, having seen a notice of the award in the public press, addressed to Mr. Everett, who was then Secretary of State, a protest with a view to have the award rejected, or, if that should not be done, to lay the foundation for a claim against the United States. "This case was," declared Mr. Reid, "submitted to arbitration by treaty stipulations between the governments of the United States and Portugal, without the knowledge or consent of the claimants, after a peremptory demand for the claim had been made, and I wish this protest to appear patent on the records of the Department of State of the United States, so that the rights of the claimants against their own government shall not be prejudiced or compromitted." Mr. Everett replied that the award "must be considered as decisive."

Appeal to Congress.

In January 1854 Mr. Samuel C. Reid, jr., presented to Congress a memorial praying for an appropriation to pay to the owners, officers, and crew of the *General Armstrong*, or their legal representatives, the amount of their losses.[3] This memorial was referred to the Committee on Foreign Relations, from which Mr. Slidell, on the 10th of March 1854, made a favorable re-

[1] S. Ex. Doc. 24, 32 Cong. 2 sess.

[2] S. Ex. Doc. 7, 33 Cong. 1 sess.

[3] S. Mis. Doc. 14, 33 Cong. 1 sess.

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port, accompanied with a bill to direct the Secretary of State to examine and adjust the claims growing out of the destruction of the privateer and settle them on principles of justice and equity. The report proceeded upon the ground (1) that the claim against Portugal was just; (2) that Mr. Webster refused to transmit to the arbitrator an argument by Mr. Samuel C. Reid, jr., on the ground that the terms of the treaty did not allow it; (3) that the decision was made without consultation with the minister of the United States at Paris, and without inviting him at any time to make any explanation or argument on the part of the claimants; (4) that to accord an indemnity would stimulate citizens to emulate the conduct of Captain Reid; (5) that if the United States acted on the principle that its citizens were always to be compensated for any injuries they might suffer from the violation by belligerents of the law of nations, other countries would be more earnest in maintaining the inviolability of their territory.

May 29, 1854, Mr. Perkins from the Committee on Foreign Affairs presented to the House of Representatives a report expressing the same conclusions as that of Mr. Slidell.

Debate in the Senate.

June 23, 1854, the Senate proceeded to consider the bill as in Committee of the Whole.[1] The debate was opened by Mr. Slidell, who argued that the submission to arbitration was made without the knowledge or consent of the claimants; that they had no opportunity to plead their rights before the arbitrator; and that the decision was made in disregard of the facts. He maintained that the government had no right to submit the claim to arbitration unless with the consent of the parties.

Mr. Clayton thought that the claim should be paid "on high principles of state policy." There was nothing in the history of the war of 1812 to equal the daring and courage of Captain Reid and his men. The governor of Fayal enforced his neutrality against the Americans, but not for their protection. The claim was submitted to arbitration without the claimants' consent, and even if the government had the power to do such a thing, it was bound at least to give the claimants an opportunity to be heard. But, without reference to any technicalities, he thought that the money paid to the claimants would be well disposed of.

Mr. Toombs declared that there was "not a single principle"

[1] Cong. Globe, XXVIII., part 2, p. 1486.

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on which the government was bound to pay the claim. He considered it clear that the attack was made on the privateer by the British; but as there appeared to be some doubt on the point he did not wish to pass upon it. He thought it exceedingly doubtful whether Portugal was liable for the damage, even assuming that Great Britain was the aggressor. Arbitration was a proper mode of deciding the case. The United States had done its full duty. If, in the war then raging between Russia on the one side and Turkey and her allies on the other, a Russian vessel should be attacked and destroyed by the other belligerent in a place in the Chesapeake Bay where the United States had no armaments and no vessels of war, he could not consider the United States bound to pay for it. Portugal had a right to make war against England for the wrong done to her, but there was no justice in making her pay damages for an act done in violation of her rights.

Mr. Pratt expressed the opinion that the argument made on behalf of the claimants amounted to placing in their hands the war-making power, or imposing on the government the obligation to pay their claim.

Mr. Seward took the view that the question was not so much whether the United States was "bound" to pay the claim, but whether it was "right" to pay it. It would have been just to make good the damage to the claimants even before seeking reparation from Portugal.

Mr. Bayard said his sympathies led him to vote for the claim. Moreover, while he had no doubt as to the power of the government to submit the claim to arbitration, he thought the treaty was misconstrued and an injustice done to the claimants when an opportunity to be heard was denied them.

Mr. Chase coincided with the opinion expressed by Mr. Pratt, and observed that Mr. Seward, seeming to feel the weakness of the arguments drawn from law and usage, had defended the claim "upon the simple ground of some general equity."

Mr. Bell considered the argument against the obligation of the government sound, save, perhaps, as to the exception taken by Mr. Bayard; but he thought it good policy in a case of such extraordinary daring and gallantry to bestow some bounty. The case could not form a precedent.

Mr. Clay commented adversely upon Mr. Seward's argument that there was no obligation to pay the claim, but that it was "right" to do it.

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The vote on the bill resulted as follows:

Yeas: Messrs. Atchison, Bayard, Bell, Brown, Clayton, Dodge of Iowa, Foot, Gwin, James, Pettit, Seward, and Slidell—12.

Nays: Messrs. Allen, Chase, Dawson, Dixon, Dodge of Wisconsin, Evans, Fessenden, Fitzpatrick, Geyer, Gillette, Hamlin, Pratt, Rockwell, Stuart, Sumner, Thompson, of Kentucky, Toombs, Toucey, Wade, Walker, and Williams—21.

The bill was rejected.

On July 28, 1854, however, the Senate, on motion of Mr. Geyer, agreed to reconsider its vote, and the bill went to the calendar.[1]

January 26, 1855, the bill was again taken up in the Senate and a substitute was offered by Mr. Weller, of California, limiting the amount that might be allowed by the Secretary of State to $131,600. The Senators who had participated in the previous debate urged the same reasons as before for and against the passage of the bill.

Mr. Stuart, in opposition to the claim, inquired whether the government was prepared to adopt the principle that a private claimant against a foreign government should have control over the mode of negotiation for the adjustment of the claim.[2]

Mr. Brown supported the bill on the ground that the government had "mismanaged" the case.

Mr. Fessenden denied any legal liability on the part of the government. The idea that the claimant had a right to insist that the government should go to war on account of his claim, and should not resort to any of the modes of amicable adjustment pointed out by the law of nations, was, he declared, "preposterous."

Mr. Jones briefly spoke against the bill, saying that its advocates seemed to differ among themselves as to the facts on which they supported it.

Mr. Weller thought that the claim should "by every principle of justice" be paid; he did not "stand upon technicalities."

Mr. Dawson did not consider the claim in its origin just against Portugal, since she was unable to protect the privateer.

Mr. Cass maintained the liability of Portugal, and thought that there were also "equitable subjects" connected with the case that justified a grant by the government for the losses sustained.

[1] Cong. Globe, XXVIII., part 3, p. 1987.

[2] Cong. Globe, XXX. 403.

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Mr. Butler considered that it was competent for the government to submit the claim to arbitration, and that the government could not be put into the position of an insurer against an adverse decision.

Mr. Houston took the view that the government had "compromised" the rights of the claimants "without their full assent and acquiescence."

The vote being taken, it stood—

Yeas: Messrs. Bayard, Bell, Benjamin, Brown, Cass, Clayton, Cooper, Dodge of Iowa, Douglas, Foot, Houston, Jones, of Iowa, Morton, Pettit, Reid, Rockwell, Rusk, Seward, Thomson, of New Jersey, Weller, Wells, and Wright—22.

Nays: Messrs. Allen, Brainerd, Bright, Brodhead, Butler, Chase, Clay, Dawson, Evans, Fessenden, Fitzpatrick, Gillette, Hunter, Pearce, Stuart, Sumner, and Wade—17.

Reference to the Court of Claims.

The bill therefore passed the Senate; but it was afterward referred to the Court of Claims for a report. The case was argued before that tribunal by Messrs. Charles O'Conor, P. Phillips, and Samuel C. Reid, jr., on behalf of the claimants, and by Mr. Montgomery Blair, Solicitor-General, for the government; and on March 17, 1856, Chief Justice Gilchrist delivered the opinion of the court, Blackford, J., dissenting, sustaining the claim and directing that testimony be taken as to damages.[1] The testimony established damages to the amount of $70,739; but on a rehearing of the case Scarburgh, J., who had previously concurred with Chief Justice Gilchrist, changed his view and delivered an opinion concurring with Judge Blackford. Thus the court finally rejected the claim, Gilchrist, C. J., dissenting.[2]

Opinion of Judge Blackford.

The arguments for and against the claim were, with one exception, fully discussed in the opinion of Judge Blackford. They are sufficiently disclosed in the following passages from that opinion:

Question as to First Aggression.

"The first inquiry to be made is relative to the nature of the demand of the claimants against Portugal.

"There is no absolute certainty, from the evidence, as to whether the privateer or the British vessels were the aggressors. The first gun was fired by the privateer, but that firing

[1] The Case of the Private Armed Brig of War *General Armstrong*. Reported by Samuel C. Reid, jr., New York, 1857.

[2] Report of the Court of Claims, February 1, 1858, S. Mis. Doc. 142, 35 Cong. 1 sess. 106–116.

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may have been justifiable in self-defense. Whether it was so or not, is a question upon which there is contradictory evidence. * * *

"It appears to me, from an examination of the evidence of those persons having any personal knowledge of the affair, which evidence is contradictory, and none of which is impeached, that the question of fact in controversy as to whether the privateer or the British ships were the aggressors, was a fair one for negotiation between the United States and Portugal, and to be referred, if they could not agree, to some proper tribunal for adjudication.

Liability of Portugal.

"There is another inquiry relative to the demand of the claimants against Portugal, and that is whether, supposing the British vessels to have been the aggressors, the laws of nations rendered Portugal liable for the loss of the privateer?

"Had the privateer, instead of being destroyed, been captured only by the British, and had afterwards come into the possession of Portugal, there is no doubt but that Portugal would have been bound to restore the vessel to the original owners; nor is there any doubt but that the governor of Fayal, if he had had the power, would have been bound to endeavor by force to prevent the disaster. But the difficulty as to these matters is, that the privateer having been destroyed could not be restored, and that the governor had no means by which he could have prevented, by force, the destruction of the privateer. The above stated question, therefore, whether, supposing the British to have been the aggressors, Portugal was liable by the laws of nations to pay for the privateer, is not entirely free from doubt. And the cause of the doubt is, that the privateer was never in the possession of Portugal, and there was no neglect of duty by the governor of Fayal. Chancellor Kent, in one part of his commentaries, says: 'It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution.' (1 Kent's Com. 117.) But on a subsequent page his language is as follows: 'A neutral has no right to inquire into the validity of a capture, except in cases in which the rights of neutral jurisdiction were violated; and in such cases the neutral power will restore the property, if found in the hands of the offender, and within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor. It belongs solely to the neutral government to raise the objection to a capture and title, founded on the violation of neutral rights. The adverse belligerent has no right to complain when the prize is duly libelled before a competent court. If any complaint is to be made on the part of the captured, it must be by his government to the neutral government, for a fraudulent, or unworthy, or unnecessary submission to a violation of its

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territory; and such submission will naturally provoke retaliation.' (1 Kent's Com. 121.) If this last cited passage from Kent be the law, Portugal was not liable, because it is certain that the governor of Fayal did not submit to the outrage fraudulently, or unworthily, or unnecessarily. But, on the contrary, he endeavored, as soon as he had noticed of the hostile acts, to prevent, by peaceable means, the further violation of the neutrality of the port; and he had no other means by which it could be prevented. Wheaton's language is as follows: 'Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral state, where the property thus taken comes into its possession, to restore it to the original owners.' (Wheaton's International Law, 494.) This doctrine of Wheaton agrees with that laid down by Kent in the passage last above cited from his Commentaries. Kent there says, that in cases in which the rights of neutral jurisdiction are violated 'the neutral power will restore the property if found in the hands of the offender and within its jurisdiction.' This doctrine of these eminent American authors is decidedly in favor of Portugal; for if her liability depended on her having possession of the privateer, she certainly was not liable, the vessel having been destroyed by the British ships.[1]

[1] The question of a secondary liability on the part of the offending belligerent is referred to in the following letter:

"DEPARTMENT OF STATE, *July 26, 1815.*

"JOHN QUINCY ADAMS, Esq.

"SIR: In the absence of the Secretary of State, but by his order, I have the honor to enclose the protest of the master of the schooner *Baltimore*, by which it appears that the vessel was captured in a very unjustifiable manner by the boats of several British men-of-war within the jurisdiction of Spain. The Secretary of State is aware that in the first instance Spain ought to be held accountable for this outrage upon our rights and her neutrality; but in the present deranged state of our diplomatic relations with that power, he thinks an attempt ought to be made to procure redress to the sufferers directly from the British Government. You will be pleased, therefore, to lay the case before that government, in the manner and at such time which you may deem best calculated for that purpose.

"I have the honor to be, &c.,

"JOHN GRAHAM."

(MS. Instructions to United States Ministers, VIII. 58.)

In the case of the schooner *Hope*, captured within Buenos Ayrean jurisdiction, Mr. Seward, in a letter to Mr. Kirk, United States minister, of January 30, 1864, said that, in view of the fact that the claim which had been made against the Argentine Republic on account of the capture originated in events that occurred prior to the recognition of Buenos Ayres as an independent State, the great lapse of time which had since taken place rendered the "official" prosecution of the claim inexpedient, though friendly representations might be made. (MS. Instructions to the Argentine Republic.)

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"The question respecting the liability of Portugal, under the circumstances of the case, does not appear to be settled by foreign writers on the laws of nations. Bynkershoek may be considered to be against the Portuguese side of the question. (Bynkershoek on the Law of War, 59, 60.) But Klüber, who is a much later writer, is in favor of Portugal. This last named author says 'that the neutral is not to allow, voluntarily, that either of the belligerent parties shall commit, upon its neutral territory, either continental or maritime, any hostile acts.' (Klüber's Law of Nations, page 86, section 284.) Portugal was not accountable for the outrage, according to the authority of Klüber, because it is clear that the governor of Fayal did not allow, *voluntarily*, the breach of the neutrality of the port. This doctrine of Klüber is substantially the same with that of Kent last referred to; the latter author saying, that the complaint against the neutral government must be for 'a fraudulent, or unworthy, or unnecessary submission to a violation of its territory.' That there was no such submission in this case is shown by the correspondence between the governor and the British commander during the night of the 26th of September aforesaid. Indeed, Captain Reid's protest confines his complaint to the *inability of Portugal*. That protest says: 'And the said Captain Reid also protests against the government of Portugal for their inability to protect and defend the neutrality of this their port and harbor.'

Propriety of Arbitration.

"It appears to me, therefore, that the question of public law involved in the present case, as well as the question of fact before referred to was a very proper subject to be submitted by the governments of the United States and Portugal to arbitration. * * *

"Those questions, both of fact and of law, had been the subjects of negotiation for more than thirty years previously to 1851, when the treaty between the two governments was entered into submitting the controversy to arbitration, which resulted in an award, by the President of the French republic, against the validity of the claim.

Liability of United States.

"In consequence of that award, the claimants have abandoned their claim against Portugal; but they now turn round and demand the amount, namely, one hundred and thirty-one thousand six hundred dollars, against the United States. The ground of this demand is, that the Secretaries of State, and the President and Senate of the United States, have lost, by mismanagement, the claim against Portugal, and have thus made their own government liable for the amount. There are several charges of mismanagement insisted on which will be particularly noticed.

Charges of Mismanagement.

"One of the charges, which is that of neglect in the negotiation, admits of a short answer. The delay which occurred, from the time the claim was presented soon after it originated, till 1837,

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is accounted for by the disordered state of the government of Portugal during that period. * * *

"Another charge of mismanagement of the claim relates to the submission to arbitration.

"The claimants say that our government received a *bonus* from Portugal as a consideration for referring the case. * * * There is surely nothing in this treaty to support, in the slightest degree, the idea that the submission of the case, by the President and Senate, was in consideration of a *bonus*, or for any other purpose than that of having the claim properly and legally investigated and determined. The treaty provides for the payment of all the claims except that of the *General Armstrong*, and refers that claim to arbitration; and that is the whole of the treaty as regards the submission. It is unnecessary surely to notice any further this extraordinary charge against the treaty-making power of the United States.

"Another charge is, that our government had no authority to submit the case to arbitration without consulting the claimants. This position is untenable. * * * The correct view of this matter is, that as soon as our government was induced by the claimants to interfere, the controversy became an affair of state, to be treated of between the two governments as other differences between nations are treated; that is to say, by negotiation, arbitration, and such other modes as are recognized by the laws of nations.

"Another charge of mismanagement is the refusal of the Secretary of State, Mr. Webster, to forward to the arbiter a written argument of the claimants. * * *

"It appears to me that the language of the treaty shows that the arbiter was to determine the case upon the correspondence which had taken place on the subject between the two governments. That correspondence had been very extensive, and had been conducted with great ability on both sides. The questions of fact and of law belonging to the case had been fully investigated by the gentlemen to whom the business was confided. It would seem to have been proper, under those circumstances, for the parties to submit the case to the arbiter, upon the correspondence, without further argument by either of them. It is proper also to add that if, as the claimants contend, Mr. Webster's refusal to forward the argument was improper, he was guilty of a wrong to the claimants. Now the law is settled, that for any such wrong by a public officer the government is not liable to the individual injured. The language of Judge Story on this subject is as follows: 'In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs, since that would

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involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the government.' (Story on Agency, section 319.)

"To place this charge in its true light, I must borrow the argument of an eminent statesman. Mr. Webster, in his refusal to forward the argument, was either right or wrong. If Mr. Webster was right, there is an end of the charge. If Mr. Webster was wrong, then there is an end of the charge also; because the government is not liable for the wrong of a public officer in his action respecting a private claim. So that whether Mr. Webster was right or wrong, there is no ground for the charge.

"The claimants make one more charge of mismanagement of their claim, namely, that the award should have been rejected as not being within the terms of the submission.

"The claimants say that the arbiter has decided on the facts of the case, when he was only authorized to decide a question of law. * * * The second article commences by saying, that the parties disagreed respecting the question of public law; but when the article comes to state the agreement to submit, it says, that her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American government in behalf, &c., should be submitted to the arbitrament, &c.; and the third article, in order to enable the arbiter to determine the merits of the claim, directs that copies of all the correspondence, in reference to the claim, should be laid before him. It seems therefore, to be very clear that the merits of the claim, that is, both the facts and the law, were submitted to the arbiter, and were to be decided by him.[1]

Powers of Government.

"But there is another and more enlarged view of this case, which it is proper to notice.

"I consider when, at the request of a person presenting a claim on a foreign nation, our government assents to interfere in his behalf, its action may be by negotiation, compromise, arbitration, or even by reprisals or war. But in the adoption of any such measure, the government, by the understanding of the parties, and by the laws of

[1] When Mr. Charles B. Haldduck was appointed to succeed Mr. Clay as chargé d'affaires of the United States at Lisbon, Mr. Webster on March 20, 1851, transmitted to him a protocol in relation to the submission of the case to the umpire. Mr. Webster observed "that the points for the consideration and decision of the arbiter have reference both to the amount of the claim and its validity." (H. Ex. Doc. 53, 32 Cong. 1 sess. 85.) The protocol was accepted by the Portuguese Government with "two slight alterations in form," one of which merely substituted the word "duplicate" for "triplicate" in respect of copies of certain papers, and the other of which made it "appear *more clearly* that the arbiter was to decide upon *the amount* as well as validity of the claim." (Id. 87.)

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nations, exercises its own judgment and discretion. * * * The judgment and discretion of our government in the present case were exercised by the President and Senate in referring, by a treaty with Portugal, the claim in question to the arbitrament of the President of the French republic, and by the executive department in its negotiations with the Portuguese authorities before and after the submission. This exercise of judgment and discretion by the treaty-making power, and by the executive department, was political in its nature, and is entirely independent of the judiciary. The result was an award of the arbiter, upon the merits, in favor of Portugal. The award must be considered final and conclusive. * * *

A Question of Bounty.

"I have very little more to say in regard to this suit. I have shown that it was upon the repeated solicitation of the claimants, that our government caused the claim to be presented to the Portuguese Government; and that the facts and the law on which the claim was founded were disputed by Portugal; that there was an able correspondence on the subject during several years between the two governments; that the case was far from being a clear one, either as to facts or to law, for either of the parties; that the parties not being able to agree, referred, by treaty, the matters in dispute to arbitration; that the evidence and the law were placed before the arbiter in conformity to the terms of the treaty, and that an award was rendered by the arbiter in favor of Portugal. The reason, no doubt, of the claimants' application to our government for assistance was, that they had no hope, by their own efforts, to obtain anything from Portugal. The assistance applied for was given in the mode which our government thought most advisable, and which was in accordance with the laws of nations. The failure of the cause before the arbiter was because the claim did not appear to him to be well founded. I know of no ground, under those circumstances, upon which the United States can be held liable for the claim in a court of justice governed as this court is by legal principles. The bravery of the officers and crew of the privateer in the conflict at Fayal cannot be too highly admired. For their valor on that occasion, they received from Congress, in 1834, an appropriation, as prize money, of ten thousand dollars. For any further compensation to which the present claimants may believe themselves entitled, they must rely, in my opinion, not upon any legal right, but upon the liberality of Congress.[1]

Views of Judges Scarburgh and Gilchrist.

Judge Scarburgh stated that it was upon the ground that the United States received a "bonus" for referring the claim to arbitration that he had concurred in the judgment of the court directing

[1] S. Mis. Doc. 142, 35 Cong. 1 sess. 106–116.

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the taking of testimony. But he had come to the conclusion that while there was "some plausibility" in this view, there was "no compromise" and "no bonus." "The United States," said Judge Scarburgh, "agreed to accept the proposal of Portugal to pay the other claims provided for in the treaty, and to refer this claim to arbitration. Their authority to do this is clear beyond dispute. The act, therefore, is valid. It is not only valid, but final and conclusive."

Chief Justice Gilchrist adhered to his former opinion. Having argued the case on the merits and come to the conclusion that the original claim against Portugal was valid, he declared that he was "unable to perceive what good and sufficient reasons there were that required the United States" to submit the claim to arbitration; and he therefore held that the United States ought to pay it. He also maintained that an injustice had been done in not affording the claimants "an opportunity to be heard" before the arbitrator.

Final Payment of the Claim.

It has been said that all the arguments for and against the claim were discussed in Judge Blackford's opinion, with one exception. That exception was the argument based on the assertion that the correspondence exchanged at Rio de Janeiro in 1814–15 was not laid before the arbitrator. By a message of January 28, 1852, President Fillmore transmitted to the House of Representatives a mass of correspondence touching generally on the subject of claims against Portugal.[1] By this correspondence it appeared that on March 20, 1851, Mr. Webster instructed Mr. Hadduck, who had been chosen to succeed Mr. Clay at Lisbon, "to compare and authenticate, jointly with the Portuguese Government," copies of the correspondence to be submitted to the arbiter. "You will understand, of course," said Mr. Webster, "that these copies are limited to such communications as have passed between the American legation and the Portuguese Government at Lisbon, and between this department and the Portuguese legation at Washington."[2] On the 12th of the following July however Mr. Webster, in order to provide "against the omission of any important part of the earlier portion of the correspondence," namely, "that which passed in 1814 and 1815, in Rio de Janeiro, where the Court of Portugal at that time resided, and which it could not have been intended to exclude," transmitted to Mr. Hadduck a "printed copy" of

[1] H. Ex. Doc. 53, 32 Cong. 1 sess. [2] Id. 85.

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President Polk's message of December 15, 1845, with which the correspondence in question was communicated to the Senate. On the 17th of July, five days after this supplementary instruction was signed at Washington, Mr. Hadduck, acting under the instructions of March 20, signed and sealed at Lisbon a protocol relating to the submission of the case to the arbiter.[1] The contents of this protocol were not disclosed; but, on the assumption that it specified the papers which were to be submitted, and that the correspondence transmitted with the supplementary instruction was not included in it, it was argued that the United States had incurred a liability by failing to present to the arbitrator a very material part of the evidence embraced by the convention. Mr. Blair's reply to this argument was twofold. In the first place he contended that, as the correspondence in question was in the archives at Lisbon, it was the merest assumption to say that it was not included in the protocol. But, even if it was not included, he in the second place maintained that "no manner of injury" could have resulted from its absence, since every material part of it was supplied by the correspondence exchanged at Lisbon, in which Governor Ribeiro's report, and the notes of the Marquis d'Aguiar to Lord Strangford and Mr. Sumter were textually quoted at length and commented upon. Judge Blackford did not discuss this question in his opinion. But Judge Scarburgh took the ground that, in the absence of evidence to the contrary, it was proper to assume that the printed document sent with the supplementary instructions was presented to the arbitrator, since it did not appear that the copies of the papers which were submitted were prepared at or before the signing of the protocol.

It subsequently transpired, however, that the printed document was not included among the papers submitted to the arbitrator, and this circumstance was adopted as the principal foundation of a new report, made by Mr. Mason, from the Committee on Foreign Relations, in favor of paying the claimants $60,739, which represented the amount of damage established before the Court of Claims, less the $10,000 previously appropriated as prize money. Mr. Mason's report, referring to the findings of the Court of Claims, said:

"It was contended in the argument on the part of the government that, even conceding that this last-named correspond-

[1] H. Ex. Doc. 53, 32 Cong. 1 sess. 87.

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ence was not before the arbitrator, still no injury could have resulted to the claimants, because all the material facts contained in it were referred to or otherwise cited in so much of the correspondence as was exhibited. Still, the committee are of opinion that the failure to exhibit it, as required by the convention, is a matter of just complaint by the claimants, because, amongst other reasons, it cannot be known what inference or conclusions might be drawn by the arbitrator by reason of its absence.

"Nor do the committee mean to say that, had that evidence been before the court, it would have made a clear case of demand in law against the government; but they advert to it as a further equitable consideration in favor of the claimants."[1]

As it was thus substantially conceded that "all the material facts" contained in the Rio de Janeiro correspondence "were actually referred to or otherwise cited" in the correspondence exchanged at Lisbon—a correspondence embracing twenty-one diplomatic notes which probably would fill upward of a hundred closely printed octavo pages—it is not easy to conjecture what unfavorable inference the arbitrator could have drawn from the omission merely to present in separate form papers extensively quoted and elaborately discussed in the correspondence submitted to him. For example, Mr. Hopkins in a note of June 28, 1849, which fills over sixteen closely printed octavo pages, quotes Governor Ribeiro's report, the Marquis d'Aguiar's note to Lord Strangford, the Marquis d'Aguiar's note to Mr. Sumter, Mr. Dabney's report, and other early documents.[2] Captain Reid's protest formed an accompaniment of another note. Indeed, the report of Governor Ribeiro and the Rio de Janeiro correspondence formed the subject of a large part of the correspondence exchanged at Lisbon. Nevertheless, the bill for the relief of the claimants passed the Senate. It was not acted upon by the House.

In 1878 the claim against the United States was revived,[3]

[1] Sen. Report, 347, 46 Cong. 1 sess. 23.

[2] In the printed list of twenty-one diplomatic communications submitted to the arbiter, the fifth is described as "Note de Mr. Hopkins, de 28 de Julho, de 1847." (S. Report 347, 46 Cong. 2 sess. 25.) Mr. Hopkins was not at Lisbon in July, 1847. The description is erroneous. The note intended to be described is, as is shown by an examination of the original papers, the note of June 28, 1849. (Mr. Vignaud, Sec. of Embassy, to Mr. Moore, March 20, 1897, inclosing a statement of M. Girard de Rialle, Director of the Archives of the French Foreign Office.) Two other papers are described in the printed list as bearing date in 1847, when in fact they belong to 1849.

[3] S. Mis. Doc. 21, 45 Cong. 3 sess.

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and in the following year it was laid by the agent of the claimants before the President. The President referred it to the Department of State, where the examiner of claims rendered an opinion upon it, which was communicated to the chairman of the Committee on Appropriations of the Senate at the chairman's request. In this opinion the examiner of claims stated that the history of the case was "contained in three printed volumes," which he had "examined sufficiently" to enable him "to state with correctness" the "few preliminary facts" essential to a consideration of the claim. One of these facts, which he said was "clearly established," was that "this British fleet"—the three vessels at Fayal—"intended for the capture of New Orleans, was kept busy by the *Armstrong* long enough to enable General Jackson to reach that city and save it." As the British fleet when it sailed under Sir Edward Pakenham from Jamaica for New Orleans on the 26th of November 1814 consisted of upward of fifty sail and a large army, the "preliminary fact" thus stated seems to have been somewhat misconceived. Another "preliminary fact" was that the demand on Portugal for reparation "was continued under every administration from President Monroe to Fillmore." This statement quite overlooked the second administration of Monroe, the administration of the younger Adams, the first administration of Jackson, and the administrations of Tyler and Polk, in three of which the claim was not pressed, and in two of which the government refused to press it. On these and one or two other "preliminary facts" the opinion was expressed that the United States had, "under all the circumstances, incurred an obligation to their own citizen," which the government was "bound, under the extraordinary circumstances of this case, in equity, in morals, and in honor, to discharge."[1]

The claim formed the subject of favorable reports in the second session of the Forty-sixth Congress.[2] In the first session of the Forty-seventh Congress a bill was introduced in the Senate to pay it,[3] and was favorably reported by the Committee on Foreign Relations. By this bill the Secretary of State was directed to examine and adjust all claims of "the captain, owners, officers, and crew," upon the evidence established before the Court of Claims, "and to settle the same on principles

[1] S. Mis. Doc. 13, 46 Cong. 1 sess.
[2] S. Report 347, 46 Cong. 2 sess.; H. Report 1014, 46 Cong. 2 sess.
[3] Cong. Record, XIII. part 1, p. 22.

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of justice and equity," to the amount of $70,739 as proved before the Court of Claims. The bill was taken up April 13, 1882, and Mr. Pendleton made some remarks upon it.[1] He stated that in submitting the evidence to the arbitrator the correspondence at Rio de Janeiro was "excluded;" that it "never was presented to the arbitrator," and that the adjudication was made "upon the ground that there had been no infraction of the neutrality of Portugal." He further stated that in the "excluded" correspondence Portugal "had declared in the strongest possible terms, and it was practically admitted by Great Britain, that there had been a breach of neutrality at the time it occurred." "I do not care to place this claim," said Mr. Pendleton in conclusion, "upon any particular and special legal ground, although I think it is defensible upon several. I wish gentlemen to vote for it either because it appeals to patriotism, to good feeling, to an admiration of the heroism of our countrymen which was displayed on that occasion."

Mr. Platt was the only other Senator who spoke. He said that he had examined the claim and must record his vote against it; that the only ground on which it could be put, and upon which it was going to pass the Senate, was "that stated by the Senator from Ohio, that it appeals strongly to the imagination." The vote was—yeas, 41; nays, 13.

The bill passed the House on the 17th of April under a suspension of rules by a vote of 136 to 36.[2]

It was permitted to become a law May 1, 1882, without the President's approval.[3]

[1] Cong. Record, XIII. part 3, p. 2843.

[2] Id. pp. 2957–2960.

[3] 22 Stats. at L. 697. By an act of March 2, 1895, Congress directed that a balance of the fund remaining unexpended under the act of 1882 by reason of the failure of certain beneficiaries to appear should be "applied for the liquidation and settlement of the claims of Samuel C. Reid," on the "vouchers on file" in the Department of State. (28 Stats. at L. 843.) By a report of Mr. Ray, from the Committee on the Judiciary of the House, of February 9, 1897 (H. Report 2848, 54 Cong. 2 sess.), it appears that no money had been paid to Mr. Reid under the act, on the ground that the necessary vouchers had not been filed. He was allowed under the act of 1882 the sum of $32,595.60, which represented one-half of the amount awarded to the owners of the brig, and 40 per cent of the amount awarded to the officers and crew, for his services in prosecuting the claim. From the percentages allowed him assignments of upward of $14,000 for money lent, fees to attorneys, etc., were deducted.

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During the debates in the Senate in 1855 a letter from Mr. Marcy, Secretary of State, to Mr. J. M. Mason, then chairman of the Committee on Foreign Relations, was read, in which the former said: "I can not countenance the principle that where this government is called on by a citizen of the United States to interpose for recovering claims against any other government, proceeds in good faith for that purpose and fails in its object, or obtains what may be regarded as an inadequate indemnity, it places itself in a situation to be called on to pay the claims or to satisfy the expectations of the claimants." It may fairly be maintained, as the result of our investigation of the records, that this principle was not violated in the present instance. When those who advocated the payment of the claim attempted to argue it on legal grounds, they invariably exhibited such radical differences of opinion as to render it only the more apparent that there was no legal ground on which it could be supported. Till the discovery was made that the Rio de Janeiro correspondence was not separately presented to the arbitrator, the most effective legal argument seems to have been that, because an agent of the claimants was not allowed to submit a statement to the arbitrator, they were "denied a hearing." This argument, however, will not bear examination. In the first place, the claimants were not parties to the arbitration; the parties were the governments of the United States and Portugal. The claimants could be heard only through their government, and it belonged to the government, as a necessary incident of its power to conduct foreign intercourse, to determine what representations should or should not be made. In the thousands of cases which the United States has submitted to arbitration, it has never in a single instance failed to exercise this essential right of governments. In the second place, there was no denial of a hearing, except in the same sense as there has been such a denial in hundreds of similar cases. The claimants had for years been heard through their government, the only organ through which they could be heard at all, and they were heard before the arbitrator when the elaborate and able arguments of their government, made and reiterated at their instance, and embracing every point at issue, were laid before him in the diplomatic correspondence. As to the omission separately to present the Rio de Janeiro correspondence, it is apparent that it assumed in course of time a form quite distinct from that

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which it originally bore. From the vague suggestion in 1858 that it might have created an inference, the nature of which it was not attempted to define, it had come to involve in 1882 the exclusion from the arbitrator of a practical admission by Great Britain that she had violated the neutrality of the port.

The payment of the claim was, in fact, an exercise by the government of the power to reward by its bounty the performance of acts which deserve public recognition. And such was the theory on which the Department of State acted in the distribution of the fund. By a joint resolution of March 2, 1867, it was made unlawful to pay any account, claim, or demand against the United States that accrued or existed prior to April 13, 1861, to any person who in any manner sustained the rebellion.[1] The question having arisen whether this provision applied to the distributees under the act of 1882, Dr. Francis Wharton, then Solicitor of the Department of State, held that it did not, for the reason, among others, that they had no claim against the United Stotes prior to the passage of that act, "which gave them the fund in question as a gratuity.[2]

Question of Neutral Obligation.

In none of the discussions of the case of the *General Armstrong*, including that before the Court of Claims, was there an exhaustive examination of the question of neutral obligation. The arguments of the agents of the claimants, as well as those of the representatives of the United States at Lisbon, for the most part assumed that if it were established that the British were the aggressors the liability of Portugal was perfect, and, from the point of view of the claimants, it was not desirable to say anything which might seem to impair this position. Mr. Hopkins strongly maintained that the British having been the aggressors, Portugal was bound to make indemnity for the destruction of the privateer, without regard to the question whether the authorities possessed either the disposition or the means to afford protection. On the part of Portugal it was maintained that the duty of a neutral government extended to the employment of all the means in its power and no further, and it does not discredit the communications of the Portuguese ministers for foreign affairs to say that the most impressive presentation of this view was contained in a very able note

[1] U. S. Rev. Stat. sec. 3480.

[2] Opinion of January 1, 1889, MSS. Dept. of State.

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of Mr. De Figanière, the Portuguese minister at Washington, which was not among the papers submitted to the arbitrator.[1]

It is admitted that the commission of hostile acts by one belligerent against another within the waters of a friendly state is a violation of international law for which the neutral may demand reparation.[2] Enemies may, says Grotius,[3] "lawfully be killed in their own country, in the enemies' country, in a country that belongs to nobody, or on the sea. But that we may not kill or hurt them in a neutral country proceeds not from any privilege attached to their persons, but from the right of that prince in whose dominions they are." We are informed by Livy that the inviolability of the neutral jurisdiction was acknowledged even by the ancients. On a certain occasion, during the Second Punic War, Scipio, having conquered the greater part of Spain, resolved to seek the alliance of the Numidian King, Syphax, with a view to attack the Carthaginians in Africa. For this purpose he sailed from New Carthage with two galleys only. It happened that at the same time Hasdrubal Gisgo was on his way to the dominions of Syphax, in order to seek his alliance for the Carthaginians.[4] When Scipio arrived Hasdrubal was at anchor with seven galleys, and with this overwhelming force the temptation to effect the capture of the Roman general was very great. But before the Carthaginians could weigh anchor Scipio was borne by a strong wind into the port, and, as Livy says, "they durst not attack him in the King's haven."[5] In more recent

[1] Mr. De Figanière to Mr. Clayton, July 9, 1850, H. Ex. Doc. 53, 32 Cong. 1 sess. 101.

[2] Hautefeuille, Des Droits et des Devoirs des Nations Neutres en Temps de Guerre Maritime (Paris, 1848), I. 412–415; Ortolan Diplomatie de la Mer, II. 287; Upton, Law of Nations (ed. 1863), 346.

[3] De Jur. Bel. ac Pac., Lib. III. c. IV. sec. VI. part 1.

[4] Liddell, History of Rome, 356.

[5] "Magnum in omnia momentum Syphax affectanti res erat Africæ opulentissimus ejus terrae rex bello jam expertus ipsos Carthaginienses, finibus etiam regni apte ad Hispaniam, quod freto exiguo dirimuntur, positis. Dignam itaque rem Scipio ratus quae, quoniam aliter non posset, magno periculo peteretur, L. Marcio Tarracone, M. Silano Carthagine Nova. quo pedibus ab Terracone itineribus magnis ierat, ad praesidium Hispaniae relicitis, ipse cum C. Laelio duabus quinquerimibus ab Carthagine perfectus tranquillo mari plurimum remis, interdum et leni adjuvante vento, in Africam trajecit. Forte ita incidit, ut eo ipso tempore Hasdrubal, pulsus Hispania, septem triremibus portum invectus, ancoris positis terrae applicaret naves, cum conspectae duae quinqueremes, haud cuiquam dubio quin hostium essent opprimique a pluribus, priusquam

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times the Venitians and Genoese being at war, their fleets met at Tyre, "and would have engaged in the very Haven, but were there interdicted by the Gouvernour; but yet with this proviso, that if by consent they would go out of the protection of the Port, and at open Sea decide the cause, they had their freedom; and accordingly they sailed forth and engaged."[1] Likewise on a certain occasion it happeded that "Cornelius de Wit, Commander of a Ship of War of the States General, and Captain Harman, Commander of one of His Majesty's Frigates," being at Calais, the former sent a challenge which was "as briskly accepted by the latter, but both were interdicted the execution of the same in the Port, but out of the protection of the same they might decide the question; which they did to the no small Fame of the last; for in that dispute, of 380 men then on board the States Man of War there were scarce 100 whole Men in her, and Harman having entered and taken her, brought her at his Stern in Triumph to the Port again."[2]

Case of the Kearsarge.

In 1864 France claimed the right as a neutral to forbid the commission of hostile acts by belligerents within such distance of the shore as would expose persons and property there to injury. In June of that year the United States man-of-war *Kearsarge* arrived off Cherbourg in quest of the Confederate cruiser *Alabama*, which then lay in that port. The *Kearsarge* did not enter, but kept off at a distance of three miles or more, waiting for the *Alabama* to come out. On the 16th of June M. Drouyn de l'Huys, then minister of foreign affairs, informed Mr. Dayton, the minister of the United States, that the *Alabama* had been notified to leave Cherbourg, and that, as she had professed entire readiness to meet the *Kearsarge*, he was apprehensive lest each might attack the other "as soon as they were three miles off the coast." In this relation M. Drouyn de l'Huys said "that a sea fight would thus be got

portum intrarent, possent, nihil aliud quam tumultum ac trepidationem, simul militum ac nautarum, nequiquam armaque et naves expedientum, fecerunt. Percussa enim ex alto vela paulo acriori vento prius in portum intulerunt quinqueremes quam Poeni ancoras molirentur; nec ultra tumultum ciere quisquam in regio portu audebat." (Livius, Ab Urbe Condita (ed. par Riemann et Homolle, Paris, 1889). Lib. XXVIII. s. XVII. par. 10–16.)

[1] Molloy, De Jure Maritimo (5th ed.), 12.

[2] Ibid.

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up in the face of France, and at a distance from their coast within reach of the guns used on shipboard in these days. That the distance to which the neutral right of an adjoining government extended from the coast was unsettled * * * and that, in a word, a fight on or about such a distance from their coast *would be offensive to the dignity of France*, and they would *not permit it.*" Mr. Dayton replied that he knew no rule but that of the three-mile limit; but that, if nothing would be lost and risked by having the fight farther off, he had no objection. In communicating this conversation to Captain Winslow, of the *Kearsarge*, Mr. Dayton said that he did not suppose that the French Government "would have, on principles of international law," the least right to interfere with him "if three miles off the coast;" but that if he would "lose nothing" by fighting six or seven miles off shore instead of three, he had better do so.[1] The *Alabama* was sunk on the 19th of June about five miles off Cherbourg. It seems that the fight began at a greater distance from land, but moved nearer as it proceeded, and that at the end Captain Semmes tried to make the shore. During the engagement a French man-of-war, which had followed the *Alabama* out of Cherbourg, lay at least three miles off. Mr. Seward, in an instruction to Mr. Dayton of July 2, 1864, said: "I approve of your instructions to Captain Winslow. It will be proper for you, nevertheless, while informing M. Drouyn de l'Huys that I do so in a spirit of courtesy toward France, to go further and inform him that the United States do not admit a right of France to interfere with their ships of war at any distance exceeding three miles."[2] In this case no question arose as to the right or the duty of a nation to require the observance of neutrality within its jurisdiction. These were assumed. But the remonstrance of the French Government seems to have implied that a distinction might, under the circumstances, have been made between what was due from the neutral to the belligerents and what was due from the neutral to itself. It was not suggested that the neutral could be required to protect one belligerent against the hostilities of the other beyond the three-mile limit, or that it had the right to do so; but it was declared that a fight within a certain distance could not be permitted because it would be "offensive to the dignity of France."

[1] Dip. Cor. 1864, part 3, p. 104. [2] Id. 121.

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Use of Neutral Territory as Base of Operations.

The right of the neutral to forbid hostile acts by one belligerent against another within its jurisdiction forms merely one aspect of the general subject of neutral rights and duties. As one belligerent can not lawfully attack another within a neutral port, so likewise he is forbidden to make such a port the base of hostile operations. On December 5, 1665, Sir Leoline Jenkins gave an opinion to His Hajesty in council on the case of the ship *St. Anne*, of Ostend, which was brought into Dover by a Portuguese privateer.[1] The privateer, it appeared, was a small shallop fitted out at Dover, and manned chiefly by British subjects, but commissioned by the King of Portugal, who had given his privateers leave to arm in such port or kingdom as should be convenient for them, they to bring their prizes into Portugal to be judged. Sir Leoline Jenkins said there were two questions in the case. One was whether the commission of the privateer was good; the other whether the capture was in violation of the protection due to persons coming into British harbors or ports. It seems that the ship was not taken within his Majesty's "chambers," though it was captured somewhere in the channel. In reply to the second question, Sir Leoline Jenkins said:

"The Second Question is, as I humbly conceive, best resolved out of a Declaration, which your Majesty's Grandfather of blessed Memory published in the Year 1604, in Reference to these Hostilities, in these Words:

"'Our Pleasure is, that within Our Ports, Havens, Roads, Creeks, or other Places of our Dominion, or so near to any of our said Ports or Havens, as may be reasonably construed to be within that Title, Limit, or Precinct, there shall be no Force, Violence, or Surprise, or Offence suffered to be done, either from Man of War to Man of War, or from Man of War to Merchant, &c. but that all, of what Nation soever, so long as they shall be within those Ports and Places of Jurisdiction, or where Our Officers may prohibit Violence, shall be understood to be under Our Protection, and to be order'd by Course of Justice, &c. And that Our Officers and Subjects shall prohibit, as much as in them lies, all hovering of Men of War, &c. so near the Entry of any of our Havens or Coasts; and that they shall receive and succor all Merchants and others, that shall fall within the Danger of any such as shall await our Coasts, in so near Places, to the Hindrance of Trade to and from our Kingdoms.'

"So that, considering this Shallop set out of your Majesty's

[1] Life of Sir Leoline Jenkins, by William Wynne, II. 727, London, 1724.

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Port, where it hovered for Prey, since it was mann'd for the most Part with your Majesty's Subjects, contrary to the Meaning of the 4th and 6th Article of the Treaty with Spain, made in the Year 1630; since the Surprisal was made in the Night, not by Force of Arms, but by abusing your Majesty's Name and Authority; since the true Commission was neither pretended, shewed. nor indeed on Board at the Time of the Capture; I am of Opinion that the Capture was unduly made, and that the Ostender ought to have his Ship and Goods restored to him; and that the Commander in the Shallop, and the Enligh on Board, deserve to be punish'd. All which I do with all Humility submit to your Majesty's Royal Wisdom."

On July 14, 1799, the British frigate *L'Espeigle* was lying in the Eastern Ems, within Prussian jurisdiction, when four Dutch ships, among which was the *Twee Gebroeders*, came along. The British frigate lay where she was, but some of her boats were manned and sent out on the high seas to capture the ships, which they did. Lord Stowell said that "the very act of sending out boats to effect a capture" was "itself an act directly hostile—not complete, indeed, but inchoate, and clothed with all the characters of hostility." He directed the vessels to be restored.[1]

Exception Suggested by Bynkershoek.

It has been suggested by Bynkershoek[2] that a belligerent may pursue a vessel which he has attacked on the high seas into neutral waters *dum fervet opus*. This suggestion has been almost universally condemned. G. F. de Martens[3] declares that "hostilities begun or continued in neutral territory must violate the rights of sovereignty of the neutral power, and therefore the law of nations forbids the belligerent powers to begin or continue hostilities in the territory, or on the parts of the sea, under the dominion of a neutral power." To the same effect is Azuni.[4] Bynkershoek "himself admits," says Wheaton, "that he had never seen it [the doctrine in question] mentioned in the writings of the publicists or among any of the European nations, the Dutch only excepted; thereby leaving the inference open that, even if reasonable in itself, it neither rested upon authority nor was sanctioned by general usage. There is, besides, some

[1] *Twee Gebroeders* 3 C. Rob. 162, 164.

[2] Juris Publici, Lib. I. c. VIII.

[3] Law of Nations. Lib. VIII. c. VI. sec. 6.

[4] Maritime Law, Part II. c. I. Art. IV. sec. 4.

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reason to believe that he meant to confine the doctrine within narrower limits than have since been sought to be given to it. Be this as it may, it is sufficient to observe that the extreme caution with which he guards this license to belligerents is wholly inconsistent with the exercise of it. For how is an enemy to be pursued in a hostile manner within the jurisdiction of a friendly power without imminent danger of injuring the subjects and property of the latter?"[1] Pistoye and Duverdy declare that belligerents can not, without violating the rights of the neutral, "either pursue or fight each other" within his waters.[2] Phillimore pronounces Bynkershoek's suggestion inadmissible.[3]

[1] Wheaton, Law of Maritime Captures and Prizes, 57; Int. Law, Lawrence's ed. of 1863, p. 721.

[2] Traité des Prises Maritime, I. 94.

[3] Int. Law (3rd ed.), III. 285.

"DEPARTMENT OF STATE, *Nov. 25, 1806.*

"JAMES MONROE, Esq.

SIR: In the month of Sept. last, the French ship of war *L'Impetueux* of 74 guns being disabled by a gale of wind, and making for an asylum, was fired upon and afterwards burnt by the British ship *Melampus* and two others, on the coast of North Carolina, within the limits of our jurisdiction. The enclosed communication from the Navy Department which had instituted an inquiry through Capt. Barron, into the circumstances of the case, proves that this outrage on the sovereignty and neutrality of the United States, was committed so near the shore, that neither ignorance nor even doubt can be pleaded by the British Commander. I enclose also a letter on the subject from Genl. Turreau, the French Minister Plenipotentiary near the United States.

"You will observe, that in the report of Capt. Barron no mention is made of the distance from the shore, at which the firing and pursuit by the British ships commenced. Should it be alleged, or even, contrary to probability, be ascertained that the distance was more than a marine league, and the authority of Bynkershoek be cited, as justifying the continuance of a combat or pursuit, begun without, into the waters of the neutral jurisdiction, you will be able to reply, 1st. That he alone seems to countenance such a doctrine (Quest. Iur. Pub. L. I. Chap. VIII.), no preceding or succeeding authority on public law being found which makes any such exception to the general immunity of neutral territory. 2d. That if the first attack was not within the neutral limits, it was pretty certainly so near to them, that the continued hostility must be regarded as premeditated, and not as resulting from the heat of the pursuit, a condition, tho' not the only one, required by Bynkershoek, in favor of the assailant; 3d. That the destruction of the French ship, whilst aground at so small a distance from the shore, must have been executed with a deliberation wholly inconsistent with the plea countenanced by that writer;

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Belligerent Duty of Restitution.

From the inviolability of neutral territory it results that a belligerent is legally bound to restore, on the application of the neutral, enemies' property which he may have captured within the latter's jurisdiction or by means of hostilities there committed.[1] "The sanctity of a claim of territory," said Lord Stowell in a well-known case, "is undoubtedly very high. * * * When the fact is established it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may belong to the enemy; and if the captor should appear to have erred willfully, and not merely through ignorance, he would be subject to further punishment."[2] Acting upon this doctrine, Lord Stowell ordered the Spanish ship *Anna*, which was captured by a British privateer within a mile or two of some of the small mud islands at the mouth of the Mississippi, to be restored.[3] He intimated, however, that he was disposed to agree with Bynkershoek's suggestion as to

4th. You will be able particularly to oppose to Bynkershoek the authority of the Judge of the British High Court of Admiralty Sir William Scott, in his decision 20th Nov. 1805, on the case of the schooner *Anna*, which was captured within the territorial limits of the United States. His words according to a report authenticated by the proctors, are, 'It is said the pursuit began before, and that altho' you may not begin within the neutral territory, you may pursue there, and I should be *inclined* to coincide with that, if the captor had been out on a legal cruize, and had legally summoned the vessel to surrender, and the *capture had been made without violence.*' You will find also by what succeeds, that no distinction was admitted by the judge between a ship of war and a privateer.

"The President instructs you to represent this case to the British Government, which cannot fail at once to perceive the insult and injury which have been committed, and he will not permit himself to doubt that its justice and its friendly respect for the United States, will be manifested by exemplary proceedings against the offenders, and by enabling this Government otherwise to fulfil the responsibility under which it has been brought to that of a nation in amity. These just expectations of the President are not a little strengthened, by the tenor of the letter from the British Board of Admiralty to Admiral Bukley, written in consequence of your representation on the subject of Capt. Whitby, and communicated in your despatch of Sept. 13th last, which has just been received.

"I have the honor to be &c.,

"JAMES MADISON."

(MS. Instructions to United States Ministers, VI. 367.)

[1] Wheaton, Law of Maritime Captures and Prizes, 57.

[2] The *Vrow Anna Catharina*, 5 C. Rob. 15, 16.

[3] The *Anna*, 5 C. Rob. 373.

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hot pursuit so far as to admit that, if a vessel should flee to some uninhabited place in neutral territory, like the little mud islets in question, in order to escape visitation and search, he would not stretch the point so far as, on that account alone, to hold the capture illegal. "But," says Phillimore, "even in this case the neutral State itself would have a clear right, if it chose to intervene, to insist on a restitution of the property. The sound doctrine is thus stated by Lord Stowell: 'that when the fact [of neutral territory] is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may belong to the enemy.'"

On March 4, 1801, the Danish minister at London demanded the restitution of certain Swedish ships which had been captured by the English frigate *Squirrel* in a port of Norway. On the 18th he demanded restitution of a French ship captured by the *Achilles* under similar circumstances. March 24 Lord Hawkesbury replied that the complaints, so far as they related to the Swedish ships, having been ascertained to be well founded, His Majesty's government would signify in the strongest manner its disapprobation of the conduct of the offending officer, and would cause the ships in question to be released.[1]

The Question of Neutral Duty.

Such being the duty of the belligerent, what is the duty of the neutral? Mr. Hopkins, in one of his notes to the Conde de Tojal, referred to the case cited by Vattel[2] of the Dutch East India fleet which, having put into Bergen, in Norway, in 1666, in order to avoid a British squadron, was attacked by the English admiral. "But," says Vattel, "the governor of Bergen fired on the assailants; and the court of Denmark complained, though perhaps too faintly, of an attempt so injurious to her rights and dignity." The action of the governor of Bergen was within his admitted right; and it is not only the right but the duty of the neutral to cause its neutrality to be respected. But, if its neutrality is violated by the seizure or destruction of enemies' property within its jurisdiction, is it under an absolute obligation to the injured belligerent, from which it can relieve itself if need be only by going to war, to compel the offending belligerent to restore or pay for the property, or else to restore or pay for it itself?

[1] Ortolan, Dip. de la Mer. II. 432.

[2] Law of Nations, Lib. III. c. VII. sec. 132.

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By various early treaties it was stipulated that if the property of either party should be captured within the jurisdiction of the other, the latter, being at the time neutral, should do its utmost to restore it, but at the owner's expense.[1] Bynkershoek considered this rule unjust. If, for example, the captor should seize the property and go away, was the private person to make war to regain it? By later treaties, however, the stipulation as to expense was omitted, and it was provided that the contracting parties should use "all the means in their power" to effect restitution. And "if," says Bynkershoek, "it is the duty of the prince to do this, even by all the means in his power, he will do it at his own expense, even by war, if no other argument (*ratio*) suffices."[2] Molloy refers to a case in which the Dutch "assaulted, took, burnt and spoiled," some English merchantmen in the neutral waters of Hamburg; "for which action," he says, "and not preserving the peace of their Port, they, (the Hamburghers) were by the Law of Nations adjudged to answer the damage, and I think they have paid most or all of it since."[3] He makes no statement of the case beyond this unsatisfactory version of it.

Opinion of Sir Leoline Jenkins.

May 12, 1675, Sir Leoline Jenkins gave the King an opinion on a memorial of the Dutch ambassador concerning the Dutch ship *Postillon*.[4] It appeared that this ship, while at anchor in the English port of Torbay, on March 29 discovered four French ships making at her. She cut her cable and ran aground for better security, but the French ships then sent out four boats, manned and armed, which under the conduct of a frigate seized the *Postillon* so near to the shore that bullets fell on the land.

[1] "Art. XXII. That if any Ship or Ships belonging to the People or Inhabitants of either Republick, or any neutral Power, be taken in the Harbours of either by any third Power, not belonging to the People or Inhabitants of either Republick, they in whose Port, or Offings, or Jurisdiction the Ships aforesaid shall be taken, shall be oblig'd in like manner with the other Party to do their utmost for pursuing and bringing back the said Ship or Ships, and restoring them to their Owners. But all this shall be done at the Expence of the Owners, or those whom it concerns." (Treaty of Peace and Union between Oliver Cromwell, as Protector of England, and the United Provinces of the Netherlands. At Westminster, April 5, 1654. A General Collection of Treatys (London, 1732), III. 74.)

[2] Questionum Juris Publici, Lib. I. c. VIII., "*An hostem aggredi vel persequi in Amici territorio vel portu?*"

[3] De Jure Maritimo (ed. 1701), 12.

[4] The *Postillon* had on board 164 pipes of Spanish wines.

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The deputy vice-admiral went on board the French admiral's vessel and, in the name of the King of England, demanded restitution of the ship and cargo as being unduly seized and carried away in a British port. The French admiral refused to give her up and took her away, saying that he would leave it to his King to settle the matter.

Sir Leoline Jenkins said:

"That the Matter of Fact was thus, I have all Reasons to believe, because it agrees with the Information I have from Sir John Fowell your Majesty's Vice Admiral in those Parts; and I humbly conceive it to be a Violation of that Security, which All Parties in War ought, by the Law of Nations, to suffer each other to enjoy in your Majesty's Ports. And as your Majesty's Vice Admiral used his Endeavours to prevent the said Violation, so the French Commander is more deeply in the Wrong, in that the Action here is not of a desperate Caper, but of a Commander of Note; who being admonish'd by the proper signal, and spoken to by the proper Officer to forbear Hostility, has more violated the Reverence due to your Majesty's Ports, than I have known hitherto in any case that has fallen within the Compass of my Observation.

"That there is a reparation most justly due to your Majesty, and to your Majesty alone in this Case, is my humble Opinion; yet I know not how that Reparation can be reputed a full and satisfactory one, unless the Ship and Goods that were taken out of your Majesty's Protection be restored, or else the full Equivalent thereof with the Damages; 'tis true, the Dutch are now in a Capacity to make a direct Demand of such a Restitution from the French, yet if the wrong Doer do carry away and enjoy the Fruits of his Violences, and the innocent ally be forced to sit down by his Loss, the Rights of Ports, where every Man promises to himself Safety from his Enemy, (as it were upon the Publick Faith) will be thought not asserted to the full, since they consist not only in the Reverence due to the Government, but in the Indemnity of All Parties for the Punishment of an unjust Violence, such as this is; and which undoubtedly belongs to your Majesty, and to your Majesty alone to punish; the Affront to Authority must in the first Place be expiated, but then the Loss to the Party violated ought, as I humbly conceive, to be fully made up. However, the Time and Manner of demanding this Reparation, is not (cannot be) prescribed by any Rule of Law that I know of; therefore I shall not presume to speak any Thing in it; Your Majesty's Reasons of State, and your Royal Resentment, being the proper Measures for this Demand."[1]

In this opinion the measure of reparation due from the belligerent to the neutral for his violation of the neutral territory

[1] Life of Sir Leoline Jenkins, II. 777.

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is clearly defined, but it is stated that the "time and manner" of demanding this reparation are not prescribed by any law, but must depend upon His Majesty's "Reasons of State" and "Royal Resentment."

The Affair at Lagos.

On the morning of the 18th of August 1759 the Toulon fleet of seven vessels, while on its way to Havre under the command of M. de la Clue, was chased by a British fleet of sixteen ships of the line and two frigates under the command of Admiral Boscawen. A running fight ensued, and on the following morning M. De la Clue had only four vessels left—the *Océan*, the *Redoubtable*, the *Téméraire*, and the *Modeste*. His position was then such that escape seemed impossible, and, being near the Portuguese fortress of Lagos, in Algarve, he determined to run his ships aground and burn them, trusting to the protection of the neutral territory for saving their crews. The *Océan* was the first vessel to go ashore. She was beached near the fort of Almadana, and an officer was sent to the commandant to express the hope that, if the English should attack her, he would defend her. The *Redoubtable* grounded near the fort of Ezaria. The *Téméraire* did not go ashore, but anchored near the fort of Figueras and asked for protection. The *Modeste* anchored under another fort, and likewise asked for protection. Nevertheless, the *Téméraire* and the *Modeste* were attacked by the English and carried away, while the *Océan* and the *Redoubtable*, though aground, were fired on and burnt.

When Pitt first heard of this incident he hastened to instruct the British minister at Lisbon to express regret for any violation of territory which might have been committed. He was not to attempt to justify what the law of nations condemned; but, if there had been an actual violation of the coasts of Portugal, it might be urged "in extenuation" that the action was begun a great way from them. Moreover, "all reasonable satisfaction" consistent with "honor" would, said Pitt, be given; but, he added, "any personal mark on a great admiral who has done so essential a service to his country, or on any one under his command, is totally inadmissible, as well as the idea of restoring the ships of war taken." The King would not be averse even to sending an extraordinary mission to Portugal if the circumstances should turn out to be of sufficient magnitude.[1]

[1] Mahon's History of England (Reed's ed.), II. 581.

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At this time the prime minister of Portugal was the famous Conde d'Oeyras, better known as the Marquis de Pombal. He represented in strong terms the injury done to Portugal, and, while refusing to accept as satisfactory the expressions of the British minister, demanded the restoration of the vessels that were carried away.[1] This demand seems to have given Pitt much annoyance. The Earl of Kinoul was appointed special ambassador extraordinary to Lisbon, and in a "most secret" instruction to him Pitt referred to the demand for restitution as "unexpected," and said that notwithstanding the "friendly and confidential" declaration of the Conde d'Oeyras "that a compliance therewith was not expected," it was attended with difficulty and inconvenience. A refusal would be made use of both by enemies and by neutrals. A total declination of discussion would look like peremptoriness, and the going far into one "would open an ample and litigious field for every hireling and ill-intentioned pen all over Europe to inveigh against the naval pretensions of England, already too much the common object of envy and calumny." Under these circumstances Lord Kinoul "was not to enter into much controversial reasoning," but to "touch lightly" on the continuous character of the fight, and add that English officers would be admonished to be more careful in the future.[2] It seems that Lord Kinoul afterward, in the presence of the diplomatic corps at Lisbon, made a speech in this sense, and that the Portuguese Government investigated the conduct of the commandants of the forts at Lagos, who were charged with having made "a very feeble resistance" to the English. It does not appear, however, that anyone was punished. The French Government demanded that Portugal procure restitution of the captured ships, and her failure to do so was mentioned when in 1762 France and Spain declared war against her. But it was not the cause of the hostilities on the part of France.[3] The war was preceded by a demand on the part of France and Spain that the King of Portugal join their alliance against England. They gave him eight days in which to answer. The Spanish declaration of war recited that neither representations "founded in justice and utility" nor "fraternal persuasions" had been able to "alter the King of Portugal's blind affection for the English." The French declaration recited the alliance between France and

[1] Ortolan, Dip. de la Mer. II. 317.
[2] Mahon's History of England, II. 581-582.
[3] Flassan's Diplomatie Française, VI. 179, 467.

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Spain "to curb the excessive ambition" of the English Crown; their "invitation" to the King of Portugal to join their alliance; his "suspicious and dangerous neutrality;" Spain's "motives of the most tender friendship and affinity;" the Portuguese King's "blind devotion to the will of England," and the fact that "moderation" had been "thrown away" on him. Independently of these common motives each government had, said the French declaration, separate grievances, and it then referred to the demand for the restitution of the ships and to an attempt on the part of the Portuguese Court to regulate the precedence of ambassadors by the date of their commissions.[1]

In 1781, during the reign of Louis XIV., an English squadron commanded by Commodore Johnstone was, while at anchor at Porto Praya, in the Cape Verde Islands, in the dominions of Portugal, attacked by a French fleet under the command of M. De Suffern. Neither side took any prize from the other, and after the attack was over M. De Suffern, who had been resisted by the Portuguese forts as well as by the English ships, continued on his course. He subsequently received the approbation of his government; perhaps, says Ortolan, in retaliation for the action of the English at Lagos. It seems that he was a lieutenant on the *Océan* on that occasion, and was carried a prisoner to England.[2]

Results of Precedents.

By the foregoing precedents it appears (1) that the commission of hostilities by one belligerent against another in neutral territory is a violation of the law of nations; (2) that such violation in-

[1] Annual Register, 1762 [218], [219]. "Everyone knows the utmost and violent attack made by the English, in 1759, on some of the (French) King's ships under the cannon of the Portuguese forts at Lagos. His Majesty demanded of the most faithful king to procure him restitution of those ships: but that prince's ministers, in contempt of what was due to the rules of justice, the laws of the sea, the sovereignty and territory of their master (all which were indecently violated by the most scandalous infraction of the rights of sovereigns and of nations), in answer to the repeated requisitions of the king's ambassador on this head, made only vague speeches with an air of indifference that bordered on derision." (The French King's declaration of war against Portugal, Versailles, June 20, 1762. Annual Register, 1762, p. [220].) See Flassan, Diplomatie Française, VI. 182. Lord Mahon, referring to the French and Spanish declarations, remarks: "Never was any aggression more destitute—I will not say of good reason—but even of plausible pretext." (History of England, II. 457.)

[2] Dip. de la Mer, II. 320.

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volves an offense to the neutral nation, and that reparation from the offending belligerent is due to that nation alone; (3) that, if property was captured, it is the duty of the offending belligerent to restore it on the demand of the neutral; (4) that nations have by numerous treaties pledged themselves as neutrals to use "all the means in their power" to protect or effect the restitution of property in such cases; but (5) that the manner in which this obligation must be discharged was not ascertained either by any express rule or by any general understanding.

American Precedents.

Turning to the diplomatic history of the United States, we find that the character of the obligation in such cases has on certain occasions, when that government held the position of a neutral, been specifically discussed and defined. By early treaties with France, the Netherlands, and Prussia,[1] the United States bound itself by a reciprocal engagement to endeavor "by all the means in its power" to protect and defend in its ports or waters, or in the seas near its coasts, "the vessels and effects" belonging to the citizens of the other parties, and to "recover and restore" to the right owners any such vessels or effects as should there be taken from them. In the first war of the French Revolution the Government of the United States, being neutral, received complaints of the seizure of British vessels by French cruisers within its jurisdiction, as well as of the sale within its jurisdiction of British vessels which were captured on the high seas by French cruisers fitted out in violation of its neutrality. At that time the United States had no treaty with Great Britain similar to those with France, the Netherlands, and Prussia, but in a note to the British minister of September 5, 1793, Mr. Jefferson said that it was the opinion of the President that the United States should observe toward his nation the same rule, and even "extend it to captures made on the *high seas* and brought into our ports, if done by vessels which had been armed within them." Continuing, Mr. Jefferson, referring to three vessels which, after having been captured near the coast, were brought into the port of Philadelphia, where they then lay, said:

"Having, for particular reasons, forborne to use *all the means in our power* for the restitution of the three vessels mentioned

[1] France, February 6, 1778, Art. VII.; Netherlands, October 8, 1782, Art. V.; Prussia, September 10, 1785, Art. VII.

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in my letter of August 7th, the President thought it incumbent on the United States to make compensation for them; and though nothing was said in that letter of other vessels taken under like circumstances, and brought in after the 5th June, and *before the date of that letter*, yet where the same forbearance had taken place it was, and is his opinion, that compensation would be equally due. As to prizes made under the same circumstances, and brought in *after the date of that letter*, the President determined that all the means in our power should be used for their restitution. If these fail, as we should not be bound by our treaties to make compensation to the other Powers, in the analogous case, he did not mean to give an opinion that it ought to be done to Great Britain. But still, if any cases shall arise subsequent to that date, the circumstances of which shall place them on similar ground with those before it, the President would think compensation equally incumbent on the United States."

By this note the obligation of the United States to use "all the means in its power" was confined to the exercise of those means within its own jurisdiction, and such was the construction given to the note by the board of commissioners under Article VII of the Jay Treaty.[1] By the neutrality act of 1794 the courts of the United States were expressly invested with power to restore property brought within the jurisdiction under the circumstances which Mr. Jefferson described.[2]

During the first administration of President Monroe a correspondence took place between the United States and Portugal in regard to depredations on Portuguese commerce by privateers said to have been fitted out in the United States, and to have been commanded by American captains and manned by American crews.[3]

[1] *Supra*, Chapter X.

[2] "The doctrine heretofore asserted in this court is that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations; and the doctrine is fully recognized by the act of Congress of 1794." (*La Amistad de Rues*, 5 Wheat. 385, 389, S. P. *Arrogante Barcelonez*, 7 Wheat. 496.)

[3] In a note to Mr. Clay of March 9, 1850, the Conde de Tojal, discussing the case of the *General Armstrong*, said that during the war between the United States and Great Britain of 1812 the American privateer *Grampus* on July 17, 1814, captured the British ship *Doris* near the island of Flores, in Portuguese jurisdiction; and that another American privateer, the *Warrior*, on March 12, 1815, captured the British vessels *Nicholson* and *Dundee* near Fort San Antonio, also within Portuguese jurisdiction; and that in none of the cases did the British Government exact any indemnity.

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In this relation Mr. John Quincy Adams, who was then Secretary of State, declared:

"The Government of the United States having used all the means in its power to prevent the fitting out and arming of vessels in their ports to cruize against any nation with whom they are at peace, and having faithfully carried into execution the laws enacted to preserve inviolate the neutral and pacific obligations of this Union, cannot consider itself bound to indemnify individual foreigners for losses by captures, over which the United States have neither control nor jurisdiction. For such events no nation can in principle nor does in practice hold itself responsible. A decisive reason for this, if there were no other, is the inability to provide a tribunal before which the facts can be proved.

"The documents to which you refer must of course be *ex parte* statements, which in Portugal or in Brazil as well as in this country could only serve as a foundation for actions in damages, and for the prosecution and trial of the persons supposed to have committed the depredations and outrages alleged in them. Should the parties come within the jurisdiction of the United States there are courts of admiralty competent to ascertain the facts upon litigation between them, to punish the outrages which may be duly proved, and to restore the property to its rightful owners should it also be brought within our jurisdiction, and found upon judicial inquiry to have been taken in the manner represented by your letter. By the universal laws of nations the obligations of the American government extend no further."[1]

By the Treaty of Washington of 1871 the neutral is required to use "due diligence" to prevent violations of neutrality within its jurisdiction by one belligerent to the detriment of the other. The tribunal of arbitration held that "due diligence" must be exercised "in exact proportion to the risks" to which either belligerent might be exposed by the neutral's failure to fulfill its obligations—in a word, that "due diligence" was a question of circumstances. And it was only in cases in which the tribunal found that there had been an absence of such diligence—an absence of due diligence within the neutral jurisdiction—that Great Britain was held liable to make compensation for the consequent injuries.

The principal authority for the view that the neutral, if it fail to obtain restitution or compensation from the offending belligerent by peaceful means, must declare war at all hazards, or else make compensation itself, seems to be the expression

[1] Mr. Adams to the Chevalier Correa de Serra, March 14, 1818, H. Ex. Doc. 53, 32 Cong. 1 sess. 166.

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of Bynkershoek that if it is the duty of the prince to effect restitution "by all the means in his power," he will "do it at his own expense, even by war, if no other argument suffice." It is evident, however, that a declaration of war might, as a means of obtaining either restitution or compensation, assume the form of a *reductio ad absurdum*. If Great Britain and France should be at war and a fleet of ironclads of the one should capture and destroy a similar fleet of the other in the waters of some small state, would the latter be required to make a futile declaration of war in order to discharge itself from liability for an enormous damage which it could neither prevent nor repair? Only, it would seem, on the theory that a belligerent may, though he has assumed the risk of destruction, at any time require a neutral to assure him against it by entering the latter's waters. It is indeed true, as Vattel observes, that nations "are naturally equal, and inherit from nature the same obligations and rights;" that "power or weakness does not in this respect produce any difference;" that "a small republic is no less a sovereign state than the most powerful kingdom;" and that "whatever is lawful for one nation is equally lawful for any other, and whatever is unjustifiable in the one is equally so in the other."[1] But it is quite consistent with all this to take into account a nation's resources in determining whether it has, for the purpose of discharging its obligations either of protection or of reparation, in fact employed, in an actual sense, "all the means in its power."

[1] Law of Nations, Preliminaries, secs. 18, 19.

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CHAPTER XXIV.

FRENCH AND AMERICAN CLAIMS COMMISSION: CONVENTION OF JANUARY 15, 1880.

Conclusion of the Convention.

In a previous chapter an account has been given of the settlement of the claims of British subjects against the United States growing out of the civil war in the latter country. On December 25, 1863, Mr. Dayton, then minister of the United States at Paris, inclosed to Mr. Seward a copy of a note of the 23d of that month from M. Drouyn de l'Huys, the imperial minister for foreign affairs, in which the latter expressed regret that the Cabinet at Washington had not given assurances in regard to "the indemnifications, so equitably due to so many French residents, for injuries of all kinds, which they have suffered in the United States."[1] Mr. Seward expressed surprise at this complaint. He said that most of the claimants were believed to have been residents of the insurgent territory, and that France, by recognizing the insurgents as belligerents, might be expected to have accepted all the responsibility of that measure, and to be content to regard her subjects domiciled in the belligerent territory as identified with the belligerents themselves. But, waiving this question for the moment, he observed that the United States had long since proposed to the French Government a convention for the adjustment of claims of its citizens, and that this proposition was still pending; and he also adverted to the fact that the President had, in his last annual message, recommended the establishment of a special tribunal for the settlement of claims of foreigners which had originated since the commencement of the civil war.[2] Mr. Dayton brought these instructions to the attention of M. Drouyn de l'Huys,

[1] Dip. Cor. 1864, part 3, p. 12.

[2] Mr. Seward to Mr. Dayton, January 12, 1864, Dip. Cor. 1864, part 3, p. 17.

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who made a memorandum of the points and promised to consider them further.[1] The negotiations thus begun, though for long periods intermitted, ended in a convention, which was signed January 15, 1880, by Mr. Evarts, Secretary of State, and M. Outrey, the French minister at Washington, for the adjustment of the claims of French citizens against the United States growing out of the civil war in the United States, and of citizens of the United States against France arising during the "late war between France and Mexico," and the Franco-German war and the Insurrection of the Commune.

Jurisdiction of the Commission.

The first two articles of the convention, which define the jurisdiction of the commission, are as follows:

"ARTICLE I.

"All claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of France, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of France, or voluntarily giving aid and comfort to the same, by the French civil or military authorities, upon the high seas or within the territory of France, its colonies and dependencies, during the late war between France and Mexico, and during the war of 1870–'71 between France and Germany and the subsequent civil disturbances known as the 'Insurrection of the Commune;' and on the other hand, all claims on the part of corporations, companies or private individuals, citizens of France, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of France not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the Government of the United States, upon the high seas or within the territorial jurisdiction of the United States, during the period comprised between the thirteenth day of April, eighteen hundred and sixty-one, and the twentieth day of August, eighteen hundred and sixty-six, shall be referred to three Commissioners, one of whom shall be named by the President of the United States, and one by the French Government, and the third by His Majesty the Emperor of Brazil.

"ARTICLE II.

"The said Commission, thus constituted, shall be competent and obliged to examine and decide upon all the claims of the aforesaid character, presented to them by the citizens of either

[1] Dip. Cor. 1864, part 3, p. 33.

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country, except such as have been already diplomatically, judicially or otherwise by competent authorities, heretofore disposed of by either Government; but no claim or item of damage or injury based upon the emancipation or loss of slaves shall be entertained by the said Commission."

In order that a claim might come within the jurisdiction of the commission, it was necessary, under these articles—

1. That it should be the claim of a citizen of one of the contracting parties.

2. That it should have arisen out of acts committed by the civil or military authorities of the defendant government.

3. That such acts should have been committed upon the high seas, or within the territory of one of the contracting parties.

4. That the claim, if against France, should have arisen either during the late Franco-Mexican war, or the Franco-German war of 1870-'71 and "the subsequent civil disturbances known as the 'Insurrection of the Commune'"; or, if against the United States, between April 13, 1861, and August 20, 1866.

5. That the claimant must not have voluntarily given aid and comfort to the enemies of the defendant government.

6. That the claim must not have been disposed of by either government "diplomatically, judicially, or otherwise by competent authorities."

7. That it must not be for the loss or emancipation of slaves.

Miscellaneous Provisions.

By Article IV. the commissioners were required to meet in the city of Washington at the earliest convenient time within six months after the exchange of the ratifications of the convention, and, as their first act in so meeting, to make and subscribe a solemn declaration impartially and carefully to examine and decide, to the best of their judgment and according to public law, justice, and equity, without fear, favor, or affection, all claims laid before them. The concurring judgment of any two commissioners was made sufficient for the decision of any intermediate question and for every final award.

Act to Execute the Convention.

By an act of June 16, 1880,[1] adopted for the purpose of carrying the convention into effect, the President was authorized to appoint a commissioner and an agent on the part of the United States, at salaries of not more than $8,000 and $5,000, respectively,

[1] 21 Stats. at L. 296.

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and to make such provision for contingent expenses and for taking testimony for the United States as to him should seem proper. For all these purposes and for the payment of half of the salary of the third commissioner, whose compensation was not to exceed $8,000 a year, the act appropriated $100,000. The act also authorized the commissioner on the part of the United States, in conjunction with the other commissioners, to make rules and regulations for the conduct of business, and directed that at the termination of the commission the records should be deposited in the Department of State, except that copies or duplicates of papers produced by either government might be deposited instead of the originals. Where a witness proved to be recalcitrant, the commissioners were authorized to issue a commission to take his testimony, and if he happened to be in the United States, provision was made for compelling him to testify.

Organization of the Commission.

In accordance with the provisions of the convention the President of the United States appointed as commissioner Mr. Asa O. Aldis, who had been a member of the Southern Claims Commission. The French Government appointed M. L. de Geofroy, who was succeeded May 24, 1883, by M. A. A. Lefaivre. The Emperor of Brazil appointed, as third commissioner, the Baron de Arinos.

On the part of the United States the Hon. George S. Boutwell appeared as agent and counsel. Assistant counsel for the United States served as follows: Mr. John Davis till July 6, 1882; William Hayden Edwards from July 6, 1882; Hartwell P. Heath from November 1, 1883; Francis M. Boutwell from November 19, 1883.

On the part of France the duties of agent and counsel were separate. The post of agent was filled till April 4, 1881, by Mr. Arthur Lanen, who was succeeded on that day by M. Paul Dejardin. M. Dejardin was succeeded June 16, 1881, by M. Grimaud de Caux, who served till the close of the commission.

As counsel on the part of France appeared the Marquis Charles Adolphe de Chambrun. He was assisted by Mr. Alexander Porter Morse from October 15, 1881, and also by Mr. Albert C. Janin from December 15, 1883.

Mr. Washington F. Peddrick served as secretary on the part of the United States from the beginning to the close of the commission. M. Léonce Laugel acted as secretary on the

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part of France till April 26, 1882; and from January 16, 1883, Mr. Jules Boeufvé acted in a similar capacity.[1]

December 1, 1880, Mr. Peddrick officially informed Mr. Evarts that the commissioners met at the Department of State in Washington on November 5, 1880, and made and subscribed the declaration required by Article IV. of the convention; that they then adjourned to November 23, to meet on that day at the office of the commission; and that on November 23 they adopted rules for the regulation of their procedure. "The commissioners have therefore," said Mr. Peddrick, "directed me to further inform your excellency that they are now ready to proceed to the transaction of the business of the commission, and that in conformity with Article VIII. of the convention, which provides that every claim shall be presented within a period of six months, reckoned from the day of their first meeting for business after notice to the respective governments, the commissioners have appointed Wednesday, the 22d day of December 1880, as the day of their first meeting after the notice herewith given." Mr. Evarts duly acknowledged the receipt of this notice.[2] The commissioners established their office at 1518 H street.

Inspection of Papers.

March 10, 1881, Mr. Boutwell addressed a letter to Mr. Blaine, in which he stated that he had information that there were "papers in the War Department which relate to the rights of claim-

[1] From time to time other persons were employed in various capacities in connection with the commission. E. C. Bartlett was employed as stenographer, at a salary at first of $1,800, and afterward of $2,500. (H. Ex. Doc. 235, 48 Cong. 2 sess. 592.) June 3, 1881, Mr. Peddrick wrote to Mr. Blaine that the official work of the commission had so increased as to render further assistance necessary. Since the 22d of the preceding December more than 450 cases had been filed, and the number increased from day to day; and in all these cases it was necessary to keep a record of the various papers, to supervise the printing of them, to enter notices and issue commissions for the taking of testimony, and to perform various other duties, besides keeping a journal of the proceedings of the commission. Mr. Peddrick had also been appointed disbursing agent. In the performance of these duties he had had one assistant, and he now asked for the appointment of another, which was granted. Hartwell P. Heath was appointed second assistant secretary. On the request of Judge Aldis, Mr. Peddrick was authorized March 5, 1883, to appoint an additional clerk to the commission.

[2] Mr. Evarts, Sec. of State, to Mr. Peddrick, December 9, 1880, H. Ex. Doc. 235, 48 Cong. 2 sess.

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ants before the French and American Claims Commission under the treaty of January 15, 1880, which the agent and counsel for the United States Government and the claimants may have occasion to examine." To this end he suggested that measures should be taken by the Department of State to obtain from the War Department the custody of the papers or an opportunity for the examination of them by the parties interested. To this suggestion, which was duly conveyed to the War Department, the Secretary of War replied that, as there was no separate record or docket of claims in which French citizens were interested, it would not be practicable to undertake to search for and transfer to the Department of State the papers relating to such claims, and that the only practicable course seemed to be "that which was pursued by the British and American and the United States and Mexican Claims Commission," which was for the Department of State at the instance of the agent of the United States to call upon the War Department for information or papers in specific cases, giving the names of the claimants in each case, and such other data as might be attainable, so as to enable the War Department to furnish certified copies of such papers as might be desired. In various cases applications were made by the agent of the United States to the Department of State for leave for claimants to inspect and to obtain certified copies of papers in that or in the War Department.[1]

Cessation of Functions of French Commissioner.

July 11, 1881, the president of the commission, Baron de Arinos, after announcing that leave was granted to file new memorials in two cases, stated that he and the American commissioner had agreed on and signed a decision in the case of Pierre S. Wiltz, administrator, etc., *v.* The United States, No. 313, but that as M. De Geofroy, the commissioner on the part of France, had just given them notice that he had retired from the commission and that his functions as commissioner had ceased, they did not feel at liberty to pronounce judgment in the case and had decided to postpone it till a commissioner should be appointed in M. De Geofroy's place. Counsel for France inquired whether the interruption of the proceedings of the commission by the retirement of M. De Geofroy would have the effect of suspending the taking of testimony. By

[1] H. Ex. Doc. 235, 48 Cong. 2 sess. 273–275.

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Article III. of the convention it was provided that in case the office of commissioner became vacant, the vacancy should be filled within three months from the date of its occurrence. With reference to this provision the eighth article stipulated that, in case "the proceedings of the commission" should be "interrupted by the death, incapacity, retirement, or cessation of the functions of any one of the commissoners," the period of two years within which the commissioners were required to complete their labors should "not be held to include the time during which such interruption may actually exist." By another clause of Article VIII. the time for the presentation of claims was limited to six months from the first meeting of the commissioners for business; but it was also provided that the commissioners might in a particular case extend the time for presenting the claim "to any time not three months longer." Nothing was stipulated as to the effect of an interruption of the proceedings upon the requirements touching the presentation of claims or the taking of testimony, unless the term "proceedings of the commission" should be held to include those processes. Under these circumstances counsel for the United States contended that the commission, since one of its members had retired, should not pass upon the question raised by counsel for France as to the taking of testimony; but he also contended that the interruption caused by the retirement of M. De Geofroy was not of such a character as to prevent the running of the three months in the cases in which the time for filing memorials had been extended. Counsel for France, on the other hand, maintained that the retirement of M. De Geofroy not only prevented the making of final decisions, but that it also stopped the running of the additional time granted for the filing of memorials, and besides precluded any action on applications for leave to file memorials. The two commissioners, after retiring and conferring with M. De Geofroy, announced that they "were of opinion that the retirement of M. De Geofroy would not stop the taking of evidence or the action of the two remaining commissioners on all interlocutory questions," and that it could not "extend the time of three months allowed for filing memorials under Article VIII. of the treaty." The commission then adjourned to October 12, 1881, a period of three months. When the commission met again on that day, a letter was read from M. De Geofroy of October 10, saying that he was ready to

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take his seat again on the commission. Baron de Arinos, to whom the letter was addressed, stated that he had been advised by the Secretary of State of the United States and by the French minister that M. De Geofroy was still recognized as a commissioner by both governments. Baron de Arinos also stated that M. De Geofroy, who was then necessarily absent on account of the illness of one of his children, would probably be present at the next meeting. On these announcements being made, counsel for the United States stated that there were certain questions raised by the interruption of the proceedings which he desired to have discussed and considered when all the commissioners were present. The president said that the questions should be reduced to writing and then submitted. Mr. Aldis stated that numerous petitions for leave to file memorials had been granted during the three months which had just elapsed, and that, apart from the question of M. De Geofroy's absence, these applications were considered by the president and himself separately. He suggested that counsel should come to an understanding as to what steps should be taken for ratifying these acts. No affirmative action on the subject appears to have been taken, and the various acts that had been performed seem to have been permitted to stand without objection.

Taking of Testimony.

By the rules of the commission provision was made for the taking of testimony in the United States and in France. At the suggestion of several parties who were appointed commissioners to take testimony in Paris, Mr. Morton, the minister of the United States at that capital, inquired of the French foreign office whether there was any means of compelling the attendance of witnesses, many of whom had refused voluntarily to appear, and whether it was the intention of the French Government to be represented by counsel at such examinations. The foreign office replied that there was no law in France by which witnesses could be compelled to answer a summons unless it proceeded from a competent judicial authority. As to being represented at the examination of any witnesses who might voluntarily appear, the foreign office answered that the initiative in the matter was intrusted to the agent of France before the mixed commission.[1]

[1] H. Ex. Doc. 235, 48 Cong. 2 sess.

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Withdrawal of Claims.

From time to time during the proceedings of the commission correspondence took place between the two governments and their respective agents in regard to the withdrawal of certain claims of which it was affirmed that the tribunal had no jurisdiction. This question was first raised in the case of David Piaggo *v.* France, No. 2 on the American docket. It has been seen that the jurisdiction of the commission was confined to claims for injuries committed "upon the high seas or within the territory of France," or "upon the high seas or within the territorial jurisdiction of the United States." In the case of David Piaggo, the agent of the French Government requested the agent of the United States to withdraw the claim on the ground that the acts complained of occurred at Matamoras, in Mexico, during the French occupation of that place, and therefore were not committed within the territory of France. "In conformity with the text of the convention," said the French agent, "and by virtue of the instructions which have been given to him, the French agent has always taken scrupulous care to exclude claims founded either upon [the] loss or emancipation of slaves, or upon acts of war which were to be imputed to the Confederates. Convinced that you are animated by the same spirit, I ask you, Mr. Agent, to withdraw the claim of David Piaggo." The question was referred by the agent of the United States to his government. On the 20th of April 1881 Mr. Blaine instructed Mr. Boutwell that the view expressed by the agent of France accorded with that held by the United States. "The injuries," said Mr. Blaine, "upon which the claim is founded did not occur on the high seas nor in France; and the only remaining question being whether Mexico was a colony or a dependency of France, I find no difficulty in determining that it never was."[1]

November 18, 1881, M. Outrey, the French minister at Washington, asked Mr. Blaine to cause the claim of Isaac Taylor, a citizen of the United States, to be withdrawn under Article II. of the convention, on the ground that it had been disposed of by the competent authorities of France. The claim was for the value of certain merchandise shipped at New York in 1870 on the *Magdalena*, a German vessel, for Bremen. The merchandise was seized by a French vessel of war, and

[1] H. Ex. Doc. 235, 48 Cong. 2 sess.

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was condemned by a French prize court. On appeal to the council of state the condemnation was affirmed. M. Outrey, while observing that the rule as to the finality of the decisions of prize courts differed from that generally applied to the decisions of other judicial tribunals, declared that there did not appear to be any occasion for discussing that question, since, even if it were admitted, for the sake of the argument, that the case of the *Magdalena* was not to be considered as having been judicially decided, it could not be denied that it had been disposed of "otherwise by competent authorities." Mr. Blaine expressed his concurrence in this view, and said that the agent of the United States would be instructed to withdraw the claim from the further consideration of the commission; but, as there were two French claims the withdrawal of which the American agent had requested, he also observed that it was not doubted that the French Government would pursue the same course in similar cases; and he further declared that the withdrawal of the claim was not to be considered as an expression of opinion against its justice, nor as a bar to any other remedy of which the claimant might seek to avail himself. Mr. Blaine wrote in this sense both to M. Outrey and to Mr. Boutwell. M. Outrey at once assented to the terms of the withdrawal. The French agent, however, declined to withdraw the claims which the American agent had specified, and this was treated by Mr. Boutwell as a refusal to accept the conditions on which Mr. Blaine had directed the withdrawal of the claim of Taylor. The situation with respect to these cases remained practically unchanged till May 24, 1883, when the claim of Taylor, the whole of one of the French claims, and a part of the other were simultaneously withdrawn.[1]

June 11, 1883, the agent of France declined to withdraw the claim of G. A. Le More, No. 211, and that of J. Perrodin, No. 90. The latter was prosecuted before the United States Court of Claims and, after judgment against the claimant, was abandoned by him. This abandonment, Mr. Boutwell contended, was to be considered as investing the decision of

[1] H. Ex. Doc. 235, 48 Cong. 2 sess. 598. February 7, 1882, Mr. Frelinghuysen inclosed to M. Outrey a list of claims which the United States desired to have withdrawn. February 22 M. Outrey replied that it was only in case the agents could not agree that the two governments were to be consulted. To this view Mr. Frelinghuysen assented.

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the Court of Claims with the character of a final disposition of the claim. October 3, 1883, the agent of France demanded the withdrawal of four claims against France—the Arizona Mining Company, No. 13; George Goodman, No. 16; Willustun and Duttun, No. 17; Humphrey E. Woodhouse, No. 7. On the 24th of October Mr. Boutwell declined to reply in regard to cases Nos. 13, 16, and 17 till the case of Le More was disposed of. In the case of Woodhouse, No. 7, which was a prize case, he contended that there had been no decision that touched the subject-matter of the claims set forth in the memorial.

Power of Commission to Determine its Own Jurisdiction.

The claim of Le More gave rise to a long correspondence. The amount of the claim was $350,726.46, which was alleged to represent the value of 830 bales of cotton, situated in Louisiana, which were seized by the United States fleet under Admiral Porter and taken to Cairo, Illinois, where they were libeled in the district court of the United States as prize. In this court the decision was adverse to the claimants, and it was finally affirmed by the Supreme Court of the United States.[1] But, though the proceedings were *in rem*, the claimants were at every stage represented by counsel. While the case was still before the courts the French legation at Washington endeavored to bring on a diplomatic discussion of it; but in this the Department of State declined to concur, on the ground that the claimant had not exhausted his judicial remedies. After the case was decided by the Supreme Court the claimant's counsel moved for a rehearing on the ground of an alleged error in the record prejudicial to his rights, but the motion was denied. The case was then again laid before the Department of State. That Department, however, declined to reconsider it, maintaining that the record disclosed no failure of justice such as would justify a recourse to diplomacy. As to the demand for the withdrawal of the claim from the cognizance of the commission, Mr. Frelinghuysen, who had succeeded Mr. Blaine as Secretary of State, declared that the case was even more clearly disposed of by competent authority than was Taylor's case, and that it should be withdrawn. Meanwhile the commission had ordered the case to be submitted, and the French Government assumed the position that neither government could interfere to cause the

[1] 6 Wallace, 521.

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execution of that order to be postponed.[1] The United States then asked that the agent of France before the commission be instructed to delay action on the case till the two governments should have disposed of the question of withdrawal.[2] The French Government, however, in view of all the circumstances, thought that "the claimant ought to have the benefit of the doubt," and that the decision of the question of jurisdiction should be left to the commission. Against this position the United States protested, but the French Government refused to abandon it. While the statements made by the United States in regard to Taylor's case were fully admitted, it was pointed out that in conformity with the action taken in that case, France had withdrawn, prior to any decision by the commission, several claims which had been presented to it. But in all these cases, said the French Government, the two governments agreed that the claims had previously been disposed of by competent authority, a question which, if the two governments had not reached an understanding upon it, would necessarily have been left to the commission itself. In the case of Le More they had been unable to reach an understanding, France maintaining that the point on which the claimant based his demand had really never been decided. The case must therefore be left to the commission.[3]

[1] M. Roustan, French minister, to Mr. Davis, Acting Secretary, January 7, 1884.

[2] Mr. Davis, Acting Secretary, to M. Roustan, French minister, January 7, 1884.

[3] Mr. Morton, in reporting the decision of the French Government, January 15, 1884, said: "I will add confidentially that although the French Government has never made directly, or even indirectly, any complaint as to the operations of the commission, I have reason to believe that it has given very little satisfaction. The French Government did not expect that the proceedings of the commission would be so elaborate and attended with such expenses and costs for the claimants. They were under the impression, it seems, that its judgment would be rendered more in equity than in law, and that each claim would be promptly and fairly disposed of without involving long and costly pleadings and charges. If I have well understood intimations made, I must say in a very discreet manner, the French foreign office fears that when the results obtained by submitting the French claims to this commission will be officially reported to the Chambers, a great feeling of dissatisfaction will prevail. They ascribe this, I am informed, to the great influence of Mr. Boutwell, who, they say, carries everything his own way and upon whom they look as too keen a lawyer, one whose high position overshades the plain and simple-minded representatives of the French Government near the commission." (H. Ex. Doc. 235, 48 Cong. 2 sess.)

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In March 1884 the commission dismissed the claim of Le More, as well as the four American claims above mentioned, for want of jurisdiction.

Question as to "Territorial Jurisdiction."

We have seen that the United States withdrew the claim of David Piaggo against France from the cognizance of the commission because the acts on which the claim was based were committed at Matamoras, in Mexico, and not within the "territory" of France or of any of her dependencies. A similar question arose in the case of Joseph Chourreau, a citizen of France, against the United States, No. 43 French docket, though not on a request for withdrawal. The claim of Chourreau was based on the seizure of cotton and other personal property by the military authorities of the United States on December 31, 1863, in the parish of Iberia, in Louisiana. In the English text of the convention the language used in respect of acts of the authorities of the United States was not precisely the same as that employed in respect of acts of the authorities of France. The acts for which France was to be held liable were described as acts committed on the high seas or within the "territory" of France. The acts for which the United States was to be held liable were described as acts committed on the high seas or within the "territorial jurisdiction" of the United States. An effort was made in the case of Chourreau to give substantial effect to this difference in phraseology. Counsel for the United States, seeking to have the claim dismissed by the commission, contended that while the "legal jurisdiction" of the United States extended over all their territory, it was for the time being suspended as to the territory in which the Confederacy bore sway; that the "territorial" jurisdiction was confined to that part of the territory which was in the actual possession and control of the United States; and that the words "territorial jurisdiction," in the English text of the convention, were designed to exclude that part of the rightful territory of the United States over which the United States Government had not at that particular time actual jurisdiction. Counsel for France combatted this view on principle as well as upon the fact that in the French text of the convention the word "*territoire*" was used alone as the equivalent of the words "territorial jurisdiction."[1] A majority of the commissioners went so far as to sustain the position of

[1] H. Ex. Doc. 235, 48 Cong. 2 sess. 231, et seq.

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counsel for the United States. The French agent, however, protested against the decision, and requested the commission to refer the question to the two governments. To this request the commission acceded; and the question was presented to the United States both by the American commissioner and by M. Outrey, the French minister. Mr. Frelinghuysen, after examining the texts of the convention and the negotiations which preceded its conclusion, declared that the words "territorial jurisdiction" were intended to have the same force as the word "territory," which was in fact used in the French text; and that, so far as the decision in Chourreau's case was based on a distinction between the words, it failed to carry out the purpose of the contracting parties and should be corrected. "I desire, however," Mr. Frelinghuysen added, "in order that there may be a complete understanding on this point, to state that I do not express any opinion as to the validity of claims which arose in that part of the United States which was in rebellion at the time the claims are alleged to have arisen, but leave such claims to be decided in each case by the commission in accordance with the rules of public law, of justice, and of equity; the interpretation now given to the treaty not adding force to claims which, measured by those rules, may be invalid."[1]

Extension of the Commission.

On April 15, 1882, Mr. Boutwell communicated to Mr. Frelinghuysen a statement of the condition of the business before the commission on the 13th of that month.[2] By this statement it appeared that the number of claims then presented against the United States was 726, of which the first was filed December 22, 1880, and the last September 22, 1881. The number of claims against France was 19. Out of all these claims only 108 had been disposed of. Five awards had been made against the United States, and none against France. One claim against France had been dismissed and 1 withdrawn. A hundred and one against the United States had been dismissed. In only 150 of the claims against the United States, and in only 1 of the claims against France, had the testimony on the part of the claimant been closed, though some testimony had been taken in 583 claims against the United States, and in 10 claims against France. Moreover, the work of the "*commissioners*," observed

[1] H. Ex. Doc. 235, 48th Cong. 2 sess. 16. See, also, Boutwell's report, 134.
[2] H. Ex. Doc. 235, 48th Cong. 2 sess. 589.

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Mr. Boutwell, had been suspended for three months on account of the cessation of the functions of the French commissioner. It was obvious that, as the result of this condition of things, the commission would be unable to complete the business before it within the two years allowed by the convention of 1880. On the 19th of July therefore a new convention was signed at Washington for the purpose of extending the existence of the commission till July 1, 1883. This convention was duly ratified; and the two governments by an identic note conveyed to His Majesty the Emperor of Brazil their desire to have the services of the Baron de Arinos as third commissioner continued through the extended term.[1] The Baron was permitted to serve to the end of the commission.

Second Extension.

The first extension of the life of the commission did not, however, suffice for the completion of its labors. On February 3, 1883, the American commissioner advised Mr. Frelinghuysen that the commissioners and counsel were unanimous in the opinion that the term of the commission should be further extended. Of the 745 claims before the commission, 203 had been disposed of. Of the 542 that remained, there were 94 which might be determined without argument, leaving 448 to be decided on hearings. Both governments and many of the claimants were still taking testimony, and must continue to take it till April or longer. It would thus be impossible to finish the work of the commission by the 1st of July, even if the parties were deprived of their right under the convention of 1880 to make oral arguments. If a further extension of time were refused, probably 300 French claims and half of the American claims would fail for that reason. It was therefore suggested that a new convention should be made, extending the term of the commission to March 1, 1884, and that this convention should also provide that no evidence or testimony should be presented to or received by the commission after July 1, 1883. Such a stipulation was deemed important, in order that a period of eight months prior to the proposed day of adjournment might be secured for the printing of evidence, the making and printing of briefs, and the examination and decision of cases. February 8, 1883, a convention on these lines was concluded, and it was duly ratified. It provided that no evidence should be presented to or received by the commission after July 1,

[1] H. Ex. Doc. 235, 48th Cong. 2 sess. 17.

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1883; but it extended the term of the commission to April 1, 1884.

Adjournment and Final Award.

March 31, 1884, the commissioners brought their labors to a close, and in so doing rendered the following final award:

"OFFICE OF THE COMMISSION,
"*No. 1518 H Street, Monday, March 31, 1884.*

"Pursuant to adjournment, the Commission met at 12 o'clock M.

"Present: Baron de Arinos, President; Monsieur A. A. Lefaivre and Hon. A. O. Aldis, Commissioners; Monsieur Grimaud de Caux, Agent, and Monsieur Charles A. de Chambrun, Counsel on the part of the French Republic; Hon. Geo. S. Boutwell, Agent and Counsel for the United States, and the Secretaries.

"By direction of the President, the Secretary then read the final award as follows:

"THE FINAL AWARD.

"We, the undersigned Commissioners appointed under, and in pursuance of Article I. of the Convention between the United States of America and the French Republic, concluded the fifteenth day of January, 1880, first stating that Monsieur A. A. Lefaivre, on the twenty fourth day of May, 1883, succeeded Monsieur L. de Geofroy as Commissioner on the part of the French Republic, do now make this our final award of and concerning the matters referred to us by said Convention, as follows:

"I.

"We award that the Government of the United States of America shall pay to the Government of the French Republic, within twelve months from the date hereof, the sum of six hundred and twenty five thousand five hundred and sixty-six dollars and thirty five cents ($625,566.35) without interest, subject to the deduction provided for by Article X. of the Convention aforesaid, for and in full satisfaction of the several claims on the part of corporations, companies, or private individuals, citizens of France, upon the Government of the United States arising out of acts committed against the persons or property of citizens of France, during the period comprised between the thirteenth day of April, 1861, and the twentieth day of August, 1866, said sum being the aggregate of the principal sums and interest allowed to certain claimants by the several separate awards to that effect made in writing and signed by us, or such of us as assented to said separate awards, which are among the records of this Commission, and are hereby referred to, printed copies of which are hereto annexed.

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"II.

"All other such claims on the part of citizens of France against the United States, which have been presented and prosecuted for our award, have been and are hereby disallowed or dismissed, in manner and form as will appear by the several separate awards in writing concerning the same, signed as aforesaid, and which are among the records of the Commission.

"III.

"We award that the Government of the French Republic shall pay to the Government of the United States within twelve months from the date hereof the sum of thirteen thousand six hundred and fifty-nine francs and fourteen centimes (13,659 frs. 14 cents.,) without interest, subject to the deduction provided for by Article X. of the Convention aforesaid, for and in full satisfaction of the several claims on the part of corporation, companies, or private individuals, citizens of the United States, upon the Government of France arising out of acts committed against the persons or property of citizens of the United States during the late war between France and Mexico, or during the war of 1870–1871 between France and Germany, and the subsequent civil disturbance known as the "Insurrection of the Commune," said sum being the aggregate of the principal sums and interest allowed to certain claimants by the several separate awards to that effect made in writing and signed by us, or such of us as assented to said separate awards, which are among the records of this Commission, and are hereby referred to, printed copies of which are hereto attached.

"IV.

"All other such claims on the part of citizens of the United States against the Government of the French Republic which have been presented and prosecuted for our award have been and are hereby disallowed or dismissed in manner and form as will appear by the several separate awards in writing concerning the same, signed as aforesaid, and which are among the records of this Commission.

"V.

"Certain other claims and parts of claims on the part of citizens of France against the United States, and on the part of citizens of the United States against France, were also presented, but were afterwards, and before any award was made thereon, withdrawn by the Agent of the United States or by the Agent of the French Republic, as will appear by the records of the proceedings of the Commission, printed copies of which, duly approved by the Commissioners, will be delivered to each Government herewith.

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"VI.

"And we refer to the several separate awards made and signed as aforesaid, as a part of this, our final award, and to a tabulated statement hereto attached, giving the number of each claim, the name of the claimant, the character of the claim, the place where, and the time when it arose, the amount claimed, the disposition of the claim, and, where an allowance has been made, the principal sum and interest in each case allowed; it being our intent that the proceedings of this Commission shall have the force and effect named and provided in Article XI. of said Convention.

"Signed at Washington, this thirty-first day of March, A. D. 1884.

"BARON DE ARINOS,
"*President, and Commissioner appointed by the Emperor of Brazil.*
"A. LEFAIVRE,
"*Commissioner on the part of the French Republic.*
"A. O. ALDIS,
"*Commissioner on the part of the United States.*

"Although the Commissioner on the part of the French Republic signs this final award, he solemnly declares that he does it in reasserting the principles set forth as well by M. L. de Geofroy, his predecessor, as by himself in the dissenting opinions that were filed by them."

National Character of Claimants.

In several cases a question arose as to the jurisdictional effect to be given to a change in the nationality of interested parties, or as to the disposition of a claim where, the original party being dead, the interested parties were of different nationalities. The commission, holding that the treaty requirement as to the claimant's citizenship applied as well to the time when the claim was sought to be collected as to the time when it arose, uniformly decided that it had no jurisdiction to award anything against the United States in favor of a person who was not at the time of the award a citizen of France, even though he appeared as the heir or successor of an original French claimant. The same rule was reciprocally enforced in respect of claims against France.

Two of the cases thus disposed of by the commission subsequently came before the courts, and an effort was made to obtain the judicial rejection of the principle on which they were decided. In one of these cases[1] Jean Prevot, a citizen

[1] Bodemüller v. United States, 39 Fed. Rep. 437; January, 1889.

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of France, had a claim against the United States for cotton taken from him during the civil war, and the United States admitted its liability to him to the amount of $2,425.15. Some time after the war he died, leaving a widow and three children. His widow qualified as his administratrix, and as such prosecuted the claim before the commission, which allowed the sum of $2,020.94, with interest at 5 per cent from May 1, 1863. This sum was, as the commission stated, awarded for the value of the cotton, less one-sixth, which represented the interest of a child, a Mrs. Bodemüller, whose husband had been naturalized as a citizen of the United States. On the ground that the nationality of the wife followed that of the husband, the commission refused to allow anything on her interest because she was, at the time when the award was rendered, a citizen of the United States. Subsequently Mrs. Bodemüller, having become a widow, brought suit against the United States under the act of March 3, 1887, providing for suits against the government in certain cases.[1] The jurisdiction of the court was denied on the ground (1) that the claim was a "war claim;" (2) that it had been rejected by the commission; (3) that the action of the plaintiff, if she had any, was against the French Government.

The court, Boarman, J., said that, although the claim before its allowance by the commission was a "war claim," the pending cause of action did not appear to be of that character, and that the validity of the plaintiff's demand depended on the power of the commission to deduct her share of the succession. This act of the commission was, said Judge Boarman, an exercise of power "of the highest judicial kind." Assuming that Congress could constitutionally vest such power in the commission, it did not appear that Mrs. Bodemüller had ever submitted to the commission the cause of action which she set up in the pending suit. In her capacity as one of the heirs to her father's succession, she was not, said Judge Boarman, so represented by the administratrix "as to make the commission's award, and the unwarranted deduction made by it on the sum allowed to the succession, *res adjudicata* as to her." Judge Boarman accordingly overruled the exception to the jurisdiction. He dismissed the suit, however, on the ground that the debt due by the United States was due to the succession, and that, in the absence of any pleading or proof showing the

[1] 24 Stats. at L. 505.

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right of the plaintiff, as an heir to the succession, to bring a suit for herself under the succession laws of Louisiana, the right to bring the action remained in the administratrix of the succession.

A suit was then instituted against the United States by the administratrix, but it failed on a plea of the statute of limitations.[1]

The second case to which we have adverted was finally adjudicated by the Supreme Court of the United States.[2] In this case the original claimant was L. F. Foucher, Marquis de Circé, a citizen of France, who once owned a plantation in Louisiana. In 1862 this plantation was occupied by Federal troops, who encamped upon it, used it as a pasture, and built on it a hospital. In 1865 a military commission, sitting at New Orleans, recommended that Foucher be paid by the United States the sum of $36,433.33; but the claim was not settled, owing to the act of Congress of February 21, 1867, by which the government was forbidden to pay any claim for the occupation of or injury to real estate by the authorities of the United States during the civil war.[3] In 1869 Foucher died, leaving his widow as universal legatee; and in 1877 the widow died, leaving as joint universal legatees her nephews and nieces. Both estates were settled up, the executors were discharged, and the successions were considered as finally closed. No money had ever been received on the war claim, and no mention was made of it in the distribution of the estates. But when the commission was installed under the treaty of 1880 the claim was revived. By the rules of the commission each claimant was required to file a memorial, and, if the original claimant was dead, his executor or administrator, or the legal representative of his estate, was required to appear, unless it were shown that there were no creditors, and that the estate was settled. The successions of Mr. and Mrs. Foucher were opened, and Mr. Arthur Denis was appointed dative testamentary executor in both, in place of those named in the wills. In due time Mr. Denis filed with the commission a memorial entitled "Arthur Denis, dative testamentary executor of Foucher, *vs.* The United States," in which he presented the claim in the right of L. F. Foucher, deceased, and joined with him as

[1] Mr. Alex. Porter Morse, of counsel, to Mr. Moore, February 9, 1897.

[2] Burthe *v.* Denis, 133 U. S. 514, 10 Sup. Ct. Rep. 335; March 3, 1890.

[3] 14 Stats. at L. 397.

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claimant all parties interested in the successions of Mr. and Mrs. Foucher. All these parties were citizens of the United States, except Paul Louis Burthe and Dominique François Burthe, who were citizens of France; and from these Denis filed a power of attorney. Later they filed a separate petition or memorial in person.

In June 1883 the commission rendered the following award:

"ARTHUR DENIS *vs.* THE UNITED STATES. } No. 603.

"We allow this claim at the sum of nine thousand and two hundred dollars, with interest at five per cent from April 1st, 1865."

After deducting costs and expenses, Mr. Denis had $5,280 left for distribution, and this sum he, as dative executor, proposed to distribute among all the legatees. The two French legatees, however, claimed the whole of it. The supreme court of Louisiana, McEnery, J., delivering the opinion, held that although awards for damages inflicted by the civil and military authorities of the United States could be made by the commission only in favor of French citizens, yet that, as the award in question had been made "in favor of the representative of a deceased French citizen, to his dative testamentary executor, and paid to him as such," and had been "placed in his possession as an asset of said succession, to be disposed of in the course of its administration," the money should be distributed among all the legatees without regard to their nationality.[1]

Fenner, J., dissented on the ground (1) that under the treaty as interpreted by the commission, neither country could recover from the other any award except where the actual claimants, by whatever title, whether by descent, devise, or conveyance, were, at the date of the award, citizens of the country recovering; (2) that it was shown by evidence properly admitted that the claim, to the extent of the interest of the American colegatees, was substantially abandoned by their own counsel, and that the amount awarded was only that portion of the claim which properly belonged to the French legatees; (3) that the executor prosecuted the claim and received the fund, not as executor merely, but as attorney in fact, of all the legatees, and was bound to pay the money to the persons for whose benefit the award was made.

[1] Succession of De Circé, 41 La. An. 506.

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The judgment of the supreme court of Louisiana was reversed by the Supreme Court of the United States. Field, J., delivering the opinion of the latter tribunal, said that "independently of the express provisions of the treaty, it could not reasonably be urged that the award should inure to the benefit of citizens of the United States;" that it would be a "remarkable thing" in diplomacy for the United States "to make a treaty with another country to indemnify its own citizens for injuries received from its own officers;" that the "express language" of the treaty limited the jurisdiction of the commission "to claims by citizens of one country against the government of the other;" and that "that body possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country."[1]

In the case of Mrs. Bodemüller, as well as in that of the successors of Foucher, the well-known case of Comegys *v.* Vasse[2] was cited as authority for the proposition that the commission should have looked only to the original claimant, and should have disregarded the nationality of his legal successors. But, whatever may be the inferences that may be drawn from the language of the court in that case, the question of the effect of a change of nationality in the ownership of a claim was not involved in it. Vasse, prior to 1802, insured at Philadelphia certain vessels, the property of citizens of the United States, which were captured and carried into Spanish ports, and were afterward abandoned to Vasse, who paid the insurance on them. In 1802, his creditors caused him to be adjudged a bankrupt. His assignees were Jacob Shoemaker, Cornelius Comegys, and Andrew Pettit. In 1824, Shoemaker having died, Comegys and Pettit, his surviving assignees, received from the Treasury the sum of $8,846.14, which was awarded to them by the commissioners under the Florida Treaty on account of the captures and losses above referred to. Sub-

[1] Briefs of counsel for the French Government and of private counsel for the claimants before the commission were offered in evidence to show that the claims of the American legatees were practically abandoned, and that the award was, in fact, confined to the interest of the French legatees. The court expressed the opinion that the evidence would have been admissible for that purpose, if it had been necessary to consider it.

[2] 1 Peters, 193; 1828.

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sequently Vasse brought an action of assumpsit for the recovery of the money against Comegys and Pettit in the circuit court of the United States for Pennsylvania; and it appeared that when he made the return of his effects to the commissioners in bankruptcy, the claim against Spain for spoliations was not in the schedule. At the trial a verdict for the sum claimed was rendered subject to the opinion of the court, and the court gave judgment on the facts in favor of Vasse. The defendants then obtained a writ of error. The opinion of the Supreme Court was delivered by Mr. Justice Story. He said that the decision of the commissioners upon the validity and amount of the claim was conclusive and final, but that they did not possess "the authority to adjust all conflicting rights of different citizens to the fund so awarded." The commissioners were to look to the original claim against Spain, and for that purpose it was "wholly immaterial" upon whom the claim might, in the intermediate time, have devolved, or who was the original legal as contradistinguished from the equitable owner, "provided he was an American citizen." The award of the commissioners therefore presented no bar to the action, if the plaintiff was entitled to the money awarded by them. The next question considered was whether the claim against Spain for indemnity passed to Vasse by the abandonment. The court held that it did. Finally, did the claim pass to the assignees under the bankrupt act, which covered "all the estate, real and personal, of every nature and description, in law and equity," of the bankrupt? The court held that it did. The judgment of the circuit court was accordingly reversed, and a judgment was ordered to be entered in favor of Comegys and Pettit. The claim was from first to last in American hands.[1]

[1] The view taken by the Supreme Court in Comegys *v.* Vasse of the legal nature of a claim against a foreign government for an unjust condemnation is broader than that expressed by Sir Thomas Plumer, master of the rolls, in Campbell *v.* Mullett, 2 Swanston, 555 (1818–19). In this case it was held that the sums paid by the British Government on the awards under Article VII. of the Jay Treaty were not recovered by the claimants on "the ground of right;" that "right" comprehended only what might be "enforced in a court of justice;" and that the treaty, in stipulating for an indemnity for unjust condemnations, merely gave a "bounty" to the claimants.

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Mr. Boutwell's Report.

On the adjournment of the commission Mr. Boutwell addressed to the Secretary of State the following letter:[1]

"FRENCH AND AMERICAN CLAIMS COMMISSION,
"*1518 H Street, Washington, March 31, 1884.*

"SIR: I have the honor to inform you officially that the French and American Claims Commission completed its business at the session held this day, and presented and signed the final award as required by the 9th article of the convention.

"The several awards against the Government of the United States amount to $319,595.02; the interest thereon amounts to $305,971.33. This makes an aggregate of $625,566.35.

"The awards against the French Republic, including interest, amount to the sum of 13,659.14 francs.

"The docket of the Commission shows that 726 claims were presented against the United States, and that the aggregate of said claims was $17,581,000. The interest at 5 per cent., would have amounted to an equal sum. This would have made $35,000,000 in all; the awards, therefore, are less than 2 per cent. of the sum claimed.

"This result shows that many of the claims were unfounded and others greatly exaggerated. The chief expense incident to the defense of the claims has arisen from these facts. It is estimated that the printed record of the testimony, motions, and pleadings, will amount in the aggregate to about 100,000 pages.

"I am able to say, as the result of my acquaintance with the business of the Commission, that the claimants against the Government of the United States have had due allowance made for the losses sustained by them as far as their claims were supported by proofs.

"In two or three instances claims against the French Goverment have been disallowed when, as it seemed to me, the proofs justified an award.

"Upon the whole, however, I am prepared to say that I accept the work of the Commission as a just and equitable performance of the duty imposed upon them by the convention.

"The questions raised, and the discussions and decisions of the Commission, have required an interpretation in some particulars not only of the treaty between France and the United States of the 15th of January, 1880, but also of the treaty between France and the United States of 1803, the treaty between Italy and France, by which Nice and Savoy were ceded to France, and the treaty between Germany and France, by which the provinces of Alsace and Lorraine were ceded to Germany.

"Important questions of citizenship have been raised, discussed, and adjudicated.

[1] H. Ex. Doc. 235, 48 Cong. 2 sess. 616.

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"As the time approached for the completion of the business of the Commission the duties of the counsel were increased, and I have had no opportunity to prepare such a report of the proceedings of the Commission as their importance required. If, in your opinion, such a report is necessary, I shall be ready at any time to undertake its preparation.

"As my official relations with you, and with the Department of State, are now at an end, I take great satisfaction in expressing to you my thanks for the confidence and constant support that I have received at your hands.

"Very respectfully, your obedient servant,

"GEORGE S. BOUTWELL,
"*Agent and Counsel for the United States.*"

Mr. Frelinghuysen, in acknowledging the receipt of this letter, expressed appreciation of the manner in which the interests of the United States had been cared for by the agent and counsel of the United States and his assistants. He also stated that he had asked Congress to provide for the preparation and printing of a final report of the proceedings of the commission. This report Mr. Boutwell made on the 10th of May 1884, and it was duly printed. In the course of this report, Mr. Boutwell said:

"The claims against the Government of the United States arose out of transactions that occurred between the years 1861 and 1866. The sufferers, for much the larger part, were residents of the States engaged in the rebellion, and the injuries for which they demanded compensation had been inflicted by the armies of the United States, sometimes by the orders of the officers in command, and in other cases without specific authority. The claimants had knowledge of the events connected with the losses for which they demanded compensation, and they had, also, the means of gathering and using whatever testimony was in existence in support of their demands. Some of these claims were fraudulent in whole, and others were greatly exaggerated. The preparations for the defense by the United States could only be made after the testimony on the part of the claimants had been introduced. In many instances claims were defeated, or the amounts as set forth in the memorials were greatly reduced, by documentary evidence obtained from the various Departments of the Governments, and especially from the papers and documents known as the 'Rebel Archives.' In a majority of cases, however, the defense consisted in large part of oral testimony, given sometimes by neighbors, sometimes by negroes who were slaves upon the plantations where the events occurred, and sometimes by officers of the army who had knowledge of the transactions to which the claims related. The time that had elapsed and the defects of memory were serious difficulties which in some cases

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could not be overcome. When the names of officers were obtained who were supposed to have knowledge of the transactions, investigation and inquiry often resulted in information that the officers had died or that their residences were unknown. The examinations and inquiries incident to the defense of these causes led to delay and to the expenditure of considerable sums of money. But, as the combined principal and interest of the claims against the United States amounted to about $35,000,000 it seemed to me wise to continue the investigation in every important case as long as there was reason to believe that trustworthy information could be obtained which would justify the Commission either in making an award or in disallowing the claim.

"In all the cases against the United States the defense was managed by the counsel for the United States, and the briefs and arguments were prepared and made in each case either by the counsel or by some one of his assistants.

"In the causes against France, special counsel, who represented the respective claimants, had charge of the several cases, attended to the taking of the testimony, prepared their briefs, and, in the main, suggested the mode of conducting the cause before the Commission. In each case, however, the counsel for the United States made an oral argument in behalf of the claim whenever notice was given by the counsel for the French Government that the case would be argued orally by him, or whenever a request for an oral argument was made by the counsel for the claimant.[1]

"As the memorials were filed an examination was made from time to time of each memorial by the counsel for the United States, or by his assistant, for the purpose of ascertaining whether the memorialist had in all respects complied with the

[1] In the case of William H. Frear *v.* France, No. 9, American docket, the agent and counsel of the United States, at the instance of special counsel, moved that the commission hear the latter as well as himself. The motion was denied. Special counsel then appealed to the Department of State, protesting against the denial, and asking to be appointed specially to represent the United States in the case. The Department of State refused the request, saying: "The claims presented to the French commission are not private claims but governmental claims growing out of injuries to private citizens or their property inflicted by the government against which they are presented. * * * For the claims within its jurisdiction the commission stands in the place of the diplomatic departments of the two countries, and the respective agents and counsel represent not the claimants, but their respective governments; and it is of the utmost importance to frank, fair, and upright dealing between the two nations that the agents and counsel should not in any manner be interested in the cases which they present or defend. The commission is not a judicial tribunal adjudging private rights, but an international tribunal adjudging national rights." (Mr. Frelinghuysen, Sec. of State, to Messrs. Mullan and King, February 11, 1884, MS.)

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terms of the treaty, or whether the facts as set forth in the memorial justified the intervention of a demurrer on behalf of the United States."

Expenses of the Commission.

By the act of June 16, 1880,[1] Congress appropriated the sum of $100,000 toward defraying the expenses of the commission. On the 24th of February 1881 Mr. Boutwell made the following statement touching the charges incurred up to that time:

"FRENCH AND AMERICAN CLAIMS COMMISSION,
"*1518 H Street, Washington, February 24, 1881.*

"SIR: I have the honor herewith to submit a statement of the expenditures arising in the execution of the treaty between the United States and France, bearing date January 15, 1880, and chargeable to the appropriation made by the act of June 16, 1880, as follows:

1. Rent of office for the Commission	$2,400.00
2. Salary of the Commissioners	12,000.00
3. Salary of the counsel and agent for the United States	5,000.00
4. Salary of the assistant counsel for the United States	3,500.00
5. Salary of the secretary of the United States	3,000.00
6. Salary of the stenographer to the counsel for the United States	1,800.00
7. Salary of the clerk to the secretary for the United States	1,500.00
8. General disbursements for the quarter ending December 31, 1880 (including pay of two messengers, furniture for offices, printing, stationery, &c.)	1,595.02
Total	$30,795.02

"There are now in the employment of the Commission, on the part of the United States, a special agent and an attorney, the latter receiving $100 a week and the former $6 per day and their necessary traveling expenses.

"The attorney is engaged in taking testimony in Louisiana, and the special agent is occupied in investigating the character of the claimants and the nature of the claims.

"By order of the Commission, proposals were sent to the principal printing establishments in this city for terms, &c., and the contract for printing was awarded to the Messrs. Gibson Brothers, at the rate of 90 cents per printed page for fifty copies of memorials, pleadings, testimony, &c.

"Memorials have been filed in one hundred and sixty cases, covering claims aggregating about three million dollars.

[1] 21 Stats. at L., 296.

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"It is impossible to estimate the expenses of the commission, as the cost of printing, the expense of attorneys who may be employed to take depositions in different parts of the United States, and very likely in other countries, cannot now be foreseen.

"By the tenth article of the treaty the Government of France will be called upon to reimburse the Government of the United States to the extent of one-half the expenses of the Commission that are common to both Governments, such as rent, office expenses, &c., and by the same article the whole expenses of the Commission, including contingent expenses, will be defrayed by a ratable deduction on the amount of the sums awarded by the Commissioners, to the extent of 5 per cent on the sums so awarded. Should there be any excess in expenses over the 5 per cent it will be defrayed jointly by the two Governments.

"In the estimate of expenses herewith submitted the item of $12,000, salary of the Commissioners, is only half the total amount paid, and it is to be borne exclusively by the Government of the United States.

"It is the opinion of those who have the best means of information that not less than six hundred claims will be filed, and in most of these testimony will be taken. This testimony will all be printed, together with the memorials, pleadings, and briefs, as prepared by the counsel for the respective Governments.

"Very respectfully,

"GEORGE S. BOUTWELL,
"*Counsel for the United States.*"

As is suggested in the foregoing letter, the expenses of the commission were greatly increased by printing and by the employment of attorneys to take testimony. The printing was done under an order of January 22, 1881, by which the commission directed that "the several memorials presented to the commission, and the objections, pleas, demurrers, answers, and amendments in the several cases be printed for the use of the commission, and at the expense of the commission." The expenditure for this purpose was authorized by the Secretary of State under the second clause of section 3 of the act of June 16, 1880. Compensation was also allowed to district attorneys of the United States, on the written approval of the Secretary of State, for services in taking testimony in defense of the United States against claims before the commission. The compensation thus allowed was at the rate of $20 a day and traveling expenses for the time actually employed. The attorney to whom Mr. Boutwell referred in his letter as receiv-

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ing $100 a week and expenses was Mr. W. O. Dénègre, a member of the bar of New Orleans. His allowance was afterward increased to $150 a week and expenses. Most of the claims before the commission arose in Louisiana, a circumstance which necessitated the examination of many witnesses and the prosecution of numerous investigations in that State.[1] After June 16, 1880, Congress appropriated for the expenses of the commission the sums of $50,000,[2] $75,000,[3] $75,000,[4] $25,000.[5]

By an act of March 3, 1885,[6] the sum of $594,288.04 was appropriated for the payment of awards against the United States; and by an act of August 4, 1886,[7] the further sum of $15,639.16 was appropriated "for payment of the amount necessary to strike a balance with France, after the payment, under the final award made by the late French and American Claims Commission against the United States, of the claims of French citizens against this government," under the convention of January 15, 1880.[8]

Delays in Transaction of Business.

In the history of the present commission certain circumstances have been mentioned in explanation of the extensions of time which the two governments concurred in granting. It is proper, however, to state that the delays in the performance of the business of the commission became, in the spring of 1883, after the conclusion of the second extensory convention, the subject

[1] H. Ex. Doc. 235, 48 Cong. 2 sess. 277-281.

[2] March 3, 1881, 21 Stats. at L. 455.

[3] August 7, 1882, 22 Stats. at L. 302.

[4] February 26, 1883, 22 Stats. at L. 430.

[5] 22 Stats. at L. 583.

[6] 23 Stats. at L. 478.

[7] 24 Stats. at L. 256.

[8] The joint expenses of the commission were $96,952.76. By Article X. of the convention the joint expenses were to be defrayed, so far as possible, by a 5 per cent deduction from the awards. This deduction yielded $31,409.49—$31,278.21 on the awards to French citizens and $131.18 on the awards to citizens of the United States. There was thus left the sum of $65,543.27 to be equally borne by the two governments on account of the joint expenses. France however, from time to time during the sessions of the commission, made advances on account of the expenses in question, without regard to the deductions subsequently to be made from the awards. It thus came about that there was a balance due her on that account at the close of the commission of $15,639.16. (Mr. Bayard, Sec. of State, to Mr. McLane, July 27, 1888, MS. Inst. to France.)

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of a discussion between the commission and the counsel for the French republic. The discussion began with a public statement by counsel dated March 19, but presented on the 20th, in the nature of an attack on the commission, its procedure, and its jurisprudence. On the same day counsel for the United States presented a statement for the purpose of showing that the business of the commission had not been unduly retarded. On April 16 the commissioners themselves issued a statement, in which they fully reviewed all the charges of counsel for France. This statement closed the incident. It contains much that is valuable as an exposition, both of the procedure of the commission and of the principles which it applied in its decisions. The statement of counsel for France and the reply of the commissioners are as follows:

"STATEMENT OF THE COUNSEL FOR THE FRENCH REPUBLIC.

"IN THE MATTER OF THE DESPATCH OF BUSINESS.

"The following extract is taken from the procès verbal of the commission:

"'The president of the Commission then made the following statement:

"'Since the 23d of January last only fourteen cases have been submitted to the Commission for its judgment. At this time there are no briefs awaiting our consideration. In view of this fact, my colleague as well as myself wish to urge it upon counsel to present more briefs, and that as soon as possible; and that this may be properly enforced, the secretaries are requested to enter this statement upon the record.' (Minutes of the Commission, March 15, 1883.)

"As this announcement indicates that the Commissioners are perplexed and disappointed at the want of despatch and progress in the business before the Commission, counsel for the French Republic proposes, by way of answer and information, to suggest some of the causes which in his opinion have largely contributed, if they have not produced, the results of which the Commissioners now complain.

"Among these causes, and in their order, may be enumerated numerous delays in the determination of questions of jurisdiction and principle, which affected classes of cases.

"First. The delay and interruption incident to the discussion and the disposition of:

"(A) The so-called territorial jurisdiction question.

"(B) The ownership of slaves question.

"(C) The arrest and imprisonment question.

"Secondly. The multiplication and substitution of general and sometimes inconsistent and incoherent orders materially affecting and in some instances overruling the rules of practice published to the world at its organization as the law of the Commission.

"Thirdly. A want of consistency and uniformity in the decisions and rulings of the Commission.

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"The inevitable tendency of all this has been to inspire claimants and their attorneys with doubt and want of confidence, which has resulted in the withholding of cases.

"I.

"TERRITORIAL JURISDICTION.

"(A) The docket of the Commission and the record show that this issue was made on the 10th of January 1882 by the counsel for the United States in the case of Joseph Chourreau *v.* The United States, No. 43, and the same was sustained and the claim disallowed by two Commissioners on the 28th of February 1882, as not within the territorial jurisdiction of the United States.

"Subsequently, on the 1st of April 1882, two Commissioners decided to refer the question to the respective governments for determination. On the 13th day of May 1882 a communication was received from the two governments overruling the position of the counsel for the United States and repudiating the principle and grounds upon which two Commissioners had dismissed the claim of Chourreau.

"On the same day the decision reached by Chourreau was set aside, in conformity with the declaration of the governments.

"From the 10th of January 1882 to the 13th day of May 1882, a period of four months was lost. Pending the discussion of this issue claimants whose cases would be ruled by the decision hesitated to proceed and declined to submit their cases. (Statement of counsel for the French Republic, filed April 13, 1882.)

"THE OWNERSHIP OF SLAVES QUESTION.

"(B) This issue, which affected a large majority of claims, was also raised by the counsel for the United States on demurrer in the case of De Laureal, No. 97, and Bleze Mote, No. 282, on the 14th and 16th days of February 1882. On the 12th day of May 1882 counsel for the French Republic moved the dismissal of the demurrers interposed by the United States in these cases as 'frivolous.'

"On the 23d day of May 1882 the Commissioners took the subject under advisement; but up to this date the determination of this jurisdictional question, which it is the usage of courts and commissions on such losses to dispose of *in limine*, remained in abeyance or in the bosom of the Commissioners until the 3rd day of January 1883. On that day, and in making an award in favor of the claimant Pierre Nougue (No. 323) *v.* The United States, the president announced that in deciding that case 'he, the president, and the Commissioner on the part of France overruled the objections raised by the counsel for the United States to the claim grounded upon the alleged ownership of slaves by the claimant.' (Minutes January 3, 1883.)

"During all this time—that is from the 14th day of February 1882 to the 3rd day of January 1883, a period of nearly twelve months—a majority of the claimants were left in absolute ignorance and doubt whether the Commissioners would take jurisdiction of their cases. Meanwhile counsel for the French Republic was urging a decision. In that condition and

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situation of affairs claimants or their attorneys could not be expected to undergo labor and expense to take testimony on the merits and to prepare cases which might be excluded from consideration on a question of law.

"THE ARREST AND IMPRISONMENT QUESTION.

"(C) On the 17th day of June 1882 the case of Dubos *v.* The United States was submitted, and on the 5th day of March 1883—a gap of nine months—two Commissioners awarded claimant the sum of eight hundred dollars, a sum which will not probably compensate him for the time, labor, and expense incurred in prosecuting the case.

"II.

"THE MULTIPLICATION OF GENERAL ORDERS INCONSISTENT WITH THE RULES.

"In the opinion of counsel this method of procedure has been productive only of delay and confusion, owing to the utter impossibility of understanding or of carrying out the several orders.

"Unless there be a recognized and inflexible practice, there cannot exist anything deserving the name of law.

"Whenever the practice of a tribunal varies the law is vague and uncertain, and where the law is vague and uncertain justice is a stranger.

"Since the soundness of these principles cannot be questioned, it may be asserted that the orders of May 6 1882 and of November 20 1882, in setting aside some of the most vital rules adopted by this Commission, have created confusion, and instead of tending to facilitate the despatch of business have greatly embarrassed it.

"III.

"A WANT OF CONSISTENCY AND UNIFORMITY IN THE JURISPRUDENCE OF THE COMMISSION.

"In proof of this it is only necessary to cite two or three instances by way of illustration:

"In the case of Parrenin *v.* The United States, No. 62, where the claimant testified that he had no intention of returning to France—and where the question of esprit de retour was fully presented and argued—two Commissioners on the 29th of June 1882 recognized the claimant as a citizen of France, and made an award in his favor.

"In the case of Omer *v.* The United States, No. 284, where the claimant had declared his intention to become a citizen of the United States, and had voted at municipal elections, the three Commissioners on the 12th January 1882 recognized claimant as a citizen of France, and made an award in his favor.

"In the case of Huot *v.* The United States, No. 535—apparently a stronger case—where the facts affecting the question of jurisdiction were practically similar to those developed in the cases of Parrenin and Omer, two Commissioners on the 20th February 1882 refused to consider claimant as a citizen of France, and dismissed his claim for want of jurisdiction.

"In the case of Adele Coulon *v.* The United States, No. 182, where the

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testimony showed that claimant's husband had been brutally wounded and maimed while resisting the capture of his property upon his own premises, two Commissioners on the 28th of June disallowed the claim.

"In the case of Dubos *v.* The United States, No. 26, where claimant was arrested and imprisoned by General Butler for about ten weeks, two Commissioners on the 5th of March 1883 made an award in favor of the claimant for eight hundred dollars.

"THE DUTIES OF THE COMMISSIONERS.

"The Commissioners have been vested by the convention of January 15 1880 with the exclusive power 'to investigate and decide said claims in such order and in such manner as they may think proper.' (See Article V.)

"Under this article of the convention it is for the Commission to take the necessary steps to provide for the despatch of business, neither agents nor counsel have compulsory process to bring the cases before the Commission.

"WHAT POLICY HAS BEEN PURSUED BY COUNSEL FOR THE FRENCH REPUBLIC.

"On the 25th of January 1882 the counsel for the French Republic moved the Commission to issue such order as it might deem proper to expedite business, and suggested the following form of order—that is to say:

"'First. That on January 27, and at the hour of 12 noon, and on the following days, until the whole docket has been gone through, the secretaries shall proceed to call the claims as recorded in their respective dockets, in the order in which said claims have been presented to the Commission; and that whenever a claim is reached which is not ready for final submission, cause for obtaining further delay must be shown by or on behalf of claimants, or of the defendant government, and the Commission will decide what extension of time, if any, shall be granted.

"'Second. On and after the 1st of March next all demurrers will be reserved for decision when cases are submitted on the merits.'

"And in support of his motion, as aforesaid, the counsel for the French Republic made some remarks which he concluded as follows:

"'Let us fully understand the meaning of the motion. It is intended to lay down a plan for work, and not merely to ascertain the condition of the calendar. What I am endeavoring to find is some arrangement for the disposition of these cases. The time has come, after one year's preparation, to dispose of them.

"'I say to my friend that if these cases are not decided before the 23d of December 1882 the laches will be charged to one side or the other, and the side on which the charge of being guilty of laches will rest will be responsible for the miscarriage of this Commission. If there were cases presented to this Commission, and which should not have been disposed of by reason of the failure of the United States to comply with the rules, then I should say that in my judgment the Government of the United States would be responsible. Such are the reasons why I ask the Commission to adopt this motion.'

"The Commission ordered the call of the docket, but instead of enacting

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such measures as would have resulted in the speedy disposition of each case, the Commission ordered that 'when the whole docket has been called the Commissioners will make such orders as may be required for the despatch of business.' (See Minutes, January 28, 1882, p. 2). After the empty formality of the call of the docket had been gone through, that is to say, on the 10th of February 1882, the counsel for the French Republic made the following motion:

"'First. That this Honorable Commission order that all the cases now closed on both sides shall be submitted to them for final determination within the next forty days.

"'Second. That on the 15th day of April next, a second call of the docket shall be made, at which time appropriate measures shall be adopted to further expedite business.'

"Said motion was not acted upon; instead of enforcing the rules, as should have been done, the Commission successively enacted the orders of May 6, 1882 and November 20, 1882.

"In conclusion, it is respectfully submitted that nothing short of an immediate adoption of the proposition made by the counsel for the French Republic on the 25th of January 1882 can save the Commission from failure.

"FACTS AND STATISTICS.

"It is further submitted that a careful investigation of the work accomplished up to the 1st instant shows the following facts:

"First. Cases disposed of	210
"Second. Amount claimed as principal	$2,941,909
"Third. Sums awarded, excluding interest	$27,870

which awards represent 0.95 per cent of the sums claimed.

"The result thus far is so unsatisfactory that we forbear comment.

"CHAS. A. DE CHAMBRUN,
"Counsel for the French Republic.

"ALEX. PORTER MORSE,
"Assistant Counsel.

"WASHINGTON, *March 19, 1883.*"

"STATEMENT OF THE COMMISSIONERS OF THE FRENCH AND AMERICAN CLAIMS COMMISSION AS TO THE CHARGES OF THE FRENCH COUNSEL IN REGARD TO THE DESPATCH OF THE BUSINESS OF THE COMMISSION.

"At the meeting of the 15th of March the president of the Commission made the following statement:

"'Since the 22d of January last only fourteen cases have been submitted to the Commission for its judgment. At this time there are no briefs awaiting our consideration. In view of this fact my colleagues, as well as myself, wish to urge it upon counsel to present more briefs, and that as soon as possible; and that this may be properly enforced the secretaries are requested to enter this statement upon the record.'

"The counsel and assistant counsel of the French Republic on the 20th of March presented a paper suggesting 'some of the causes which have largely contributed, if they have not produced, the results of which the Commissioners complain.'

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"Under this pretense the French counsel and assistant counsel have made an attack upon the conduct of the Commission, alleging:

"I. The Commissioners by delaying the decisions in—

"(A) The Chorreau case, 'so-called territorial jurisdiction;'

"(B) The De Laureal and Bleze Mote cases, as to the 'ownership of slaves question;'

"(C) The Henri Dubos case, 'arrest and imprisonment question,' have prevented claimants from preparing their cases.

"II. That the Commissioners have multiplied orders 'inconsistent and incoherent,' 'utterly impossible to be understood or carried out,' 'creating confusion and embarrassing instead of facilitating the despatch of business,' and 'setting aside some of the most vital rules of the Commission.' They refer to the orders of May 6 and November 20.

"III. That the decisions of the Commission are inconsistent, and to illustrate this they cite five cases.

"This paper was read by the counsel in public meeting, with the request that it be entered on the records, and this to the surprise of the Commissioners, and before its tone, language and substance were fully appreciated. We declined to have it then entered upon the records, and took it under consideration.

"That it is disrespectful and an unprovoked attack upon the general conduct of the Commission is obvious. It is improper and discourteous both in the manner of its introduction and in its language and substance. In any ordinary court of justice such misconduct of counsel would be promptly punished. We may exclude it from our records, for it is obvious that our procès verbal is not to be the receptacle and record of such accusations. But it has been published in French and English, and is no doubt intended for the ears of the French Minister of Foreign Affairs and the American Secretary of State.

"International commissions must rely for security for orderly and respectful proceedings before them upon the sense of professional duty and propriety and upon the courtesy of counsel appointed by the governments. If, instead of these, discourteous language and groundless complaints appear, and unfounded charges defaming the conduct, the orders, and the decisions of the Commission are made in a public meeting and sought to be put upon our records, it seems to be the duty of the Commissioners to report such misconduct of counsel to the government that appointed them.

"We regret that this necessity has arisen. Our duty to preserve good order and respectful proceedings in the meetings of the Commission, and to protect our conduct from unjust aspersions, as well as our respect for the French Republic (than which no nation is more observant of all the proprieties and courtesies in the conduct of public tribunals), whose counsel has attacked the Commission, make this duty necessary.

"If we take no notice of these charges the authorities of France might think them true, and that therefore we do not answer them.

"One member of this Commission is the Commissioner on behalf of the French Republic. Shall he be thus assailed by the counsel of his own government and remain silent, and thus be subject to the imputation that these accusations are true?

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"For this occasion and under these circumstances we decide to notice the accusation of the French counsel; and as this statement will be entered upon our records, and transmitted to the Minister of Foreign Affairs of France and to the Secretary of State of the United States, we allow the paper of the French counsel to go with it, and to be entered upon our records.

"We take up these charges in the order in which they were presented.

"THE CASE OF CHOURREAU, AS TO TERRITORIAL JURISDICTION.

"This case was submitted on the 28th of January 1882, not on the 10th of January, as incorrectly stated by the French counsel.

"It was decided on February 28, just one month after.

"The United States counsel contended that the property was destroyed on the theater of war, in a place alternately overrun by the troops of both armies, and so was not in the territorial jurisdiction of the United States. The claimant contended that it was within the territorial jurisdiction of the United States. Both counsel in their briefs used the phrase 'territorial jurisdiction' as used in the English text of the convention, and no reference to the French text and no intimation of any difference in the texts were made.

"The majority of this Commission thought the act was not committed within the territorial jurisdiction of the United States. From the 28th day of February to the 29th day of March nothing more was done with the case, but on the 29th of March the counsel for France moved the Commission to reconsider its decision, stating that the words 'territorial jurisdiction' were used in the English text, but that the word 'territoire' was in the French text; that a conflicting construction was given to these different texts of the treaty, and that the meaning of the two governments in using these different words in the two texts of the treaty should be left to the governments to settle.

"Mr. De Geofroy, the French Commissioner, on the 1st of April expressed his conviction that the French text rendered exactly the intention of the two governments, and that the difference was caused by an error in transcribing the English text.

"Immediately, on the 1st of April, the Commission referred the question to the two governments to determine what they meant by using these different words, and announced that the Commission would not decide any cases depending on the question till the decision of the governments was received.

"Notwithstanding this announcement, the French counsel, on the 13th of April, declined to submit any business whatever, though not affected by this question, stating that claimants representing the majority of claims declined to proceed with the submission of their cases, even though they may not fall within the scope of the so-called limitation of the expression 'territorial jurisdiction,' and moved the Commission to adjourn to the —— day of May to await the decision of the two governments. So unreasonable a delay, so wholly unjustifiable, could not be tolerated. We denied the motion, and between the 13th of April and 13th of May (when the decision was received) held seven public meetings and transacted a large amount of business.

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"It will be seen that the Commission was prompt in deciding the case in the first instance; that when the difference in the two texts of the treaty appeared we immediately referred it to the two governments; that we did all we could to go on with business, and that the French counsel, assuming to act for a majority of claimants, did his best to delay all business and prevent any from being done for a whole month.

"II.

"THE OWNERSHIP OF SLAVES QUESTION.

"By the law of France a French citizen who owns slaves anywhere forfeits his French citizenship. But to this general law there are some exceptions. If the owner of slaves had owned them before the 29th of April 1848, or owned them by succession, inheritance, by gifts testamentary, or inter vivos, or by marriage agreements, such ownership did not work a forfeiture of citizenship.

"As this law created a penalty, we required the United States to prove strictly that the claimant did not come within the exceptions; and in this way a few cases in which the United States claimed a loss of citizenship by slaveholding were allowed, because there was nothing to show but that the claimant held the slaves under the exceptions and lawfully.

"The charge which the French counsel make is that owing to our delay in deciding the question presented in the Bleze Mote case, 'from the 14th of February 1882 to the 3d of January 1883, a majority of the claimants were left in absolute ignorance and doubt whether the Commission would take jurisdiction of their cases. Meanwhile the counsel for the French Republic was urging a decision.'

"Let us turn to the record to show that this statement is wholly incorrect.

"On February 16 1882 the counsel for the United States demurred to the memorial in the cases of Bleze Mote and De Laureal, on the ground that the claimant admitted that he 'was a slave owner before and during the late war.' But this admission of claimant was not in the memorial, but appeared in his testimony. It is needless to say that a demurrer can only apply to facts stated in the memorial or otherwise ascertained. There was no stipulation of counsel that this slaveholding of Bleze Mote was or was not unlawful, though the United States counsel assumed it was admitted to be unlawful.

"In support of his demurrer the United States counsel filed a brief on February 16 1882 claiming that the slaveholding was unlawful; that this could be proved by any proper parol evidence; that this Commission on such evidence could find the fact, and that the judgment of a French court declaring the forfeiture was not necessary. On the 8th of May he set the case for hearing on the demurrer.

"The French counsel did not join in demurrer, but on the 12th of May moved 'to set aside the demurrer for the following reasons: (1) That the demurrers do not set forth any ground of defence; (2) that they are frivolous; (3) that they are speaking demurrers; (4) that they are feigned demurrers; (5) that they are pleas to the jurisdiction under the form of demurrers.'

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"It is needless to say that upon such a motion—attempting to turn the question upon trifling technicalities—the main question could not be decided.

"Nothing could have been devised more completely to obstruct the decision of the main questions and divert the discussion to petty and frivolous technicalities than the motion of the assistant French counsel.

"The assistant French counsel, though now asserting that 'meanwhile' (that is, from February 14 1882 to January 3 1883) he 'was urging a decision,' admitted in court that he had never given any attention to the examination of the papers in the cases before the 8th of May—that is, had wholly neglected them for eighty-three days—and Mr. Boutwell complained that no notice was taken of the demurrer or brief for seventy-five days, 'counsel having neglected to observe the rules of the Commission,' and that the assistant French counsel 'had no right to be heard on his motion.'

"Upon this dispute between counsel they agreed to postpone the discussion.

"On the 22d of May the assistant French counsel filed another statement in support of his motion to set aside the demurrer, and 'formally declined to enter further into the argument on the merits of the grounds of the demurrer.' He thus insisted upon discussing his motion to set aside, and would not argue the main question. The United States counsel, by his brief of May 22, ignored the motion to set aside, and argued the main question. Thus both insisted on different questions, and as the pleadings stood the main question, as to the effect of slaveholding upon French citizenship and what proof of it was necessary, could not be reached and decided at all. As the main question could not be decided, we left the case to await a hearing on the merits.

"Thus the matters stood till October 19 1882. Then the French counsel filed a 'declaration' in support of the motion to set aside.

"The United States counsel filed an answer on November 20.

"On the 25th of November 1882 the French counsel filed a brief by special counsel of seventeen pages, in which the main questions were very ably argued, and the case was then submitted to us.

"Were we chargeable with delay in deciding the question when it was not finally submitted to us till November 25 1882, and could not till then be taken up for investigation and consultation, and when the whole period from February 16 to November 25 (nine months and eleven days) was wasted by the assistant French counsel in inattention to the cases, or in frivolous disputes about technicalities?

"But on the 5th of December—ten days after the Bleze Mote and De Laureal cases were submitted—another case, that of Nougue, was submitted for final hearing on its merits, and in which the questions as to the forfeiture of French citizenship by slaveholding against French law, and whether the judgment of a French court is the only admissible proof, were fairly presented. This was really the first case in which these questions had properly come up.

"The Commission decided upon the 3d of January that the claim should be allowed; that the only proper proof of forfeiture of citizenship was the judgment of a French tribunal.

"And thus, in less than a month after the direct question was properly presented to us, it was decided.

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"The record proves that the statement that nearly a year's delay was caused by the neglect of the Commission to decide the point is wholly erroneous.

"III.

"IN REGARD TO THE CASE OF HENRI DUBOS.

"1. Claims for unlawful arrest and imprisonment vary so greatly as to the facts upon which compensation is demanded that one is scarcely ever a precedent or test for another. Probably there is not another case pending before us like Dubos's.

"The acts for which the parties were arrested, the mode of arrest, the mode of trial, the extent of imprisonment, the injuries suffered, and the claims for damages are so different in different cases that the preparation of each case must be by itself and cannot depend on another.

"2. The case of Dubos was submitted June 17 1882. Two briefs, amounting to twenty-five pages on each side, were presented, and on the 17th of June counsel on both sides argued the case orally at great length. The Commission adjourned on June 30 till October.

"The record shows how diligently the Commissioners were occupied prior to the adjournment, and that there was no time for consultation or examination of that case.

"On October 21 all the Commissioners were again in session, and about the 1st of November began the examination of this case.

"In examining the Dubos case the questions of the authority of General Butler to declare martial law, the extent and exercise of his powers under it, its application to foreigners, the legal limitations upon its arbitrary exercise, and the measure of damages were to be considered. These were new and very important questions. They were strictly questions of law, and slightly affecting the preparation of other cases. The time we took to examine this case was no more than was necessary, especially as the Commissioners disagreed.

"3. The French counsel complain that our award 'will not probably compensate for the time, labor, and expense incurred in prosecuting the case.' Why is this suggestion made? Is it the duty of the French counsel to look after the pecuniary interests of the claim agents, and to advise the Commissioners that instead of deciding 'according to public law, equity, and justice,' they should shape their awards so as to secure the claim agents against pecuniary loss?

"The Commissioners who allowed the claim carefully considered all the briefs, arguments, and precedents presented by the French counsel, and made such an award as they thought just, and they decline to review it on this complaint.

"IV.

"The nineteenth rule of this Commission, as originally adopted, provided: 'When the time has expired for taking proofs, or the case has been closed on both sides, the proofs will be printed. The argument for the claimant shall be filed within fifteen days after the papers shall have been printed; the argument for the defendant fifteen days thereafter; the reply thereto in ten days, and the case shall stand for hearing ten days thereafter.'

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"The rule contemplated that all the evidence on both sides might be taken before the time for taking proofs had expired, and in such case the printing of the evidence and the making of the briefs should proceed at once. But in all cases when the time for taking evidence expired, then the printing of the evidence and the making of briefs should immediately follow as by the rule.

"Of course no briefs could be expected till the taking of evidence on both sides was closed, or till the time therefor had expired.

"Under this rule we acted till November 20 1882—nearly two years.

"As the special counsel for claimants cannot appear before us or present their briefs, but are required, as in all international commissions, to present their briefs to the counsel of the government of which they are citizens, who, if he approves them, presents them to us, and as the counsel for France must present the briefs, it was his duty under the rules to consult with the private counsel, to select the cases closed on both sides, and in the first instance and within the fifteen days to present the briefs of claimants. As the private counsel are numerous, the claims being scattered among a great many lawyers, the French counsel have many to help in making these briefs, and there is no reason or excuse for not presenting the briefs in all cases within fifteen days.

"The United States counsel can do nothing until the claimants' opening briefs are filed; then he must reply in fifteen days.

"OF THE FREQUENT EFFORTS OF THE COMMISSIONERS TO SPEED THE DISPATCH OF BUSINESS.

"1. To ascertain the condition of the docket we ordered a call of it on the 1st of February, 1882, and required counsel 'to state the condition of the pending cases and how far they are prepared and ready for submission, and how much further time will be required to take the testimony in each case and to close the cases and submit them.'

"The call of the docket was completed on February 6. We hoped this would have the effect of speeding claimants in presenting briefs and in the taking of their evidence.

"From the tabular statement then made it appeared that forty cases were practically closed on both sides. The French counsel moved, on February 10, that they be submitted within forty days, but as that was precisely what rule 19 required, such special order was needless, and the cases were left to stand upon the general rule.

"His duty under rule 19 was to present his briefs in these forty cases within fifteen days. It would then be the duty of the United States counsel to file his brief within fifteen days, and the closing brief of claimant should then be filed in ten days.

"Between the 9th day of February and the 23d of March 1882, ten cases only were submitted. Between the 23d of March and the 27th of April, more than a month, not a single case was submitted, although the remaining thirty cases ought to have been submitted by the 22d of March. It appears from the register that in twenty of these cases no opening brief had been filed by the French counsel up to the 6th of March 1882, although they ought to have been filed by the 21st of February. In this

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state of things we felt it our duty to again call the attention of counsel to the subject of submitting cases and presenting briefs. But no allusions in our orders or requests to any neglect of counsel on either side have ever been made.

"THE REQUEST OF APRIL 29 1882.

"2. On the 29 of April 1882, we again called the attention of counsel to this subject in these words:

"'There is another subject to which the Commissioners call the attention of counsel.

"'The term of the Commission expires on the 22 day of December, or at the latest on the 22 of next March. If the whole intervening time is constantly devoted to the examination of cases it will be necessary to decide more than two cases each day in order to finish the whole work of the Commission. It is apparent, therefore, that cases ought to be got ready at once for the examination of the Commission, so that they may from this time have cases in their hands to be examined and decided. The secretary reports to us that there are now twenty-five cases in which the testimony is closed on both sides. If briefs could be prepared at once in these cases instead of taking the forty days given by the existing rules, so as to enable us to begin the examination of cases, it would greatly promote the despatch of business.'

"This was a request, not an order. It was made in the desire to promote the despatch of business, and it was hoped that it would be met in the same spirit.

"The counsel for the United States had moved on the 26 of April for an order requiring claimants to close taking testimony in all cases by June 1. The claimants had already had from one year in many cases to over four months in all cases over and above the three months granted them by the general rules in which to take their testimony. Notwithstanding this the French counsel and the special counsel for claimants requested and urged that the time for them to take testimony be extended at least to June 30 and stated various reasons therefor.

"THE CALL AND ORDER OF MAY 6.

"3. Upon the 6 of May we complied with their requests, and ordered that the claimants have till June 30, instead of June 1, to take their testimony, and the United States till November 10, and that after November 10 claimants, if wishing to take rebutting testimony, must apply immediately, so that all testimony could be closed by December 10.

"The Commission then added these words to the order:

"'It is obvious that this distribution of time leaves but a very short period for the Commissioners to examine all the evidence in all the cases and to properly decide them and complete the work of the Commission, especially if the large mass of cases be left to accumulate and to remain undisposed of till December.

"'To avoid such accumulation we call the attention of counsel to the present condition of the business, with the hope that they will immediately present their briefs in all those cases in which the testimony is closed on

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both sides. There are about thirty such cases, and we shall direct them to be called this morning in order to ascertain whether they may not be got ready for hearing and decision in a few days.

"'There are about one hundred and fifty-three cases in which the claimants have closed the taking of their testimony. In these cases the United States counsel can now proceed to take testimony. In many we hope testimony has already been taken. If these cases could be closed by the 1st of July, and then submitted to us for decision, it would prevent the accumulation of business toward the end of the term of the Commission and greatly promote the despatch of business.'

"The thirty cases were then called; the record shows there were thirty-six.

"This was the third time we had been obliged to call for briefs not filed according to the rules.

"This order of May 6 did not alter any of our existing rules. It only extended the time for the claimants to take their testimony—an extension granted to them as a favor and at their urgent request. It did not alter the rule as to submitting cases and making briefs. It only sought to ascertain whether cases 'closed on both sides,' and which had been so closed since February 10, 'might not be got ready for hearing and decision in a few days.' But no order to that effect was made, nor was allusion made to anyone's being in default, although the French counsel or claimants' counsel should have filed briefs in fifteen days from February 10 and were then (May 6) delinquent in about twenty-five cases for over two months.

"It is of this order that the counsel for France say: 'That the orders of May 6 and November 20, in setting aside some of the most vital rules adopted by this Commission, have created confusion, and instead of tending to facilitate the despatch of business have greatly embarrassed it.'

"Instead of this statement being true, it will be seen that the order of May 6 did not set aside any rules. It extended the time for taking testimony beyond the times fixed by the rules, and this extension was granted at the urgent request of the French counsel and claimants and in behalf of their interests. If such an extension had not been granted to claimants who up to that time had neglected or been unable to take their testimony, a large number of the claimants would have been cut off from proving their claims and could not have obtained any allowance. The order of May 6 was necessary, clear, and useful for the despatch of business, and especially indulgent to the claimants. It put the taking of testimony by both sides on a fair and just basis. It is appended and we refer to it.

"OF CASES SUBMITTED AND BRIEFS FILED BETWEEN MAY 6 AND JUNE 30.

"4. Thirty-six cases closed on both sides were called in the public meeting of May 6 1882.

"In eight of the cases briefs had been filed prior to May 6, leaving twenty-eight in which briefs were to be filed, and in which, by the rules, the claimants' opening briefs should have been filed by May 21. Between May 6 and June 30 only nine cases were submitted.

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"In ten of the twenty-eight cases the French counsel had filed opening briefs before June 30, leaving eighteen in which he had not filed an opening brief. Indeed, in sixteen of these cases no opening briefs have been filed up to March 20 1883.

"On the 30 of June, the last meeting before the adjournment for the summer, the French assistant counsel moved for forty days additional time to take rebutting testimony in thirty-six cases, and for from thirty to sixty days to take testimony in chief in one hundred other cases. As rebutting testimony cannot properly be taken (see rule 14) until 'after the proofs on the part of the United States shall have been closed,' 'when, if the claimants desire to take rebutting proof, the Commission will accord a reasonable time therefor,' the Commission granted thirty days to take the rebutting proof and in the other one hundred cases extended the time of claimants to thirty days more. At the expiration of thirty days (July 30) the testimony on both sides would be closed in these thirty-six cases, and then, under the rules, by the 10th of September 1882 these thirty-six additional cases should have been briefed and submitted, making, with the previous twenty-seven cases, in all sixty-three. Indeed, it was reasonable to expect that from the one hundred and fifty-three cases referred to in the order of May 6 a large number would be briefed and submitted for decision by the time we met again on the 3d of October.

"The Commission met again on the 3d of October. Between the 30th of June and the 3d of October only four cases had been submitted. On the 3d of October two more cases were submitted—six instead of sixty-three.

"On account of illness Mr. De Geofroy was not able to attend the meetings of the Commission till the 21st of October.

"NOTICE OF OCTOBER 21 1882.

"5. At the meeting of the 21st of October the Commission made the following statement:

"'The Commissioners have had under consideration the matter of the extension of time to take testimony. Heretofore the Commission has been liberal in affording both sides opportunities to complete their testimony, but the limitation put upon the continuance of this tribunal compels us to be hereafter very rigid in passing upon applications for further time to take testimony, and the counsel for the governments and all other parties interested must take notice that hereafter no further extension of time will be allowed, except upon urgent reasons given, properly supported by official statements or affidavits.'

"Motions on behalf of the claimants for the extension of time to take testimony continued to be made by the French counsel, and at the meeting of November 11 the subject was fully discussed by the counsel of both governments.

"On the 13th of November Mr. Boutwell, the counsel for the United States, presented a statement showing the condition of the business of the Commission on November 12 and the form of an order which he wished the Commission to adopt, in regard to filing briefs and granting extensions of time to take testimony. The counsel for France replied to the statement and presented his form for an order on the subject.

"It was obvious that some general order must be made limiting the

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time for taking testimony on both sides, or the business of the Commission could not be finished in the time prescribed by the convention.

"It further appeared that between the 3d of October and the 20th of November, a period of forty-eight days, only twelve cases had been briefed and submitted. At that rate, instead of closing the business by the 1st of July 1883, the time prescribed by the convention, it would take between five and six years to finish the business.

"It was plain that the existing rules were wholly insufficient, and the practice under them led to endless delays and would defeat the objects for which the Commission was established. More stringent rules, not merely requesting more briefs, but requiring them at stated periods, were necessary.

"THE ORDER OF NOVEMBER 20 1882.

"6. For these reasons the order of November 20 was adopted, which is appended to this report, but need not here be set forth in full. The following orders, which refer to the making and submitting of briefs, were then made:

"'OPINION AND ORDER RELATIVE TO THE BUSINESS OF THE COMMISSION.

"'When the order of May 6 was made it was expected that the term of this Commission would expire on the 22d day of March 1883. The order then made contemplated that the taking of testimony should cease in December 1882, so that the Commission should have three months after all the testimony was taken to examine and decide the cases.

"'Since then the term has been extended to July 1 1883—three months and eight days.

"'This extension enables us to extend the time of the claimants and of the two governments for taking testimony for three months and eight days.

"'The question now is, How shall we proceed to distribute this time among the parties so as best to promote the despatch of business and to enable the parties to present all their testimony?

"'I. We cannot assume that the governments will again extend the time beyond July 1.

"'We must make our order on that basis, that the Commission will not extend beyond July 1.

"'II. There will probably be about five hundred cases to be examined and decided by the Commission between this date and the 1st of July; that is, about three cases for every working day, or eighteen cases per week.

"'To complete the work of the Commission it is absolutely necessary that the business shall be so arranged and the cases so set for taking testimony, and so disposed of by counsel, that a constant supply of cases ready for decision shall henceforth be furnished to the Commissioners, and so that they may always have on hand daily three cases for examination and decision.

"'III. There are now sixty-seven cases closed on both sides and in which briefs can at once be made.

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"'It is ordered that in these cases briefs be prepared, filed, and furnished by the counsel of the French Republic to the counsel of the United States, and that briefs in reply be prepared, filed, and furnished by the counsel of the United States to the counsel of the French Republic, as follows:

"Briefs by French counsel.	*Replies by counsel for the United States.*
8 by November 25.	8 by December 2.
10 additional by December 2.	10 additional by December 9.
10 additional by December 9.	10 additional by December 16.
13 additional by December 16.	13 additional by December 23.
13 additional by December 23.	13 additional by December 30.
13 additional by December 30.	13 additional by January 6 1883.

"'The counsel of the French Republic will, upon consultation with special counsel, select the cases in which briefs are to be prepared as above.

"'If the counsel of the French Republic shall desire to file briefs in reply to the United States briefs, he must do so within one week from the day on which he receives the United States briefs. At the expiration of the week the case will be deemed submitted to the Commissioners for decision, unless the counsel wish to be heard orally. If either of the counsel wishes to be heard orally, he must give notice in writing thereof on or before the third day after the expiration of such last week to the adverse counsel and to the secretary, who shall inform the president of the Commission. The Commissioners will fix a day for such hearing. At the end of the oral arguments the case will be considered as submitted.

"'After the 30 of December briefs in eighteen cases must be prepared weekly by the French counsel and furnished to the American counsel, and briefs in reply weekly by the American counsel.

"'The cases before the Commission cannot be completed and decided by the Commissioners by the 1st of July next unless the weekly average of eighteen cases be supplied to the Commissioners for decision after December 30.'

"It is of this rule that the French counsel say it 'has been productive only of delay and confusion, owing to the utter impossibility of understanding it or of carrying it out.'

"Is this true?

"Could not the French counsel and the special counsel for claimants understand that they were required to furnish eight briefs by November 25, ten by December 2, ten by December 9, and so on in such cases as the French counsel might select upon consultation with claimants' counsel, instead of furnishing in all cases briefs in fifteen days after the cases were closed, as required by the original rule? The impossibility was not in understanding either the old rule or the new one, or in carrying them out. The trouble arose from disregarding them. The new rule, requiring a specific number of briefs at stated periods, was so clear and exact that it left the counsel no excuse for delay or neglect, and if obeyed would secure the indispensable despatch of business.

"In no other respect was the rule as to the preparation of briefs changed.

"As it was the duty of the French counsel to take the initiative, to

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select the cases for briefing and to make the opening brief, his right and his duty in that respect were left untouched by the new order. Indeed, the order expressly stated: 'The counsel of the French Republic will, upon consultation with special counsel, select the cases in which briefs are to be prepared as above.' The special counsel could not appear before us except through the French counsel; could not present their briefs to us, but were obliged to present them to the French counsel, who submitted them to us as they saw fit. It was for him, therefore, to consult with the special counsel, to inform them of what our rules required, and to demand compliance with them. We could make our orders only upon him, not them, and require obedience of him, not them.

"In this order there was nothing obscure, nothing difficult to do. If obeyed, the desired despatch of business was secured.

"We waited to see how the order would work. If it furnished us 'the constant supply of cases ready for decision,' we should be satisfied, and should not, probably, inquire as to the exact and literal compliance with the rule.

"On the 22 of November six cases were furnished, and we hoped we should get enough to keep us constantly employed. In December eighteen cases were furnished. In January they fell off to seven. In February there were only eleven. And in March, up to the 15th, there were only three.

"On the 15th of March we were without a single case for examination; the 'constant supply' had failed.

"In the preceding statement we have shown that these orders were clear and not to be misunderstood by anyone; that they were necessary on account of the neglect in furnishing briefs as required by the rules; that they were well calculated to speed the despatch of business, and that the delays in submitting briefs have been occasioned, not by any defect in the rules, but by the negligence of the parties who should have furnished them.

"WHAT THE FRENCH COUNSEL SHOULD HAVE DONE.

"7. But on this point we may add, if there were anything in the orders which seemed obscure and conflicting to the French counsel, why did they not state to the Commission the difficulties they encountered in understanding and applying the orders or their difficulties in procuring briefs from those bound to comply with the orders? If they had really desired the despatch of business they should have done so, and the Commissioners would at once have explained or modified the orders or enforced them by final decree, and thus have relieved them. Instead of this they have quietly acquiesced in and acted under the order of November 20 for four months and until the 20th of March, and then for the first time, instead of stating their alleged difficulties, that they might be removed, they have without provocation assailed the Commission with groundless charges and erroneous assertions and present these as excuses for not complying with the rules of the Commission requiring briefs.

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"V.

"OF THE ALLEGED INCONSISTENCY IN OUR DECISIONS IN REGARD TO THE FORFEITURE OF FRENCH CITIZENSHIP 'BY AN ESTABLISHMENT IN A FOREIGN COUNTRY WITHOUT INTENT TO RETURN,' UNDER SECTION 17, CHAPTER II, CODE CIVIL.

"1. The Commission hold that mere residence and verbal declarations of an intent not to return are insufficient to work a forfeiture of French nationality. There must be a declaration in writing before a court of record, sworn to by the claimant, of an intent to remain here and become a citizen, like the declaration of intention to become a citizen which is the first step in naturalization. Mere verbal declarations change from time to time, and are easily proved to be one thing to-day and another thing to-morrow.

"2. They hold further that the written declaration of an intent to become a citizen and to remain here, though requisite, is not conclusive proof of the intent to remain 'sans esprit de retour' when the evidence shows that the party after making his declaration changed his intention (as he had the right to), refused to perfect his naturalization, and always after claimed and reserved his right to remain a French citizen.

"In Parrenin's case (No. 62) there was no written declaration, but only verbal declarations of an intent to remain and not to return to France, accompanied with the declaration: 'I have never intended to become an American citizen; I have always wished to preserve my nationality.' Hence we held him to be a French citizen.

"In Omer's case (No. 284) he says: 'I have never renounced my allegiance to France. Some time before the war I made application for naturalization papers in the circuit court, but the application never was perfected, and I have never taken an oath to any other government.' It is not clear whether he means that he applied for papers declaring his intention to become a citizen and renounce allegiance to France, and this was not perfected, or that he made his declaration of intention, but did not perfect his naturalization by taking the second step. If the first, his case was like Parrenin's; but if the last, though prima facie sufficient, it was rebutted by proof that he had changed his intention and always claimed publicly to be a French citizen for more than twenty years, and was regarded by his neighbors as a French citizen. Upon the whole evidence we thought that his application for naturalization papers before the war, even if construed to be a declaration of intention (which was doubtful), was fully rebutted by his uniform conduct to the contrary for more than twenty years, and we therefore held him to be a French citizen.

"In Huot's case (No. 535) the French counsel charges the Commission with a want of consistency in their decisions, because 'the facts affecting the question of jurisdiction were practically similar to those developed in the cases of Parrenin and Omer,' and yet we refuse to consider him a French citizen.

"1. Mr. Huot was asked (Record, p. 26): 'Have you ever filed a declaration of intention to become a citizen of the United States; and if so, where and when?'—Answer. 'I have; in Fernandina, Florida, in 1876, before Judge Hillyer, clerk of the circuit court in Nassau County, Florida.' On

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page 61 of the record the declaration is shown: 'I, C. H. Huot, do declare on oath that it is my bona fide intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to all or any foreign prince, potentate, state, and sovereignty whatsoever, and particularly to the Republic of France.—C. H. Huot.'

"Here, then, is the written declaration, which did not exist in Parrenin's case—the indispensable requisite to prove an 'establishment without intent to return.'

"2. But as this only made a prima facie case, we must look further and ascertain whether there may not be evidence to prove that he had changed his intention to remain in this country.

"He was asked (p. 26): 'Is it your intention to remain in this country?'—Answer. 'It is my present intention to remain.' He went to France in 1863 on a visit and stayed about two months. He was asked: 'When you visited France, as mentioned in your direct examination, was it with the intention of returning to the United States?'—Answer. 'It was my intention to return.'

"There was no evidence to show an intent to return to France or an intent not to become a citizen of the United States, but the contrary was fully shown.

"This case, instead of being 'similar to that of Parrenin and Omer in the facts affecting the question of jurisdiction,' is totally unlike it on that vital point.

"In the case of Coulon (182) and Dubos (26) the alleged inconsistency is very obscurely stated. The allegation is that though Coulon was brutally wounded while resisting the capture of his property upon his own premises (as if the military authorities of the United States were making 'the capture'), yet we rejected his claim, while we allowed the claim of Dubos, who was arrested and imprisoned by General Butler.

"In Coulon's case there were two witnesses to the main facts—Mme. Coulon, the claimant, and Mme. Hemard.

"Mme. Coulon's testimony, where she differs from Mme. Hemard, we thought unreliable. Mme. Hemard testified that about forty negro soldiers came into the orange grove; that 'they came in pellmell; one jumped the fence; others came in the gate. I did not see any officers; all were colored.' 'They were stealing oranges and breaking the trees. Coulon told them to stop. One of the colored soldiers told him it was none of his business. I told Mr. Coulon he had better go away. The colored soldier told him if he did not go away he would shoot him. He then shot him.'

"We can allow only 'claims arising out of acts committed by the civil or military authorities of the United States.' Such are the words of the convention.

"The statement of the case is, in the opinion of the Commission, enough to show that the act was not committed by the authorities of the United States, but was the brutal act of a lawless negro soldier. No officer was present at the alleged 'capture' of his property, and the 'capture' was stealing oranges.

"In Dubos's case the act was committed by General Butler, and was approved by Mr. Seward and President Lincoln.

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"The governments which have established this Commission, upon considering the facts here stated, will not fail to observe how constant and frequent have been our efforts to despatch the business of the Commission, and that the delays in taking testimony, in submitting cases, and presenting briefs have not arisen from anything done or omitted by the Commissioners. If we have been in error, it is that we have been too indulgent to claimants in granting extensions of time to take their testimony—an error which it ill becomes the counsel of the claimants to complain of.

"BARON DE ARINOS,
"*Brazilian Commissioner.*
"A. O. ALDIS,
"*Commissioner on the part of the United States.*

"I concur in the conclusions of my colleagues, although I do not follow them in all the developments and particulars into which they have entered.

"While believing that some time might possibly have been saved in studying the Dubos case (arrest and imprisonment), I find the reproach of delay entirely unfounded in the 'slaves question,' in which, it seems to me, the counsel lost themselves in the labyrinth of their roundabout proceedings.

"So, in my opinion, the charge of delay in the 'territorial-jurisdiction question' is wholly unfounded.

"In regard to the accusation of 'inconsistency in the decisions,' I might consider myself as not directly brought in question; my votes up to this day have always been 'consistent.' However, I cannot help agreeing with my colleagues that the enumeration given by the counsel for France in the third section of their paper is itself sufficiently 'incoherent.' For instance, one does not understand what is the affinity they establish between Coulon's case and that of Dubos.

"But leaving aside details, I avail myself of the occasion to decline the absolute obligation of so-called 'consistency' that the counsel would pretend to impose upon us; that is to say, of deciding cases that are in some respects similar as if they were alike in all. The cases submitted to the Commissioners' judgment are very seldom identical; all present particular circumstances which determine the Commissioners' decision, so one has no right to reproach them as 'incoherent' because they decide in a different manner different cases.

"As for the orders, I have signed them with my colleagues and I accept entirely my part of the responsibility.

"It is equally inadmissible to lay the fault upon these orders so as to justify the procrastination in the submission of the claims and to assume that successive orders have abolished the rules. The orders have been made because the agent and counsel on both parts were not observing the rules, and to try to bring them back to the rules; in fact, to remedy the inertia wherever it came from. If they have not been efficacious, the fault is with those who have not been willing to regard them.

"Yet it is absolutely reversing matters to assume to dictate to the Commissioners their duties; to contend by a false interpretation of the fifth article of the treaty that it is their province to see after the presentation

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of the claims; in short, to require the Commissioners to perform the duties which have been assigned to the agent and counsel.

"The duty of the agent and counsel is to prepare and present the claims according to the rules; the duty of the Commissioners is to decide them afterwards in the order which they believe to be proper. No argument can prevail which seeks to change this distinction of duties and to shift responsibilities.

"If, as they pretend, the agent and counsel have no power to compel the claimants and their special attorneys, will the Commissioners be more able to do so? Can the Commissioners step into their place and hunt for the claimants? The agent and counsel forget that it was only through them that the Commissioners can have communication with the claimants.

"In conclusion, I join with my colleagues in rejecting the charges preferred against the Commission. I find the language used in the paper presented to be disrespectful. Finally, I protest in particular against the loss of precious time occasioned by such useless controversy.

"LOUIS DE GEOFROY,
Commissioner on the part of the French Republic.

"ORDER OF NOVEMBER 20 1882.

"When the order of May 6 was made, it was expected that the term of the Commission would expire on the 22d day of March 1883. The order then made contemplated that the taking of testimony should cease in December 1882, so that the Commissioners should have three months after all the testimony was taken to examine and decide the cases.

"Since then the term has been extended to July 1 1883—three months and eight days.

"This extension enables us to extend the time of the claimants and of the two governments for taking testimony for three months and eight days.

"The question now is, How shall we proceed to distribute this time among the parties so as best to promote the despatch of business and to enable the parties to present all their testimony?

"I. We cannot assume that the governments will again extend the time beyond July 1.

"We must make our order on that basis, that the Commission will not extend beyond July 1.

"II. There will probably be about five hundred cases to be examined and decided by the Commissioners between this date and the 1st of next July; that is, about three cases for every working day, or eighteen cases per week.

"To complete the work of the Commission it is absolutely necessary that the business shall be so arranged and the cases so set for taking testimony, and so disposed of by counsel, that a constant supply of cases ready for decision shall henceforth be furnished to the Commissioners, and so that they may always have on hand daily three cases for examination and decision.

"III. There are now sixty-seven cases closed on both sides, and in which briefs can at once be made.

"It is ordered that in these cases briefs be prepared, filed, and furnished by the counsel of the French Republic to the counsel of the United States,

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and that briefs in reply be prepared, filed, and furnished by the counsel of the United States to the counsel of the French Republic, as follows:

"Briefs by French counsel.	*Replies by counsel of the United States.*
8 by November 25.	8 by December 2.
10 additional by December 2.	10 additional by December 9.
10 additional by December 9.	10 additional by December 16.
10 additional by December 16.	13 additional by December 23.
13 additional by December 23.	13 additional by December 30.
13 additional by December 30.	13 additional by January 6 1883.

"The counsel of the French Republic will, upon consultation with special counsel, select the cases in which briefs are to be prepared as above.

"If the counsel of the French Republic shall desire to file briefs in reply to the United States briefs, he must do so within one week from the day on which he receives the United States briefs. At the expiration of the week the cases will be deemed submitted to the Commissioners for decision unless the counsel wish to be heard orally. If either of the counsel wishes to be heard orally, he must give notice in writing thereof on or before the third day after the expiration of such last week to the adverse counsel and to the secretary, who will inform the president of the Commission. The Commissioners will fix a day for such hearing. At the end of the oral arguments the case will be considered as submitted.

"After the 30th of December the briefs in eighteen cases must be prepared weekly by the French counsel and furnished to the American counsel, and briefs in reply weekly by the American counsel.

"The cases before the Commission can not be completed and decided by the Commissioners by the 1st of July next unless the weekly average of eighteen cases be supplied to the Commissioners for decision after December 30.

"IV. Besides the sixty-seven cases closed on both sides, there are one hundred and thirty-one cases closed by claimants. It is ordered that these cases receive the immediate attention of the counsel of the United States, and the testimony to be taken and the cases closed as soon as possible on the part of the United States, so that the rebutting testimony of the claimants may be taken and the cases closed on both sides at as early a date as possible. A sufficient number should be closed on both sides by December 30 to furnish at least eighteen cases weekly thereafter for submission to the Commissioners. The United States must close their testimony in twenty-five cases by December 10, and in forty more cases by December 24.

"As fast as the taking of testimony on the part of the United States is closed in the cases closed by claimants (and which are estimated as above as being one hundred and thirty-one), notice thereof shall be immediately given to the French counsel or agent, and the claimants in such cases shall take their rebutting testimony within thirty days from the day such notice is given.

"V. It is ordered that in the cases closed by claimants June 30 1883 (which are estimated at one hundred and nine) the counsel for the United States may have till the 3d day of January for the taking of the

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testimony. On that day the taking of testimony for the United States must close in all of those cases.

"In all other cases the counsel for the United States may have to and inclusive of the 3d of February to take testimony on behalf of the United States. On that day the taking of testimony on behalf of the United States must close.

"From this date to the 3d of February the time is appropriated to the taking of testimony by the United States. And the claimants are not permitted to take testimony either in chief in support of their claims or in rebuttal, except in rebuttal in the one hundred and thirty-one cases above mentioned, when notice is given by the United States counsel that the taking of testimony is closed on the part of the United States, or by stipulation with the United States counsel, or, in cases of special necessity, by application to the Commissioners and upon special order.

"After the 3d of February and until the 10th of March the claimants may take testimony in rebuttal. At that time (March 10) their taking of testimony in rebuttal must close.

"From the 5th of February to the 10th of March the counsel for the United States is not to take testimony on behalf of the United States, except by stipulation with the counsel of the French Republic, or in cases of special necessity by application to the Commissioners and upon special order.

"VI. In the one hundred and twenty-six cases in which the claimants have taken no testimony it is ordered:

"That if the claimants intend and desire to take testimony they must present an application for leave to take testimony, must set forth by affidavit the causes of the delay in not taking testimony heretofore, and must show that they have not been negligent therein, and file the same with the secretary and give notice to the adverse government by the 10th day of December.

"The adverse government may have till December 20th to answer the same.

"The case of St. Roman against The United States (No. 703) being of this class, is subject to this order.

"VII. Notice of the time and place of taking testimony, etc., instead of eighteen days, is to be six days for any place within 1,500 miles of Washington, and one day for each 250 additional miles.

"ARINOS.
"GEOFROY.
"A. O. ALDIS."

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CHAPTER XXV.

THE CARLOS BUTTERFIELD CLAIM: CONVENTION BETWEEN THE UNITED STATES AND DENMARK OF DECEMBER 6, 1888.

Agreement of Arbitration.

By a convention signed at Copenhagen December 6, 1888, the United States and Denmark agreed to refer to Sir Edmund Monson, then British minister at Athens, as sole arbitrator, what was described as "the claim of Carlos Butterfield and Company, of which Carlos Butterfield, now deceased, was the surviving partner, for an indemnity for the seizure and detention of two vessels—the steamer *Ben Franklin* and the barque *Catherine Augusta*—by the authorities of the island of St. Thomas, of the Danish West India Islands, in the years 1854 and 1855; for the refusal of the ordinary right to land cargo for the purpose of making repairs; for the injuries resulting from a shot fired into one of the vessels, and for other wrongs."

It was provided that the arbitrator should receive "duly certified copies of all documents, records, affidavits, or other papers heretofore filed in support of or against the claim in the proper department of the respective governments," and that each government should at the same time furnish to the other copies of the papers presented by it to the arbitrator. It was agreed that each government should file its evidence before the arbitrator within seventy-five days after its receipt of notice of his acceptance of the position, and that each should be allowed seventy-five days thereafter within which to file a written argument. The arbitrator was to render his award within sixty days after the date at which the arguments of both parties should have been received. The expenses of the arbitration, including the compensation of a clerk at the rate of not more than $200 a month, if the arbi-

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trator should request such aid, were to be defrayed by the two governments in equal moieties.

Notification of the Arbitrator.

December 7, 1888, Mr. Rasmus B. Anderson, by whom the convention was signed on the part of the United States, transmitted it to the Department of State; and on June 6, 1889, Mr. Blaine, who had then become Secretary of State, informed him of its ratification, and observed that the next step to be taken was to notify Sir Edmund Monson and invite him to accept the post of arbitrator. Mr. Blaine suggested that the best mode of performing that act would be for the United States and Denmark to instruct their diplomatic representatives at Athens to address to Sir Edmund a joint note, as was done in the analogous case of the *Masonic*.[1] To this end Mr. Blaine inclosed to Mr. Anderson a draft of a joint note, and, to meet any possible objection, a draft of an identic note also.[2] The Danish minister at Washington, however, suggested that his government might find difficulty in communicating with Sir Edmund Monson through its representative at Athens, who was only a consul. Mr. Blaine therefore authorized Mr. Anderson, if such difficulty should be found to exist, to sign with the Danish minister for foreign affairs a joint note, or to write a separate but identic note, to be sent out from Copenhagen. There was, however, one point, said Mr. Blaine, to be clearly understood, and that was "that the date of the receipt of notice, from which the seventy-five days allowed for the submission by each government of its case to the arbitrator are to be counted, is the date of the receipt by the department for foreign affairs of such government of the notice of the arbitrator's acceptance." The director-general of the Danish department of foreign affairs deemed it preferable to send separate identic notes, in order to avoid the delicate question as to who should sign first. In consequence the Danish minister for foreign affairs and Mr. Anderson, on July 1, 1889, sent to Sir Edmund Monson separate but identic notes, soliciting his acceptance of the post of arbitrator. On the 8th of July Sir Edmund Monson replied, accepting the trust.

[1] For. Rel. 1885, 693.

[2] For. Rel. 1889, 152. When Sir Edmund Monson was originally selected as arbitrator, he was British minister at Copenhagen. When the convention was signed, he had been transferred to Athens.

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Antecedents of the Claim.

The history of the claim thus agreed to be submitted to arbitration was peculiar. On February 2, 1855, Mr. Marcy, who was then Secretary of State, called the attention of M. Bille, the Danish chargé d'affaires at Washington, to an "outrage" committed on the 21st of the preceding December "by the officer commanding the forts at the island of St. Thomas, Danish West Indies, by firing upon the American steamer *Benjamin Franklin*, which had been regularly cleared at the custom-house." Mr. Marcy said that a detailed statement of the occurrence had been communicated to the Department of State by the commercial agent of the United States at St. Thomas, who represented the attack upon the steamer as having been entirely unprovoked; and he expressed the hope that M. Bille might be in possession of facts which would "serve to exculpate or palliate the conduct of the officer by whose orders the act of violence adverted to was committed." On the next day M. Bille communicated to Mr. Marcy a report on the occurrence from the authorities at St. Thomas, and the matter was not then further pressed.

May 4, 1860, Mr. Cass, as Secretary of State, transmitted to Mr. James M. Buchanan, then minister of the United States at Copenhagen, a letter from an attorney in the city of Washington, accompanied with a mass of papers, relating, as Mr. Cass said, "to a claim of Messrs. Carlos Butterfield & Co. against the Government of Denmark for damages, losses, and expenses occasioned by the alleged unlawful acts of the public authorities of the island of St. Thomas in detaining, etc., the steamer *Benjamin Franklin* and bark *Catherine Augusta*, vessels belonging to them. In order that you may have in your possession," continued Mr. Cass, "everything necessary to a full understanding of this claim, which you are instructed to present without delay to the Government of Denmark, I transmit, in addition to the papers mentioned above, a copy of a brief correspondence which took place in 1855 between the late Secretary of State and the Danish chargé d'affaires in this city on the subject of the firing into the *Benjamin Franklin*." This was the whole of the instruction. The "brief correspondence" referred to consisted of the notes of Mr. Marcy and M. Bille, to which we have adverted.

On June 20, 1860, Mr. Buchanan presented the claim to the Danish Government, and in so doing stated among other things

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that "the bark and the steamer were detained on one pretext or another by the authorities at St. Thomas from about the time of their arrival, in the month of September 1854, until the time of their departure, in the month of May 1855." This statement betrayed a misconception of the evidence. The attorney by whom the papers were laid before the Department of State described the claim as one for damages for "the detention of, and other acts of aggression in relation to," the vessels in question. He did not venture to say that they had been detained for any particular period. The instructions to Mr. Buchanan merely referred to the "detaining, etc.," of the vessels.[1]

By a note of August 10, 1860, the Danish minister of foreign affairs denied that his government had incurred any liability; and the claim slumbered till May 2, 1866, when Mr. Seward, as Secretary of State, inclosed to Mr. Yeaman, then minister of the United States at Copenhagen, a statement presented by some attorneys in New York, and directed him to "recall the attention of the Danish Government to the subject." Mr. Yeaman did so on the 20th of the following August, in an energetic note to the minister of foreign affairs, with which he inclosed a copy of the statement of the New York attorneys. In this statement the claim was estimated at $301,814.08, exclusive of interest. Again the Danish Government denied any liability. But before its reply was made Mr. Seward, in acknowledging the receipt of a copy of Mr. Yeaman's note, observed that while his "argument in favor of the claim" was "luminous and strong," "no definitive opinion upon the subject" could be formed till the answer of the Danish Government should have been received.[2]

[1] H. Ex. Doc. 33, 45 Cong. 3 sess. 10.

[2] Id. 71. Mr. Seward's general attitude on the subject may be inferred from the following letter, in relation to an analogous case:

"DEPARTMENT OF STATE,
"*Washington, September 6, 1867.*

"Messrs. R. P. BUCK & Co., *New York.*

"GENTLEMEN: I have to acknowledge the receipt of your letter of the 4th instant, in relation to the extended detention at the island of St. Thomas of a cargo of implements of war shipped by the bark *Patmos*. In order to comply with your request for an answer in season for the St. Thomas mail of the 7th instant, I am obliged to speak from imperfect information, and therefore confine myself to saying that you will do well to govern your conduct by the expectation that the United States will be

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The claim remained without further action till June 23, 1869, when Mr. Fish, as Secretary of State, in a note to the Danish minister at Washington, referring to the fact that the claim had been twice presented and twice rejected, proposed arbitration of it. The Danish minister promised to bring the proposition to the knowledge of his government. In April 1874 the Department of State informed Mr. Cramer, then minister of the United States at Copenhagen, that it had not as yet been advised of the intentions of the Danish Government, and instructed him to renew the proposition. The Danish Government endeavored to show that the claim should be withdrawn; and, although the claimants afterward sought to obtain some action by Congress,[1] the correspondence had been suspended for nearly twelve years when, in a note of February 18, 1886, Mr. Rasmus B. Anderson, then minister of the United States at Copenhagen, renewed, under instructions, the proposal of arbitration, which the Danish Government at length accepted.

The Alleged Seizure and Detention.

By the evidence in the case it appears that the steamer *Ben Franklin*, of 813 tons, and the bark *Catherine Augusta*, of 351 tons burden, were cleared at New York in September 1854 for the port of St. Thomas in the Danish West Indies. Though the real proprietors were Carlos Butterfield & Co., the vessels were cleared in the name of J. N. Olcott, who, "as a matter of convenience," held the title and appeared in the registry and clearance as owner. Prior to her departure from New York the *Ben Franklin* was seized, on the application of the Venezuelan consul, on the ground that she was engaged in a hostile expedition, in violation of the neutrality of the United States. The *Catherine Augusta* had left New York on the 2d of September laden with cannon, muskets, and munitions of war. The *Ben Franklin* was seized by the Federal authorities at New York on the 13th, when on the point of departing. A civil war in Venezuela had not long before been brought to a close, and it was

very slow to dispute the right of Denmark to construe her neutral obligations as requiring her to prevent the departure of articles contraband of war stored in one of her ports without ample security against their being conveyed to a belligerent engaged in hostilities with a power with which Denmark is at peace.

"Your obedient servant, WILLIAM H. SEWARD."

(MS. Dom. Let. vol. 77, p. 71.)

[1] H. Report 672, 46 Cong. 2 sess.

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a matter of common report in the American press, both in the United States and elsewhere, that General Paez, the leader of the unsuccessful party, who had sought refuge in the United States, was fitting out an expedition there for the purpose of renewing the contest. It was suspected that the two vessels in question constituted the expedition, and that its preparation for hostilities would be completed by the transfer of an armament from the *Catherine Augusta* to the *Ben Franklin* at some place outside of the United States. After a brief detention however the *Ben Franklin* was discharged by reason of the infirmity of the complaint; but she was required to give bond in the sum of $20,000 as a guaranty that her destination was not illegal. She cleared for St. Thomas September 19.

The *Ben Franklin* arrived at St. Thomas on the 29th of September and the *Catherine Augusta* on the next day. Under the circumstances the latter vessel would not have been permitted to enter the port if she had not been in distress. But on her way from New York she had encountered heavy weather, and had suffered considerable damage. Her mainmast was sprung so that it could not be repaired; many of her sails were split or blown away; her jib boom was gone; her rigging was badly injured, and some of her yards and topmasts required to be replaced. A survey was made by two American shipmasters, and on the 9th of October they recommended that the cargo should be discharged in order that the necessary repairs to the vessel might be made. It does not appear that permission to land the cargo was then applied for. But on the 15th of October Mr. H. H. Berg, the governor of the island, addressed to Mr. Ruhl, the acting commercial agent of the United States, the following letter:

"GOVERNMENT HOUSE, ST. THOMAS,
"*October 15, 1854.*

"SIR: I consider it a duty due to an Agent of a friendly nation to inform you that communication has been made to me on the part of the Republic of Venezuela relative to the 2 American ships, the Bark *Catharine Augusta* (partly laden with ammunition of war) and the Steamer *Benjamin Franklin*, lying in this harbor, namely that the ultimate intention of their voyage is hostile to the peace and tranquillity of the said Republic.

"As this Government cannot permit its subjects aiding, abetting, or countenancing undertakings which tend to disturb the peace and tranquillity of any *amical* nation, orders have been given to exact a security which preliminary has been

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fixed at $20.000, from the consignees of the vessel Messrs. Moron & Co., that no such illegal expedition be carried out, and until the security is given they are interdicted having anything to do with the said vessels and their cargoes, at the same time and until the security is given the police is ordered to prevent all Danish subjects from aiding or repairing the ships.

"Having made you this communication I have no doubt that also you on your part as acting commercial agent of the United States, will take all the measures which may be in your power to prevent effectually any traffic with said ships or cargoes, contrary to the rights as well as to the duties of peaceful nations.

"I have the honor to be, sir, your most obt svt,

"H. H. BERG."

The purport of this letter was that the Danish authorities, having been advised on the part of Venezuela that the destination of the vessels was hostile, required of the consignees at St. Thomas, as a condition of permitting the vessels to be fitted for sea, a pledge that they would not carry out the illegal design in which they were suspected of being engaged. And in this relation it is proper to advert to the coincidence that on the 9th of October Mr. Eames, then United States minister at Caracas, addressed a letter, a copy of which he duly communicated to the Department of State, to Mr. Helm, the United States commercial agent at St. Thomas, saying that on the preceding day the minister of foreign affairs of Venezuela had informed him that he had just received intelligence from the Venezuelan consul at St. Thomas that a steamer and "two other vessels" had arrived there from the United States with arms and munitions of war intended to be introduced into Venezuela in aid of the revolutionary movements which had lately taken place in that country. From the same source the minister of foreign affairs said that he had learned that another steamer was expected soon to arrive at St. Thomas with the same object, and that he feared that all or some of the vessels formed part of a military expedition set on foot in the United States against the Government of Venezuela. Mr. Eames replied that he had no information on the subject, except that he had understood that there were private letters in Caracas from St. Thomas stating that all idea of a military expedition at that time against Venezuela by the friends of General Paez had been abandoned.[1]

A reply to Governor Berg's letter was made on the 19th of

[1] H. Ex. Doc. 33, 45 Cong. 3 sess. 3.

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October by Mr. Helm, who had been temporarily away from his post on leave of absence. At this time Mr. Olcott, the ostensible owner of the vessels, had arrived at St. Thomas, and the reply obviously was written after a conference with him, as well as with the other parties interested. It was as follows:

"COMMERCIAL AGENCY OF THE U. S. OF A.
"AT THE ISLAND OF ST. THOMAS,
"*Oct 19th, 1854.*

"SIR: I have the honor to acknowledge the receipt of your communication of the 15th instant to Mr. Ruhl, then acting Commercial Agent of the United States of America, at this Island, on the subject of the two American vessels, to wit the Bark *Catharine Augusta*, and the steamer *Benjamin Franklin*, in which you say "you have received information that the ultimate intention of their voyage is hostile to the Republic of Venezuela." I have the gratification to say in reply, that whatever may have been the original intention of the parties in the embarkation of these two vessels, that I have assurances upon which I rely, *that there is now no hostile intention on the part of the owners or agents of these vessels towards any Government or nation whatever.* It affords me great pleasure to say further, that I will co-operate with your Excellency in preventing any breach of the Laws of Nations, treaties, or any interruption of the friendly relations existing between this Government and the United States as well as all friendly nations.

"The conditions you require previous to the repairs being done to the Bark are not objectionable in any degree; yet it is the opinion of the owner, Captain, Consignee, and a survey of competent American shipmasters, that the Bark which is in distress cannot be repaired without discharging her cargo, which consists of Ammunition, Cannon, Guns, &c. &c.

"The parties propose to execute the bond you require with the additional condition that no part of it will be removed after being landed, without your consent, which of course would not be given until you were fully satisfied of its legal and peaceful disposition.

"I therefore very respectfully ask that upon the execution of the bond aforesaid, which in my opinion is ample guarantee to this, as well as to the Government which I have the honor to represent, at this Island, that no injury can be done either to the Venezuelan Republic or to any other nation, that permission be given for the discharge of the cargo and repairs necessary to place the Bark in a seaworthy condition.

"I have the honor to be very respectfully your obt. servt.,
"CH. J. HELM,
"*U. S. Coml. Agt.*

"To His Excellency H. H. BERG
"*Governor of the Island of St. Thomas.*"

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Several points in this letter are to be noted: (1) That the original unlawful destination of the vessels was not denied; (2) that the conditions prescribed by Governor Berg in respect of the repairs of the *Catherine Augusta* were conceded by the parties in interest to be unobjectionable; (3) that they themselves proposed to add to the bond the condition that no part of the cargo should be removed without satisfactory assurance being given of its lawful disposition; and (4) that Mr. Helm considered it proper to cooperate with the colonial authorities in order that the neutrality of Denmark might not be violated by the citizens and vessels of his nation. These points were also prominently brought out in a dispatch from Mr. Helm to Mr. Marcy of November 30, 1854. In this dispatch Mr. Helm stated that when he returned to St. Thomas he found there the vessels in question, one in ballast and the other loaded with cannon, muskets, and ammunition, "which," observed Mr. Helm, "I presume, were originally destined for the revolutionary party in the republic of Venezuela, but which expedition was abandoned before they sailed from New York, as I have every reason to believe." The authorities had, he said, refused to permit the cargo of the bark to be discharged till his arrival, when the governor agreed that it might be done under his supervision. "The cargo was then discharged by me," added Mr. Helm, "and an inventory taken, and is not to be removed from its place of storage until the governor of this island and myself shall be satisfied that it goes in a legal and proper channel."[1]

The cargo, consisting of 18 cannon, 5,000 muskets and other arms, 600,000 cartridges, and 5,000 pounds of powder, was stored partly in the warehouses of the consignees and partly in those of the government, and the repairs of the bark were proceeded with; but they were not completed till the 19th of December, and the bark was not pronounced seaworthy till the 20th. Permission, however, to reload the cargo was not then asked for, the reason being that neither the vessels nor the cargo had been disposed of. By the papers presented to the Department of State by the Washington attorney in 1860 it appeared that on September 18, 1854, Mr. Olcott, being then in New York, sent to Mr. José Gener, in the city of Mexico, a power of attorney, with the statement that he was "desirous of a market for the sale of two vessels, with their equipments, such as clothing for soldiers, muskets, ammunition, etc." He

[1] H. Ex. Doc. 33, 45 Cong. 3 sess. 5.

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said that he was about to sail for St. Thomas, "hoping to find a market there for these vessels and their cargoes," which he then described. "At the same time," added Mr. Olcott, "I wish to see what can be done in Mexico with them. Probably you may be able to sell them to that government for war vessels, as they are well calculated for that purpose. You are authorized to sell them, with all their appurtenances, for $500,000 * * * If I should be able to effect an operation (for I intend to offer them for sale to St. Domingo, Venezuela, and other neighboring governments), I shall take care that it will be conditional until I hear from you." It seems that in the latter part of October Mr. Gener offered the vessels and cargo to the Messrs. Cammet & Co., of the city of Mexico, for the Mexican Government; that on the 10th of November the Messrs. Cammet & Co. made a proposition, but a week later withdrew it on the report that the vessels had been "detained" at St. Thomas as "suspicious;" that the negotiations were afterward renewed, but were broken off when news was received of the firing on the *Ben Franklin;* and that on March 31, 1855, Gener wrote that he had sold the vessels and cargo to the Mexican Government, but at a price greatly below what he could have obtained for them but for the occurrences at St. Thomas. He considered that those occurrences had "prejudiced the interest of Mr. Olcott to the amount of at least from $250,000 to $350,000."

It was not till May 7, 1855, that Mr. J. T. Pickett, as attorney for Mr. Olcott, informed Governor Berg that he had received instructions to dispatch the vessels to Mexico to be incorporated into the Mexican navy, and asked for permission to reship the cargo. Governor Berg objected to the documents which accompanied the request on the ground that, being witnessed only by a Mexican notary, they were not legalized according to the laws of Denmark; and he also referred to the bond given by the Messrs. Moron & Co., which could not, he said, be renounced till proof was given that the vessels and cargo had arrived at a lawful destination. On the 9th of May, however, on Mr. Helm's assurance as to the legal destination of the cargo, he allowed it to be reshipped. This task was completed on the 19th of May, when a question arose as to the payment of duties. In their bond to the governor the Messrs. Moron & Co., as consignees of the cargo, agreed to pay duty on it in the event of its being exported for the account of others than the

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original owners. Mr. Pickett contended that the sale was not to be complete till the delivery of the vessels and cargo in a Mexican port, and therefore that no duty should be exacted. The attorneys of the claimant in 1866, in their statement to the Department of State, said: "The papers do not show how this dispute was terminated, but a clearance was finally granted, dated the 26th of May 1855."[1] The Danish memorial to the arbitrator stated that the question was "settled in conformity with the wishes of the owner." As the claim never embraced any specific item for duties, the statement in the Danish memorial seems to have been correct.

Such was the "seizure" and the seven months' "detention" of the *Ben Franklin* and *Catherine Augusta*. They were sent to St. Thomas, according to their own account, for a market. As security against a violation of the neutrality of the port, they were required to give a bond, which was furnished by their consignees, not to carry into effect an alleged unlawful expedition. After the repairs of the *Catherine Augusta* were completed, they remained five months in port, awaiting a sale.

The Firing into the Ben Franklin.

While the vessels were thus lying in the port of St. Thomas the *Ben Franklin* was chartered by the "Royal British Mail Steam Ship Company" for a voyage to Barbados and return. When starting out on this voyage, she was fired into under circumstances which may be briefly narrated. The port of St. Thomas is on a bay formed by two points of land projecting into the sea. At the base of the bay are the town and the fort, while on each point there is a battery, that on the left being known as the *Prinds Frederick* and that on the right as the *Mühlenfeldt*. According to the regulations of the port, the master of an outgoing vessel was required, after obtaining his clearance at the custom-house, to have it visaed at the fort. Ordinarily this was sufficient, but by a regulation which had been in force for many years no vessel, even though her clearance had been visaed, was allowed to leave the port after sunset without a special permit, called a night pass. Whenever such a permit was granted, information of its issuance was at once communicated to the Prinds Frederick battery, in order that the vessel on giving her name might be permitted to depart. If no such permit had been granted, the fort was directed to

[1] H. Ex. Doc. 33, 45 Cong. 3 sess. 64

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stop the vessel, first by two shots, one forward and the other aft, as a warning, and then, if those were not heeded, by others directed at her until she should lie by. To this regulation men-of-war obviously were not subject, and the vessels of the Royal British Mail Steam Ship Company were specially exempted from it by a royal Danish ordinance of September 11, 1840, which placed such vessels on the same footing as men-of-war. In the present case the *Ben Franklin* had been chartered by the superintendent of the company for a single voyage. The company's signal flag was given her, but she sailed under American colors, and no application was made to the Danish authorities to accord her the privilege enjoyed by the company's ships. She was cleared in the ordinary way, and no night pass was demanded. On her way out at night she was hailed. It was asserted in behalf of the steamer that she stopped on the first shot being fired. This the garrison denied. At any rate four shots were fired, the third one of which passed through the cabin of one of the passengers, fortunately injuring no one. The Danish authorities placed the blame on the superintendent of the steamship company, because of his neglect to apply for a night pass or for exemption from the requirement. In behalf of the ship it was maintained that, as it was well known at the fort and at the custom-house that the vessel had been chartered by the company, the garrison should have been notified.

The incident was brought by Mr. Marcy to the notice of the Danish minister at Washington, with the result which has already been indicated. It was also made the subject of energetic representations by the British Government, through its minister at Copenhagen, who asked for full reparation to the owner for the damage done to the steamer, and also for the suitable punishment of the offenders. The Danish Government denied any liability in the matter, maintaining that the privilege of going out at night without a pass could not be claimed by a vessel temporarily in the service of the steamship company except under a special permission of the authorities, and that this was conceded in the case of the *Ben Franklin* by her obtaining a clearance at the custom-house and an acquittance at the fort, from all which things the boats of the company were exempt.

Immediately after the occurrence a military court of inquiry was organized at St. Thomas for the purpose of making an

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investigation. The harbor master, who also was in the service of the steamship company, stated that before noon on the 21st of December he was informed that the steamer *Ben Franklin* had been chartered by the English company to carry to Barbados the mails, merchandise, and passengers which had arrived by the packet from Europe; that not long afterward a soldier from the fort came and said that, as the *Ben Franklin* had shifted her position, it was supposed that she was going to leave port, but that the fort had not been advised of her intended departure, and that in reply he requested the soldier to say that "the steamer's commander should have reported before he left his anchorage, but he is only at present going alongside the steamer from Europe to take on board mails and passengers for Barbados, being chartered for the company's account, and will be cleared as usual by the consignee."

Major Castonier, the commandant of the fort, stated that when, on the morning of the day in question, the steamer seemed about to leave without having been cleared at the fort, the sentinel at the battery asked whether he should stop her by firing. He answered in the negative, but directed him to hold himself in readiness, and at the same time sent a man to the harbor master to inquire whether the ship intended to depart. The reply he received was that "the steamer had placed herself alongside of another steamer in order to take on board some passengers, and would then apply to the fort for clearance." Nothing was reported to him as to her taking merchandise and mails, nor as to her having been chartered by the English company. After he heard the firing in the evening, the first lieutenant, Baron de Rosenkrantz, arrived at the fort and said that he had heard in the town that the steamer would take the mail and passengers of the Royal British steamer *Parana*. In consequence he ordered the boat at once to be sent from the port to the battery to learn why they had fired, and to order them not to arrest the *Ben Franklin* if she should attempt to leave. The distinctive flag of the English company's steamers served as the distinctive flag of a large number of other vessels. The fact that the American steamer had raised the flag had not attracted the attention of anyone at the fort.

Various other witnesses testified to the same effect. The commandant at the battery testified that when he fired he could not see the flag of the *Ben Franklin*, and that he knew

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nothing of her being chartered to the English company; but that, as he had seen her emitting smoke in the afternoon, and had not been informed that she had a night pass, he conceived the idea that she intended to slip out at night.

The injury to the steamer was temporarily repaired the next morning, and she made the voyage to Barbados, returning in about twelve days.

Argument in Support of the Claim.

The argument before the arbitrator in support of the claim was prepared and signed by the attorneys,[1] and was formally transmitted by the Department of State to Sir Edward Monson through the United States minister at Athens. It claimed indemnity for the following acts:

"First. The seizure and detention of the American bark *Catherine Augusta*.

"Second. The refusal to her of the ordinary right to land her cargo for the purpose of making repairs, and herein of the exaction of unusual, onerous, and illegal conditions.

"Third. The seizure and detention of the steamer *Ben Franklin*.

"Fourth. The wrongful firing of a shot into the last-named steamer and the injuries resulting therefrom."

In support of this claim the argument stated that "Carlos Butterfield, a citizen of the United States, a merchant of high standing both in the city of New York and the city of Mexico, who had had large dealings with the Government of Mexico with respect to the building and fitting out of ships of war for that government, had, as early as the month of May 1854, months before the departure of the two vessels in question from the port of New York, visited the city of Mexico for the purpose, among others, of effecting a sale of those vessels to that government;" that, "being referred by that government to Cammet & Co., who were then buying vessels and munitions of war and army and navy supplies for the government, he made a verbal contract with that firm for the sale of the two vessels named, with equipments, together with specified kinds and quantities of arms and other munitions and materials of war, for the sum of $500,000;" and that, "returning to New York, he there concluded his negotiations for the purchase of these vessels and cargoes as stipulated in the verbal agreement, registering them in the name of John N. Olcott, his

[1] Messrs. McDonald, Bright, Fay, and Merriam, of Washington.

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agent, as a matter of convenience, the latter holding the legal title of the vessels for the benefit of Carlos Butterfield & Co.;" and that they "were properly and legally cleared from the port of New York and dispatched for the port of St. Thomas, from whence they could most conveniently be delivered to the Mexican Government should the negotiations then in progress with Cammet & Co. be successfully and formally concluded." The argument further alleged that upon the arrival of the *Catherine Augusta* at St. Thomas she was denied the right to land a part of her cargo in order that she might make repairs; that before she was permitted to receive aid the governor "exacted from her owners a bond in the extreme penalty of $20,000, notwithstanding which he afterward refused her the right to reload her cargo and detained her for a long period of time, exacting duties upon the cargo;" * * * that he "still further detained the vessel until the 26th of May 1855, when, damaged by the seaworms prevalent in that port during her detention, she was permitted to proceed;" and that, besides the damages sustained by the bark by reason of her detention, a "more serious damage" was incurred in consequence of "the loss of the sale of the vessel to the Mexican Government, caused by the delay and the suspicions attaching to her from her seizure by the Danish authorities;" that the *Ben Franklin*, on arriving at St. Thomas, "shared the detention of the *Catherine Augusta* as a suspected vessel, and was compelled to await the release of the latter in order to fulfill the conditions of their joint delivery;" that in the mean time she was fired on and injured; and that on her return from Barbados "she was, notwithstanding that every effort was made to secure her release, still further detained till the 26th day of May 1855, when, in a damaged condition, caused by seaworms in the harbor during her detention and by the effect of the shot, she was finally released and permitted to depart."

On the basis of these allegations it was argued (1) that the *Catherine Augusta* was not accorded the rights due to vessels in distress; (2) that there was no reasonable ground of suspicion in respect of either vessel; (3) that, even assuming that the cargo of the *Catherine Augusta* had a belligerent destination, this circumstance would have involved merely a dealing in contraband, which neutral governments were not called

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upon to prevent; and (4) that the dismissal of the proceedings against the *Ben Franklin* at New York made the question as to the lawfulness of the destination of the vessels *res judicata*.[1]

Altogether the sum of $272,153.87 was demanded, exclusive of interest, which was claimed from May 26, 1855, to the date of the award. The principal amount was made up as follows: (1) Loss on the sale of the vessels, $185,000; (2) repairs to the *Ben Franklin* at Norfolk and Baltimore, after she left St. Thomas, $38,846.26; (3) repairs to the *Catherine Augusta* at Pernambuco, while on her way from St. Thomas to San Blas, Mexico, $16,863.43; (4) expenses of agents and other costs attending the sale and transfer of the vessels, $6,020.18; (5) expenses, including the wages of the crew, of the *Catherine Augusta* during her detention at St. Thomas, $8,568; (6) similar expenses on account of the *Ben Franklin*, $16,856.

Argument against the Claim.

The argument presented to the arbitrator against the claim was contained in a memorial submitted by the Danish Government. In this memorial it was stated that when the vessels in question arrived at St. Thomas the Crimean war was going on, privateering was still sanctioned by international law, and there was an apprehension that the Russian Government might issue letters of marque to American vessels to capture English and French merchant ships. At the same time preparations were going on in Mexico for an insurrection, which soon afterward broke out, and in Venezuela the recent insurrection, though it had been suppressed, might easily break out anew. Under these circumstances it was the duty of the Danish Gov-

[1] In view of the suggestion that the business of the vessels was at most to be viewed merely as a dealing in contraband—a suggestion which occurs in the diplomatic correspondence—it is proper to notice in a letter of Mr. Gener to the Messrs. Cammet & Co., of October 20, 1854, the following passage:

"I will deliver to you, in the port of St. Thomas, one steamer and a bark of war, they being ready for sea, * * * armed and furnished with provisions and materials of war as follows:

"One steamer, * * * with 1 swivel gun, 24-pounder, reenforced; 6 guns, 24-pounders, on the upper deck; 2 guns, 6-pounders; 1 brass gun, 6-pounder, for signals; 2 howitzers, 12-pounders; powder and other materials of war * * * ; one bark, * * * with 4 guns, 12-pounders; 2 guns, 6-pounders; powder and other materials of war. * * *"

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ernment to exercise the most scrupulous diligence in a maritime center so important as St. Thomas, and it was doubly bound to do so in regard to the vessels in question, which were publicly reported to have left New York with the intention of arming themselves illegally in foreign territory with the cannon and other war material which the bark carried in her hold. The Government of Venezuela had watched their movements, and through the Danish consul at Caracas, as well as through the Venezuelan consul at St. Thomas, requested the governor of the Danish Antilles to prevent the vessels from leaving St. Thomas, and if possible to seize the arms and munitions which might be found on board. Under these circumstances the governor, in order to guard against the charge that the Danish Government had permitted foreign vessels within its territory to be put in condition to continue a hostile expedition against a friendly state, merely required from the consignees a bond, to the conditions of which the parties readily assented.

One of the chief objections of the Danish Government to the claims was, said the memorial, based on the relatively long time which elapsed before it was presented, as well as on the strange manner in which the United States had in the course of more than thirty years taken up the case and then let it fall. The firing on the *Ben Franklin* was the subject of immediate representations, but the American Government did not press the matter either as to the alleged insult to the flag or as to the demand for indemnity for individuals. Six years later the attention of the Danish Government was called to the detention of the two vessels; but this matter, too, seemed to be abandoned, when it was revived in 1866. Its subsequent reappearances and disappearances, concluding with a suspension of twelve years, showed, continued the memorial, that the parties interested in the case did not consider it well founded. Persons whose testimony was important to the Danish Government were dead. Papers had disappeared, and it was only after a long search and almost by chance that the Danish Government procured the documents relating to the proceedings against the *Ben Franklin* at New York in 1854, some of the judicial archives having been destroyed by fire.

As to the firing on the *Ben Franklin*, the Danish memorial contended that the vessel was not entitled to the privileges enjoyed by the steamers of the English company; that the com-

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mandant at the fort did not know that she was transporting the English mail; that the captain, instead of obtaining a night pass, contented himself with sending the customs clearance to the fort by a clerk, who said nothing about the vessel's being chartered by the English company nor about her going out at night; that the inspector of customs, who was also master of the port, was the only one who knew of the charter of the ship by the company; and that the whole responsibility for the firing on the ship must fall upon the captain conjointly with the superintendent of the company. As to the allegation that the steamer reversed her machinery immediately after the first shot, the Danish memorial said that this assertion was contested not only by the persons who were at Prinds Frederick battery, but also by those at the opposite battery, by the crew of the boat at the quarantine station, and by the captain and second officer of an English vessel anchored in the port, who unanimously affirmed that the steamer kept on her course till after the fourth shot. Assuming it to be the case, however, that the machinery was immediately stopped, but that the ship continued to move, the commandant at the battery could not be blamed for concluding that she did not wish to obey the order, but sought to escape. The Danish memorial also argued that, as the steamer was swift, and as it was impossible in the obscure light to see where the shot fell, the hitting of the vessel was at most an accident for which those who neglected to comply with the regulations of the port alone were responsible.

The Danish memorial, in discussing the legality of the measures adopted by Governor Berg in order to prevent a violation of neutrality, observed that on the American side there seemed to be an impression that the Danish Government had seized and detained the ships on the ground that they were engaged in commerce in arms and munitions of war. This reasoning was erroneous. The vessels and cargo were neither seized nor detained at St. Thomas. If false reports on the subject were circulated in Mexico, Denmark could not be held responsible for them. The governor, whose duty it was to prevent any unlawful expedition against a friendly state, merely required, conformably to the Danish laws, a guaranty of their pacific destination. Moreover, by an ordinance passed in 1817 and renewed in 1854 the importation and exportation of arms for military purposes was forbidden; but, under the circum-

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stances of the case, permission was given to unload the cargo. The ships were at all times at liberty to leave the port without obtaining the consent of the governor. The bond given by the consignees merely stipulated against a violation of neutrality, and, as the claimants declared that such was not their intention, it could not have interfered with their arrangements. The same thing was true as to the condition in regard to the cargo.

Not only was there no seizure nor detention, but the question at issue had nothing to do, said the Danish memorial, with commerce in arms and munitions of war. The vessels were constructed to serve as vessels of war, and one of them, besides having a great quantity of other war materials, had cannon on board intended to arm the other. Nevertheless, the colonial government did not comply with the demand of Venezuela to seize the arms and munitions on their arrival at St. Thomas, but contented itself with asking a moderate security. The Government of the United States had adopted strict rules on the subject of neutrality by the act of 1818, and had made claims against England for the alleged neglect of neutral obligations during the war of secession. By the treaty of Washington of May 8, 1871, a neutral state was required to exercise due diligence to prevent the commission of unneutral acts within its jurisdiction. This was precisely what the Danish Government had done, and it had done nothing more. Its measures were not only legitimate according to the laws of nations, but they were formally acquiesced in by the parties in interest, and were in fact partly suggested by the American commercial agent.

The memorial then discussed the question of damages.

Award. January 22, 1890, Sir Edmund Monson addressed to Mr. Blaine, then Secretary of State of the United States, a note accompanied with his award. The note and award were received at the Department of State February 10. They were as follows:

"ATHENS, *January 22, 1890.*

"SIR: I have the honor to transmit to you herewith my award as arbitrator under the Convention signed at Copenhagen by the representatives of the United States and of Denmark, on the 6th of December, 1888, for the settlement of the claim of Carlos Butterfield and Company.

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"A duplicate of this award will be forwarded to the Danish Government.

"I have the honor to be, Sir,

"Your most obedient humble servant,

"EDMUND MONSON.

"The Honorable JAMES G. BLAINE,

"*Secretary of State, Washington.*"

AWARD.

"The undersigned, Her Britannic Majesty's envoy extraordinary and minister plenipotentiary to His Majesty the King of the Hellenes, having been nominated by a convention signed at Copenhagen on the 6th of December, 1888, arbitrator in respect of the claim preferred by the Government of the United States against that of Denmark for compensation due by the latter to the former on account of the alleged seizure and detention in the years 1854 and 1855 of the steamer *Ben Franklin* and the bark *Catherine Augusta* by the authorities of the island of St. Thomas, in the Danish West Indian Islands, has had before him, and has duly considered, the evidence tendered by the respective parties to the said convention, and has carefully studied the arguments in which the merits of the case are set forth according to the views of the two governments.

"The argument of the United States places the question before the arbitrator as follows: What indemnity is due from the Government of Denmark for losses and injuries growing out of the following wrongful acts committed by the Danish authorities at the island of St. Thomas, West Indies:

"First. The seizure and detention of the American bark *Catherine Augusta.*

"Second. The refusal to her of the ordinary right to land her cargo for the purpose of making repairs, and herein of the exaction of unusual, onerous, and illegal conditions.

"Third. The seizure and detention of the steamer *Ben Franklin.*

"Fourth. The wrongful firing of a shot into the last-named steamer, and the injuries resulting therefrom.

"The argument of the United States contends that, as it is indubitable that a vessel injured by the elements has a right to put into a friendly port for repairs, and a further right to land her cargo in order to effect such repairs, and as it is equally indubitable that a peaceful vessel may not, under ordinary circumstances, be fired into and the lives of those on board imperilled, the mere statement of the case, with regard to the facts of which there is no material divergence in the evidence presented by the respective parties, establishes, under the principles of international law, an indubitable ground

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upon which the claim for indemnity may safely be permitted to rest.

"The Danish Government, on the other hand, argues, in the first place, that, setting aside the original merits of the case altogether, the amount of time which was allowed to elapse before the claim was first presented, and the intermittent manner in which it was subsequently pressed, constitute in themselves a conclusive objection to the validity of the claim.

"It appears convenient to settle this preliminary point at once; and the arbitrator has no difficulty in deciding that, although neither Butterfield and Company nor the United States Government have used due diligence in the prosecution of the claim, and have thereby exposed themselves to the legitimate criticism of the Danish Government on their dilatory action, the delay caused thereby can not bar the recovery of just and reasonable compensation for the alleged injuries, should the further consideration of the merits of the case result in the decision that such compensation is due.

"Those merits depend, as is legitimately stated in the Danish argument, upon the answers which the arbitrator must return to three questions which relate to the legality of the measures adopted by the Danish authorities with regard to the two vessels—measures which, as aforesaid, are described by the argument of the United States as "seizure and detention." The question of the firing upon the *Ben Franklin* will be treated separately.

"The three questions above referred to are—

"(1) Had the local authorities legitimate grounds of suspicion warranting them in taking precautions?

"(2) Is there reasonable ground for objecting to the nature and extent of the measures taken by those authorities?

"(3) Were those measures allowed to remain in force for a longer period than necessary?

"First. The careful consideration of the whole correspondence set forth in the evidence submitted by the respective parties has led the arbitrator to decide the first question in the affirmative, and he consequently declares that the authorities of St. Thomas were warranted in taking precautions to prevent the possible violation of the neutrality of the port by acts of the nature of an equipment of armed vessels intended to operate against a friendly power.

"Second. In deciding the second question, the arbitrator must point out that the words 'seizure and detention' constitute an erroneous description of the measures taken by the Danish authorities. Those measures consisted in exacting from the consignees a bond of moderate amount, for which their personal guaranty was accepted, that the vessels, if allowed to be repaired, would not be employed for purposes of aggression against a power with which Denmark was at peace; and in a subsequent guaranty that the cargo, consisting of

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munitions of war, which had to be landed in order that the ships might be repaired, should not be replaced on board or re-exported without satisfactory proof being given to the authorities as to its destination being a legitimate one, this latter precaution being obligatory on the governor in virtue of the law which forbids the free export of arms. The ships were in no sense seized nor detained, and the precautionary measures proposed by the governor of the island were cheerfully acquiesced in by the consignees and the commercial agent of the United States. The arbitrator is of opinion that these measures were reasonable, and in no sense oppressive, and that they can not be considered to have been extorted under duress.

"Third. It appears from the correspondence that no request for permission to reload the cargo was made to the governor of St. Thomas until the 7th of May, 1855, and that that permission was almost immediately granted; nor is there in the evidence presented to the arbitrator any thing to warrant the presumption that had such a request been preferred at an earlier date it would have been refused. The arbitrator must, therefore, decide that the precautionary measures were not maintained longer than was necessary.

"The conclusions arrived at by the arbitrator on these points will, therefore, have the effect of disallowing all claim for compensation for the measures taken by the Danish authorities at St. Thomas in regard to the vessels *Ben Franklin* and *Catherine Augusta* conjointly.

"There remains the question of the firing upon the *Ben Franklin*.

"The arbitrator is of opinion that the temporary engagement of the steamer by the representatives of the Royal Mail Steamship Company to convey passengers and mails to Barbadoes did not *ipso facto* entitle her to the enjoyment of those privileges accorded by the Danish Government to the regular packets of the company, in virtue of which they were allowed to leave the port of St. Thomas at night without complying with the formalities imposed on all other merchant vessels, including even Danish mail packets. It is clear that the captain of the *Ben Franklin* neglected to comply with these formalities, and consequently the Danish Government can not be fixed with the responsibility of what unfortunately ensued. It is pertinent to add that the assertion that the action of the commandant of the fort was subsequently disapproved by his superiors and that he was dismissed from his appointment is absolutely erroneous.

"The arbitrator has therefore only further to declare that neither in respect of the firing upon the steam ship *Ben Franklin*, any more than in the treatment of that steamer and of her consort, the *Catherine Augusta*, is any compensation due from the Danish Government.

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"In testimony of which the arbitrator has hereto set his hand and seal, in duplicate, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] "EDMUND MONSON."[1]

[1]An appropriate testimonial, in the form of a silver service, was presented to Sir Edmund Monson by the United States and Denmark in recognition of his services as arbitrator. When the subject was first mentioned to him he expressed hesitation as to receiving anything. Mr. Blaine then instructed the minister of the United States in London to join with the Danish minister at that capital in requesting Lord Salisbury to authorize Sir Edmund to accept a testimonial. In this relation Mr. Blaine said: "The propriety of Sir Edmund's accepting a testimonial from the two governments for his voluntary services has never been doubted. It has grown to be a custom in international arbitrations, such as that under the treaty of December 6, 1888, between the United States and Denmark, to recognize the services of the arbitrator by some suitable present, as a voluntary offering on the part of the governments which have profited through his kindly action. And the Department does not recall a case in which the United States Government has been one of the interested parties where this course has not been followed." (Mr. Blaine to Mr. Lincoln, April 19, 1890, MS. Inst. to Great Britain.) This statement was made and is of course to be understood with reference to arbitrators other than the head of a state. Where the arbitrator is the head of a state, the recognition of his individual services is always confined to an expression of thanks, though, where he is authorized to delegate his functions as arbitrator in whole or in part to other persons, it is not unusual to present some other testimonial to the latter.

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CHAPTER XXVI.

UNITED STATES AND MEXICAN CLAIMS COMMISSION: CONVENTION OF APRIL 11, 1839.

Revolutions in Mexico.

August 24, 1821, General O'Donojú, commander of the armies of Spain, and Señor Don Augustin Iturbide, then leader of the movement for Mexican independence, signed at Cordova a treaty of peace by which it was provided that Mexico should be recognized as an independent nation and in future be called the Mexican Empire.[1] On the 14th of the ensuing November a provisional junta invested Iturbide with the title and powers of emperor, and on the 19th of May 1822 the constituent congress declared his election to that office.[2] The Spanish Cortes, however, refused to ratify the treaty of peace, and civil disturbances redoubled the disorders which had previously existed. During the war with Spain the development of party strife had been checked, but no sooner had the struggle for independence practically come to an end than the struggle of parties began. The Loyalists, strongly supported by the Church party, desired to place on the throne Ferdinand of Spain; the Republicans desired the establishment of a federal republic; the Iturbidists, comprising a large part of the army, desired to maintain the government of their chief. October 31, 1822, Iturbide virtually proclaimed himself temporary dictator by dissolving the constituent congress and establishing a representative junta to exist until a new congress should assemble.[3] But his reign was of brief duration. On the 19th

[1] Br. and For. State Papers, VIII. 1238; IX. 431. It was stated in the treaty that the Spanish Government then held in Mexico only the fortresses of Vera Cruz and Acapulco, which had not the means of resisting a well-directed siege.

[2] Br. and For. State Papers, IX. 434, 799.

[3] Id. 802.

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of March 1823 he abdicated the throne and announced his intention to go into exile, and early in the following month the new constituent congress declared his coronation null and void and annulled the acts of his government.[1] On the 1st of the following October, hostilities having been committed by the Spanish governor of the castle of San Juan de Ulloa, at Vera Cruz, while negotiations for independence were in progress between the commissioners of Spain and of Mexico, war was declared against the former country.[2] In 1824 the constitution of the United Mexican States was proclaimed, and General Victoria was chosen as the first President. The first constitutional Congress was installed January 1, 1825.[3] Not long afterward, though the state of war with Spain still continued,[4] revolutionary outbreaks occurred in Durango and other parts of the republic, involving a part of the army.[5] This condition of things soon appeared to become chronic. In the executive messages to the Congress, which, owing to the absences of the President on military duty, were often communicated by the Vice-President, there are constant references to conspiracies, uprisings, and attempted secessions. In the message of April 15, 1830, for example, it is stated that Yucatan had refused to return to the federal system, and that the public peace had been broken in the States of Mexico and Michoacan. Towns had been pillaged and contributions exacted from the inhabitants.[6] At the opening of the Congress on January 1, 1832, it was announced that public order had been restored; but at the close of the session in the ensuing May it was stated that a new revolution had broken out at Vera Cruz on the 2d of January, and that the nation had in the mean time suffered all the evils of a civil war. The occupation by the revolutionists of the custom-houses at Vera Cruz and Tampico had compelled the government to resort to forced loans; and the remittance of dividends on the foreign debt had been interrupted.[7] In this revolution the government was overthrown,

[1] Br. and For. State Papers, IX. 802.

[2] Id. X. 1024–1027, 1070.

[3] Br. and For. State Papers, XII. 878, 983; XIII. 695–701.

[4] The state of war with Spain was not formally terminated till 1836. (Br. and For. State Papers, XXIV. 1085.)

[5] Br. and For. State Papers, XV. 1204.

[6] Id. XVII. 1019.

[7] Id. XIX. 1282.

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and on December 26, 1832, General Manuel Gomez Pedraza assumed the presidency of the United Mexican States at Puebla;[1] but after a tenure of less than six months he was succeeded by Santa Anna, who had begun to play a prominent part in the military and political affairs of the country. On his accession to the presidency Santa Anna declared that his heart had been "overwhelmed with delight at the triumph of liberty."[2] But in a speech at the close of an extraordinary session of Congress in the following December he referred to the perilous crisis in which the country had been placed during the year, saying that a considerable part of the regular army had been seduced, that religious fanaticism had been aroused, and that disorganizing principles had been proclaimed. The nation had been obliged to incur new charges and obligations; but the rebels of the south must succumb.[3] On January 4, 1835, he announced that peace existed over the whole republic. Nevertheless, in the following July an extraordinary session of Congress was called in consequence of the "unjust, imprudent, and rash revolution of Zacatecas."[4] In the same year the insurrection broke out in Texas.[5] In 1838 friendly relations with France were interrupted, and a French naval force blockaded the principal ports of the country and committed other acts of hostility, in consequence of the failure of the Mexican Government to adjust the numerous claims for injuries and losses which French residents in Mexico had sustained in their persons and property.[6]

[1] Br. and For. State Papers, XX. 1129, 1406.

[2] Br. and For. State Papers, XX. 1286.

[3] Br. and For. State Papers, XXII. 1447.

[4] Br. and For. State Papers, XXIII. 269. December 15, 1835, the Congress uttered a constitutional decree defining the rights and obligations of inhabitants of the Mexican territory. (Br. and For. State Papers, XXIII. 257.)

[5] Br. and For. State Papers, XXV. 683.

[6] Br. and For. State Papers, XXVI. 725–1099; XXVII. 1176. March 9, 1839, a claims convention and treaty of peace were concluded, by the former of which Mexico agreed to pay a certain sum of money to France to satisfy the claims of French citizens prior to November 26, 1838. It was further agreed that the question whether Mexican ships and their cargoes, sequestered during the blockade and subsequently captured by the French after the declaration of war, should be considered as legally acquired by capture, should be submitted to the arbitration of a third person. (Br. and For. State Papers, XXIX. 224.)

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Claims of the United States.

The brief allusion in the preceding paragraph to the numerous revolutions in Mexico is not intended to suggest reproach. They had their origin in historical conditions of which the country was the victim—conditions of which it was easy for an unscrupulous man to take advantage, but of which certain general and deep-seated differences of opinion and of interest were the ultimate cause.[1] Nevertheless, they were in their immediate effects deplorable. However desirous the government might be to perform its duty, they rendered it powerless either to prevent the commission of wrongs or to fulfill its promises to repair them. Under such circumstances many persons sufferred actual injury, while a large opportunity was afforded to adventurers. The claims of foreign governments steadily accumulated, while the complaints of their citizens over the delay of redress year by year grew louder. The remonstrances of the United States began as early as January 1828.[2] On January 5, 1835, President Jackson sent to the House of Representatives the first of a series of executive communications on the subject, accompanied with a report from Mr. Forsyth, then Secretary of State. The substance of the report was that the minister of the United States in Mexico had from time to time made various representations to the Mexican Government in regard to the claims of citizens of the United States; that, owing to the disturbed condition of the country, his representations had not been attended with success; but that, in a dispatch written in the preceding October, he had expressed the opinion that, after the meeting of the Mexican Congress in January, the state of affairs would be such as to enable him to conclude in a satisfactory manner the negotiations then pending.[3] In 1836 the Mexican Government sent Mr. Gorostiza as a special minister to the United States, but he terminated his mission in consequence of an order given by President Jackson to General Gaines with regard to advancing his troops under certain contingencies into territory claimed as a part of Texas for the purpose of protecting the frontier from Indian depredations. To this incident President Jackson referred in

[1] The Philosophy of the Mexican Revolutions, by M. Romero, North American Review (1896), CLXII. 33; Mexico: Its Revolutions, by George E. Church, New York, 1866.

[2] H. Ex. Doc. 351, 25 Cong. 2 sess.

[3] H. Ex. Doc. 61, 23 Cong. 2 sess.

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his annual message of December 5, 1836,[1] saying that, while correspondence was thus interrupted, the ancient complaints of injustice made on behalf of citizens of the United States were disregarded, and new causes of dissatisfaction had arisen; but that he hoped by tempering firmness with courtesy and acting with great forbearance upon every incident that had occurred or that might happen, to do and obtain justice, and thus avoid the necessity of again bringing the subject to the view of Congress. On the 6th of February 1837, however, he sent a special message to both Houses of Congress,[2] in which he recommended the passage of an act authorizing reprisals in the event of the Mexican Government refusing to make an amicable settlement upon another demand therefor made from on board of one of the United States vessels of war on the Mexican coast.

The Gorostiza Pamphlet.

The somewhat sudden change in the President's tone was due to the action of Mr. Gorostiza, who had written and sent to the members of the diplomatic corps at Washington a pamphlet reflecting on the course of the United States in respect of Texas. On April 20, 1836, Mr. Gorostiza exchanged with Mr. Forsyth the ratifications of an additional article to the treaty of limits between the two countries for the purpose of securing the completion of the survey of the boundary. Subsequently Mr. Forsyth informed him of the order to General Gaines, to which reference has heretofore been made. The substance of Mr. Forsyth's communication, according to Mr. Gorostiza's own memorandum of it, was that orders would be given to General Gaines to take such a position as would enable him to preserve the territory of the United States and of Mexico from Indian outrages, and the territory of the United States from any violation by Mexicans, Texans, or Indians during the disturbance in Texas; that the troops of the United States would be ordered to protect the commissioners and surveyors of the two governments when they should meet to execute the treaty of limits, and that if the troops should, in the performance of their duty, be advanced beyond the point which Mexico supposed to be within the United States, this was not to be taken as evidence of a desire to establish a claim to territory, but only as a pre-

[1] S. Ex. Doc. 1, 24 Cong. 2 sess.

[2] S. Ex. Doc. 160, 24 Cong. 2 sess.; H. Ex. Doc. 139, 24 Cong. 2 sess.

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cautionary provision, which would be abandoned whenever the disturbances in that region should cease, if the marking of the line should show it to be within the limits of Mexico.[1] Mr. Gorostiza fancied that he discerned in this communication a design on the part of the government to claim territory to which the United States was not entitled, and in his pamphlet he gave free expression to his suspicions.[2] He said that he found at the seat of government few persons who were not interested, actually and materially, in favor of Texas—one because he owned lands, bought at a very low price or accepted as a gift, another because he was engaged in speculation in slaves, provisions, or munitions of war, and yet another because he had friends or relations in the service of Texas; and if anybody in Congress or out of it raised his voice in defense of equity and right, they all charged upon him at once and declared that he was sold out to Mexico. He further declared that he had scarcely arrived in Washington when he was told that at a certain "White House" it had been asserted that the Sabine was not the Sabine, but that the real Sabine was the Nueces; and that, when the time came to exchange the ratifications of the treaty of limits, scarcely had the documents been signed and sealed when the Secretary of State made a communication which "served to dispel in part the mist concealing the deformities in the faintly appearing picture."

Mr. Van Buren's Measures.

The President's message of the 6th of February was referred to the appropriate committee in the Senate and in the House, and on February 24 Mr. Howard made from the Committee on Foreign Affairs a report which, after reviewing the relations between the United States and Mexico, closed with a resolution to the effect that, while the circumstances would warrant measures to obtain immediate reparation, yet, as an evidence of a desire to preserve peaceful relations, the President be requested to make another "solemn demand in the most impressive form" upon the Government of Mexico for redress.[3] This resolution was not acted upon by the House, which expired on the 4th of March; but an appropriation was made for the outfit and salary of a minister to Mexico whenever, in the opinion of the

[1] H. Ex. Doc. 256, 24 Cong. 1 sess.

[2] The pamphlet was sent to Congress by President Van Buren February 26, 1838. (H. Ex. Doc. 190, 25 Cong. 2 sess.)

[3] H. Report 281, 24 Cong. 2 sess.

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President, diplomatic intercouse with that power could be honorably renewed. Acting upon this provision, as well as upon the suggestion contained in the unadopted resolution, the President caused the archives of the legation of the United States in Mexico to be brought to Washington, where they were examined, and where a list was made out of such unadjusted claims as were deemed to be free from doubt. This list, with the papers relating to the fifty-seven claims mentioned in it, was sent to the City of Mexico by a special messenger, who was instructed to make a solemn demand for redress, and also to ask for an explicit and unequivocal disavowal by Mexico of Mr. Gorostiza's act in circulating his pamphlet.[1] These demands were presented to the Mexican Government in July 1837, and in the same month a new minister, Señor Francisco Pizarro Martinez, was accredited to the United States. He brought with him assurances of a sincere desire to arrange all pending differences, and was received with similar assurances.[2]

Opinions in Congress.

In Congress opinions differed as to the course which should be pursued. Mr. Howard, from the Committee on Foreign Affairs, presented a report suggestive of decisive action on the part of the United States. Mr. Cushing submitted a minority report in which he expressed the view that the errors of the Mexican Government were in so great a degree the direct result of the disorders and revolutionary changes induced by her struggle for independence that it became the honor of the United States to receive her overtures with indulgence.[3]

John Quincy Adams presented a series of four resolutions.[4]

The first declared that the just claims of citizens of the United States ought not to be sacrificed or abandoned by the United States; the second, that the existing relations between the two countries would not justify the United States on any principle of international law in resorting to any measure of hostility against the Mexican Government or people; the third, that in the existing state of the relations between the two

[1] S. Ex. Doc. 1, 25 Cong. 2 sess.

[2] Message of President Van Buren, December 5, 1837, S. Ex. Doc. 25 Cong. 2 sess. Satisfactory assurances were subsequently given in regard to the Gorostiza pamphlet. (S. Ex. Doc. 320, 27 Cong. 2 sess. 179.)

[3] H. Report 1058, 25 Cong. 2 sess.

[4] H. Res. No. 6, 25 Cong. 2 sess.

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countries there was nothing that could justify the continued suspension of amicable negotiations between them; and the fourth, that the President of the United States be requested to resume amicable negotiations with the Government of Mexico.

Negotiation of a Convention.

In April 1838 Mr. Forsyth accepted a proposition from Mr. Martinez to enter upon a negotiation for the settlement of the claims by arbitration.[1] The offer was accepted, but definite proposals for a convention were not exchanged till the following August. On the 28th of that month Mr. Martinez presented to Mr. Forsyth a memorandum in which the claims of the United States were divided into three classes: (1) Those in which the principles involved were admitted by both governments; (2) those in which the two governments agreed as to the facts but differed as to points of law; (3) those in which there was no agreement either as to the law or the facts. In order to determine all these claims it was proposed that each government should appoint two commissioners, and that the four so appointed should meet in the City of Mexico; that, wherever they should agree, their decision should be final; but that, where they should not agree, the case should be submitted to an umpire. It was also proposed that special instructions should be given to the commissioners by their respective governments on questions of international law, and that these instructions should embrace two subjects: (1) Losses in consequence of revolutionary movements; (2) indemnifications for denials of justice by the judicial authorities. As to the first subject, Mr. Martinez proposed that the commissioners should be instructed that a government is not responsible for losses incurred in political convulsions unless it has failed to take all the precautions necessary for preserving order; and as to the

[1] April 23, 1838, President Van Buren, in response to a resolution, sent to the House a report from Mr. Forsyth in regard to the alleged attack of a Mexican armed vessel on the American steamboat *Columbia*. Mr. Forsyth had no information on the subject except what he had derived from the newspapers. (H. Ex. Doc. 347, 25 Cong. 2 sess.) May 2, 1838, President Van Buren transmitted to the House a further report from Mr. Forsyth, with a note from Mr. Martinez, explaining the erroneous character of the rumors which had been published. (H. Ex. Doc. 360, 25 Cong. 2 sess.) April 26, 1838, President Van Buren sent to the House a great mass of correspondence relating to the Mexican claims, running back to January 17, 1828. When printed it filled a volume of 821 pages. (H. Ex. Doc. 351, 25 Cong. 2 sess.)

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second, that there should be no responsibility unless the judicial decision was either notoriously unjust or notoriously contrary to the principles of international law. He also proposed that no claim against Mexico should be admitted which arose prior to 1821.

In a memorandum presented to Mr. Martinez on the 31st of August, Mr. Forsyth expressed the opinion that it would be unnecessary to make any classification of claims in the convention, and that, as the commission was to be a sort of joint judicial tribunal, it would not be proper for the commissioners to receive instructions from the executive of either country. He also said that while the existence of documentary proofs in Mexico afforded a plausible reason for selecting the City of Mexico as a place of meeting, yet as the complainants would need the assistance of lawyers, and might at times be required to attend sessions of the board personally, he considered Washington the more convenient place. On the 3d of September he sent to Mr. Martinez an English version of a convention as agreed upon between them, in order that it might be translated into Spanish. On the same day Mr. Martinez proposed to Mr. Forsyth that the United States should join with Mexico in submitting "all complaints, claims, and differences" between the two countries to the King of Prussia. This proposal Mr. Forsyth declined, on the ground that his powers did not extend to anything beyond the claims under consideration, and that the President was of opinion that there were certain causes of complaint directly affecting the national character which did not admit of compromise. This statement referred to the complaints of Mexico touching the attitude of the United States toward Texas.[1] A convention for the settlement of the claims of individuals was signed September 11, 1838.

[1] May 20, 1838, the Mexican Congress adopted a decree consisting of two articles, by the first of which the government was authorized to arrange the claims of the United States by submitting them to arbitration. By the second article, the government was authorized, in case the United States should deny the satisfaction which Mexico should ask, or delay it beyond the time which should be fixed by treaty, or "continue the open aggressions already committed," to close the ports of the nation to the trade of the United States, "to prohibit the introduction and use of its manufactures, to establish a period for the consumption or exportation of those already on hand, and to take all measures required for the purpose and for the safety of the republic." (H. Ex. Doc. 351, 25 Cong. 2 sess.)

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Convention of April 11, 1839.

The convention of 1838 was not carried into effect, in consequence of the failure of Mexico within the prescribed period to authorize the exchange of ratifications. For some time the reason for this failure was a matter of uncertainty. According to one report, it was due to the fact that the minister for foreign affairs was preparing to go to Jalapa to negotiate with Admiral Baudin, the commander of the French forces, and was entirely occupied with that affair. According to another report, it was due to the circumstance that the King of Prussia, who was empowered to appoint the umpire under the convention, had not consented to do so.[1] That the latter was the explanation finally given by the Mexican Government is recited in the convention concluded by Mr. Forsyth and Mr. Martinez April 11, 1839.

By this convention it was provided that "all claims of citizens of the United States upon the Mexican Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State or to the diplomatic agent of the United States at Mexico" prior to the signature of the convention, should be referred to a board of four commissioners, two of whom should be appointed by the President of the United States, by and with the advice and consent of the Senate, and two by the President of the Mexican republic. It was also provided that the board should have two secretaries, versed in the English and Spanish languages, to be appointed by each government in the same manner as the commissioners.

Provision for an Umpire.

In the event of the commissioners differing in opinion in relation to the claims submitted to them, they were required, jointly or severally, to draw up a report or reports, stating in detail the points on which they differed and the grounds on which their respective opinions were formed; and it was agreed that such report or reports, with authenticated copies of all documents on which they were founded, should be referred to the King of Prussia. But as the documents relating to the claims were so voluminous that it could not be expected that His Majesty would be willing or able personally to examine them, it was stipulated that he should appoint a person to act as umpire in his behalf; that the person so appointed should proceed to Wash-

[1] H. Report 320, 25 Cong. 3 sess.

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ington; that his traveling expenses should be paid, and that he should receive as compensation for his services a sum equal to a half of the compensation of a United States commissioner added to a half of that of a Mexican commissioner. In order to carry this stipulation into effect, it was agreed that the plenipotentiaries of the contracting parties should, immediately after the signature of the convention, address to the Prussian minister for foreign affairs a joint note, to be delivered by the minister of the United States at Berlin, inviting the King to appoint an umpire to act in his behalf; and in the event of his declining to do so, it was stipulated that a similar invitation should be extended to Her Britannic Majesty, and in the event of her declining, to the King of the Netherlands.

Provision for Payment of Awards.

Mexico obliged herself to pay the awards of the commissioners and of the umpire; but as it might not be convenient for her to pay at once the sums found to be due, it was provided that the Mexican Government should be at liberty from time to time, as the awards were rendered, to issue treasury notes bearing interest at the rate of 8 per cent from the dates of the awards in payment of which they were respectively issued. The notes were to be receivable for import or export duties at the maritime custom houses of the republic, and were to bear interest till so received; but in order that they might not be presented in such amounts as to produce the very inconvenience which their issuance was designed to prevent, it was stipulated that the government should not be obliged to accept notes for more than a half of any one payment of duties.

Act of Congress.

By an act approved June 12, 1840,[1] provision was made for the appointment by the President of the United States of two commissioners and a secretary, in conformity with the terms of the convention. The salary of each commissioner was fixed at $3,000 a year, and of the secretary at $2,000. The President was authorized to make provision for contingent expenses. All communications to and from the secretary, on the business of the commission, were made transmissible through the mails free of charge. At the close of their labors the commissioners were required to report a list of awards to the Secretary of State; and it was provided that the records of the commission should be deposited in the Department of State.

[1] 5 Stats. at L. 383.

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Meeting of the Commission.

The commissioners were required to meet in Washington within three months after the exchange of the ratifications of the convention. The ratifications were exchanged at Washington April 7, 1840. On the part of the United States, President Van Buren, on June 16, 1840, appointed as commissioners William L. Marcy and John Rowan. The former had already had a long and almost continuous career in the public service, beginning with a command in the New York militia during the early part of the war of 1812, and subsequently extending to various positions in the civil government, among which were those of a justice of the supreme court of New York, governor of the State, and a Senator of the United States. Mr. Rowan also had been a Senator of the United States; and he had served as a judge of the court of appeals and held various other civil positions in Kentucky, to which State he emigrated at an early age from Pennsylvania.

As secretary on the part of the United States, the President appointed Alexander Dimitry, a native of Louisiana, "a man of uncommon culture."[1]

On the part of Mexico, President Bustamente appointed as commissioners their excellencies Pedro Fernandez del Castillo, first comptroller of the general appropriation fund, and Joaquin Velazquez de Leon, first officer of the war and navy department. By their respective commissions each of them was appointed "a plenipotentiary of the Mexican republic" as well as a commissioner.

As secretary on the part of Mexico, President Bustamente appointed Señor Don Lucas de Palacio y Magarola.

Mr. Rowan arrived in Washington on the 8th of July, and Mr. Marcy on the 23d of the same month; and as nothing had then been heard as to the appointment of commissioners by Mexico, they met from day to day, in a room in the building occupied by the Department of State, till the 30th of July, on which day they caused a notice to be published to the effect that they had adjourned till the 17th of August when, if the Mexican commissioners should then attend, the board would organize and proceed to business. Claimants were invited in

[1] Lanman's Biographical Annals, 1876, 121. Mr. Dimitry was once translator in the Department of State, and in 1859 was appointed minister resident to Costa Rica and Nicaragua.

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the mean time to forward their claims and documentary evidence to the Department of State.

On August 17, 1840, the day appointed, the Mexican commissioners having in the mean time arrived, the four commissioners and the two secretaries assembled at the Department of State and presented their commissions and certificates of their oaths.

Question as to Oaths.

By Article I. of the convention the commissioners of the two governments were required to "be sworn impartially to examine and decide upon" the claims laid before them; and by Article II. the secretaries were required to "be sworn faithfully to discharge their duty in that capacity." At the meeting on the 17th of August the American commissioners and secretary presented certificates of oaths taken before a justice of the peace of the District of Columbia. The Mexican commissioners, not having taken oaths before their government, and not feeling at liberty to subject themselves to the laws of the United States, subscribed oaths in the presence of each other; and the Mexican secretary was sworn in the presence of the Mexican commissioners. The American commissioners, doubting the validity of oaths thus administered, submitted on the 19th of August a formal paper in which they argued that an oath in order to be valid must be administered by a public functionary duly authorized to perform that act, and that the Mexican commissioners were not authorized to perform such an act, they being under their commissions invested with power only as commissioners and ministers plenipotentiary, which did not carry with it authority to administer oaths. "The American commissioners," said Messrs. Marcy and Rowan, "have not been able to satisfy themselves that the right to administer oaths is inherent in ministers of even general plenipotentiary powers. Such a power, they are ready to concede, may be specially delegated to such ministers; but if ministers of general plenipotentiary powers might administer oaths in virtue of their official station, it does not follow that ministers with special plenipotentiary powers as to a particular matter would have that authority." The Mexican commissioners on the 21st of August replied that, as the convention did not prescribe the manner of taking the oath, their government had given them special instructions to the effect that they might agree with their colleagues on some mode which would not jeopardize

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"the principles of independence" and "the dignity of both governments." They accordingly proposed that the commissioners proceed to take an oath among themselves. The American commissioners declined this proposal on the ground that they had already fulfilled the requirement of the convention by their oath before the justice of the peace.

The ground on which the Mexican commissioners objected to taking an oath before a judicial authority of the United States was that, by virtue of "their twofold character as commissioners and as plenipotentiaries," which had been conferred upon them by their government and admitted by the United States, they enjoyed "the immunities which the law of nations ascribes to public ministers,[1] one of which is the exterritoriality which embraces freedom from the laws, other than those of the country which they represent." They also defended their administration of oaths to each other on the ground that that mode of taking an oath was in conformity with the laws of Mexico, to which alone they as public ministers were amenable. They stated that by the constitution and laws of Mexico the President of the republic possessed the power, with the consent of his council, to make *regulations* for the fulfillment of the laws; that in the exercise of this power he might regulate the administration of oaths and delegate the power to receive them; and that, as he had instructed the commissioners to agree with their colleagues as to the administration of the oath required by the convention, which was a law in Mexico, the oath they had taken was valid according to the laws of their country. At the same time they reiterated their readiness to transmit in writing their oath to their government, and to file with the commission a copy of their communication to the minister of foreign relations.

On the 22d of August the American commissioners, while reaffirming their opinion that the authority to administer oaths was not included in a plenipotentiary power, either general or special, unless expressly included in it, expressed their satisfaction with the statement of their Mexican colleagues "that, according to the organization, constitution, and laws and usages of Mexico, the President of that republic has the right of delegating the power of administering oaths to the foreign ministers and agents of that government; and that the terms of their commissions would be construed in Mexico to

[1] Marten's Diplomatic Guide, Art. 12, Cap. I.

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convey the power which they claim here in reference to their oath, and to give validity to its exercise." This expression on the part of the American commissioners would have disposed of the question of oaths, if it had not betrayed a certain misapprehension as to the precise position of the Mexican commissioners. This position the latter sought to clarify by submitting on the 25th of August a formal memorandum, in which they declared that they had "never sought to establish, as a principle, that the power of plenipotentiaries, general or special, involves the authority to receive oaths;" that they concurred with their American associates in the opinion "that this authority can only be the effect of a subsidiary act;" but that they found such an "act," "not in their powers, but in the special instructions which they have received in the matter in question, and the purport of which they have communicated to the commissioners of the United States of America."

With the reading of this memorandum the question was closed, the American commissioners admitting the oaths which the Mexican commissioners and their secretary had taken.[1]

Organization of the Board.

The commissioners then declared themselves duly organized as a board, and authorized the secretaries jointly to give public notice of the fact. It was further resolved that the minutes of the proceedings should be approved from day to day, and that the joint signatures of the secretaries should be a due authentication of the fact. The secretaries were also directed to inform the secretaries of state of their respective governments of the readiness of the board to receive communications relative to the subjects falling within the sphere of its duties; and after agreeing as to the appointment of messengers,[2] the commissioners adjourned to the 27th of August. They did not meet again however till the 28th, when they held their first session as a board for the transaction of business. On that day they received from the Acting Secretary of State of the United States "all the documents in the possession of the

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 93–101. December 21, 1840, the Mexican commissioners presented a communication from the department of foreign relations of Mexico, of October 8, sanctioning the oath they had taken.

[2] January 8, 1841, the board appointed a clerk to each secretary at a salary of $1,500, subject to the Mexican government's approval of the allowance, which was duly given, as a proper contingent expenditure. (S. Ex. Doc. 320, 27 Cong. 2 sess. 162.)

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Department of State" relating to the claims to be adjusted, together with a list thereof which the secretaries were requested to sign and return as a receipt.

Appointment of Umpire.

The King of Prussia, having been duly requested to appoint an umpire, designated for that office Baron Roenne, then minister resident of Prussia at Washington. On the 29th of August the secretaries, by direction of the commissioners, addressed to him a joint note, which was communicated both in English and in Spanish, duly informing him of the board's organization.

Controversies as to Functions and Procedure.

At a meeting of the board on the 31st of August, the American commissioners, after an exchange of views with their Mexican colleagues, presented the following project of rules for the government of procedure:

"1st. The board will commence its session at 10 a. m., and sit till 3 p. m. And will designate in the minute of each adjournment the day when it will sit again.

"2nd. The board will take up the cases in alphabetical order, and conclude their consideration of the cases, in the order in which they are taken up, unless their consideration shall be suspended, or postponed for further proof, or some other reasonable cause, and so of the cases successively.

"3rd. The members of the board will consider each case, and the facts necessary to the just decision of it, in a judicial, and not in a forensic or diplomatic spirit; and in their consideration of it, in order to expedite business, will interchange their opinions and reasonings, verbally and informally, in the view of arriving at a full and fair understanding of the case, resorting to written communications and arguments only in the discussion of important principles, or matters affecting the merits of the case, and will make out their definitive opinions and arguments in support thereof in writing, under their hand and seals, according to the requirements of the convention. In settling the minutes of the proceedings, the board shall determine what part of the written arguments, or opinions, shall be written therein.

"4th. The claimant when he, or she, asserts the claim by agents, shall, when required, present to the board a succinct written narrative of the facts, in both the English and Spanish languages, upon which the claim is based, and a translation into the English or Spanish language of all documentary proof, relied upon for its support, and those of the English into the Spanish, and those in the Spanish language into the English, and all the motions made by such claimants shall in like manner be made out in writing, in the two aforesaid languages, and so of the reasoning in support thereof and of the main case.

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"5th. The position of the members of the board, in relation to each other, during the session, shall be selected by themselves, with an eye to their ease and convenience, without indicating any inequality, the slightest, between them; they considering themselves personally equal, in their functional character, and so of their secretaries.

"6th. Should questions of an incidental character arise, in the progress of their consideration of the cases, they will discuss and dispose of them according to the principle of the 3rd of the foregoing rules.

"7th. The casual absence of any one of the American or Mexican Commissioners shall not prevent the meeting of the board; the consideration or discussion of matters before it may proceed, but no final decision shall be made without the presence of a full board.

"8th. If it so happen that a meeting of the board shall not be formed at the time to which it shall have been adjourned, those present, or any one in the absence of the others, shall specify the time of the next meeting thereof, selecting the earliest period at which there is a prospect for forming a board.

"JOHN ROWAN
"W. L. MARCY."

On the 2d of September the Mexican commissioners set forth their views in a counter project. To the first and fifth rules they assented. The sixth they considered as included in the third, and therefore superfluous. They accepted the seventh in its "essence," with the proviso that, if the absence of one or two of the members of the board should be necessarily prolonged beyond eight days, some mode of supplying his or their vote and signature should be agreed on in order that the conclusion of the business might not be impeded. The eighth rule they considered unnecessary. To the second, third, and fourth rules, relating to the order of examination of claims, the character of the commissioners' functions, and the right of the claimants to have immediate access to the board, they objected.

Order of Examination of Claims.

For the alphabetical order in the examination of claims the Mexican commissioners desired to substitute the chronological order, based upon the time at which each claim arose. This order they declared to be "in harmony with the most impartial justice, with the interests of the claimants, with those of Mexico, and with the method of payment contemplated by the convention." They argued that, as the convention provided for the

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issuance by Mexico of treasury notes from time to time as the awards were rendered, it was just that the claimants who had suffered longest should be the first to have their claims examined and paid. The American commissioners contended for the alphabetical order, on the ground that it was the most convenient and certain and involved the least labor and delay in preparing the papers for the use of the commission. The Mexican commissioners however did not insist on the adoption of their view, and in the end neither the alphabetical nor the chronological order was observed in the examination of claims, though an alphabetical list of them was made. The claims were usually taken up in the order in which they were ready for examination.

Character of the Board's Functions.

As to the third rule, the Mexican commissioners expressed the opinion that it was unnecessary to define the character of the board's functions, and that no declaration on the subject ought to be made; but, while the American commissioners strongly contended that the functions of the board were judicial, their Mexican colleagues maintained the view that they were diplomatic. The American commissioners doubtless were led to raise the question by reason of the circumstance that the Mexican commissioners were actually invested with a diplomatic character; and the same circumstance accounts for the insistence of the Mexican commissioners on the view that the functions of the board were not purely judicial. But, apart from this phase of the question, which affected the privileges and immunities of the Mexican commissioners rather than the manner in which they should perform their duties, the controversy was of little actual moment. The Mexican commissioners declared that they had "imbued themselves with the obligations imposed upon them, *and with the character and spirit in which they are to proceed.* They know," they continued, "that it must be one of sincere desire for peace and concord; * * * that they have sworn on their honor and in their conscience to examine and *to decide impartially* on the claims which may be presented to them in conformity with the convention; that their decisions are to be governed by the principles of justice, the law of nations, and the stipulations of amity and commerce between Mexico and the United States." After this declaration the discussion, as the American commissioners subsequently stated, "appeared to dwindle down into a question in

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regard to the name rather than the nature of the thing;" and it was therefore discontinued.[1]

Question of Access to the Board.

The most substantial difference between the commissioners related to the fourth rule, which involved the question of allowing the claimants and their attorneys directly to communicate with and appear before the board. By Article IV. of the convention it was provided that "all documents which now are in, or hereafter during the continuance of the commission constituted by this convention may come into, the possession of the Department of State of the United States in relation to the aforesaid claims shall be delivered to the board. The Mexican Government," the article continued, "shall furnish all such documents and explanations as may be in their possession for the adjustment of the said claims according to the principles of justice, the law of nations, and the stipulations of the treaty of amity and commerce between the United States and Mexico of the 5th of April 1831, the said documents to be specified when demanded at the instance of the said commissioners." Under this article the Mexican commissioners contended that the board could "receive no documents unless from the departments of the respective governments, and in the form and manner in which they may be transmitted from the same." The American commissioners declared that they differed, *toto coelo*, from their associates on this subject. They declared that "the right of an individual to be heard, either by parol or in writing," was an "inherent right of man;" that in the cases before the board each claimant was "the *actor* or plaintiff, the

[1] 8. Ex. Doc. 320, 27 Cong. 2 sess. 215. The unsubstantial character of the difference as to functions, except so far as it affected the privileges and immunities of the Mexican commissioners, was again very clearly disclosed in a correspondence between those commissioners and Mr. Webster. The former having inquired of Mr. Webster whether certain claims had not been withdrawn by the United States from the cognizance of the board, Mr. Webster sent in reply certain papers, and, while adverting to the fact that the Mexican commissioners were invested with a plenipotentiary character, stated that it belonged to the board as a judicial body to determine whether the claims were still before it. The Mexican commissioners in their response declared that the character of plenipotentiaries had been conferred upon them by their government for the purpose of "securing to them the honor and the independence necessary for every public minister who is destined to perform difficult and important functions in a foreign country," but that this "personal honor" "had nothing to do with their functions as commissioners." (Id. 187.)

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state of Mexico the *reus* or defendant, and the board of commissioners the *judex* or judge,"[1] and that it was "the right of both parties to be heard, each by his agent or counsel (if he shall so choose), in writing or *viva voce*, as he may select."

The discussion of this difference continued till the 5th of October. On that day Mr. Marcy moved that the petitions of William S. Parrott and John Baldwin, two claimants, addressed to the board and specifying certain documents to be asked of the Mexican Government, be received for action. The motion was lost by the adverse votes of the Mexican commissioners, one of whom offered a resolution to the effect that the petitioners be informed that their "documents" would be received by the board if they should reach it through the Department of State. To this resolution Mr. Marcy offered an amendment to the effect that "a petition or paper" "asking" for "documents" need not come through that channel. This amendment gave rise to a discussion, in consequence of which no action was taken on the resolution or the amendment.

Rules Adopted.

So far the commissioners had succeeded in agreeing on only five comparatively unimportant rules, and, as any further agreement on the subject seemed to be impracticable, the secretaries were directed to enter and number them. They provided (1) that the board should sit from 10 a. m. to 3 p. m.; (2) that, on the failure of the board to meet pursuant to an adjournment, any member present might designate the time of the next meeting; (3) that at the sessions of the board the members might select their positions with an eye to convenience, without indicating any inequality; (4) that any member of the board might ask for a vote on any question submitted to it; and (5) that the secretaries should "form an index in alphabetical order" of all the claims that had been "transmitted to the board from the Department of State." These rules furnished no direction to the claimants as to how their cases should be prepared, or as to how they should be brought before the board.

[1] To this expression the Mexican commissioners objected as "offensive to the dignity and independence of the Mexican republic." The American commissioners explained that they had not used the word *reus* as importing anything disrespectful, but merely as indicating a party defendant; that in every contested case there must be two parties, and that the convention designated American citizens as parties in interest on the one hand and the Mexican republic on the other.

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Mode of Presenting Claims.

For the purpose of enabling the secretaries to prepare an index of the cases and documents then in its possession, the board on the 7th of October resolved to take a recess till the members should be notified that the papers were prepared. In consequence, the board did not meet again till December 21. On the succeeding day the American secretary communicated to the board a request from the agents of a certain claimant to be permitted to appear and present his case to it. Mr. Marcy moved "that the said agents be allowed to appear according to their request." On this motion the American commissioners voted yea and the Mexican nay, and it was lost. The Mexican commissioners then offered the following resolution:

"*Resolved*, That whatever written explanations, documents, or petitions the claimants or their agents may desire to present to the board in support of the justice of the claims which are submitted to its investigation will be received and considered, coming to the board through the Department of State."

The American commissioners, perceiving that, while this resolution did not in terms deny direct access to the claimants and their agents, the channel of communication mentioned in it was the only one which the Mexican commissioners would consent to open, voted for it, and it was unanimously adopted.

On the 23d of December it was resolved, on motion of the Mexican commissioners, that "whatever paper, explanation, or petition the claimants or their agents might in the manner above indicated present to the board, should be communicated both in English and in Spanish."

By these resolutions the claimants were informed as to the mode in which they might present their cases to and communicate with the board, but all personal access to it continued to be denied to them and their agents. It should, however, be observed that the convention made no provision for the appearance before the commission of claimants or their agents, or for the representation of either government by counsel before it; nor does the Government of the United States appear to have taken, or to have thought of taking, any steps toward being so represented.

Whenever documents were desired by claimants from either government, the commission, by a resolution, directed the secretaries to communicate to such government a list of the documents, with a respectful official note requesting that they be furnished.

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Disposition of Cases.

The first claim examined by the commissioners on the merits was taken up for that purpose December 29, 1840.[1] The first claim submitted to the umpire was referred to him on the 13th of January 1841; and, as it was the first to be so referred, Messrs. Marcy and Castillo were appointed by the board to lay it before him in person. This they did on the 14th of January.

The procedure of the board in considering the cases on their merits may briefly be described. The proofs of the claimants were usually accompanied with a memorial, in which the principal circumstances of the case were stated; and, as has been seen, all the papers were required to be submitted both in English and in Spanish. When the papers came before the board, the American commissioners took the set in English and the Mexican that in Spanish; and if it was found that there was a deficiency in the proofs, an opportunity was afforded to the claimant to supply it.[2] If the case was found to be ready to be proceeded with, it was orally discussed at the board; and if points of difference developed which it was impossible to remove, so that it became necessary to send the case to the umpire, each side made out and presented to the other a succinct statement of the facts of the case and the points arising therefrom, and the reports submitted to the umpire were confined to the points and statements of fact so interchanged. In some cases in which, after the interchange of points and statements, there seemed to be a possibility of agreement, the oral discussions were continued. But if further discussions seemed to be useless, the next step was to prepare reports for the umpire.

Reports to the Umpire.

The preparation of these reports proved to be by far the most laborious part of the duties of the commissioners. The transactions out of which the claims arose were generally very complex; and the fact that most of them occurred many years previously, in a foreign country, and "amid political revolutions and civil commotions," made it "exceedingly difficult in some instances

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 160.

[2] "Though the claimant or his agent could not be present at the board to ascertain, by what occurred there, the difficulties interposed, yet if in attendance, he was soon made acquainted indirectly with them; but when such was not the case much delay often resulted from want of this knowledge." (Report of Messrs. Marcy and Brackenridge, S. Ex. Doc. 320, 27 Cong. 2 sess. 235.)

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to determine whether the wrongdoers were the functionaries of the existing political power, rebels against that power, revolutionists while the country was in a state of anarchy, or lawless depredators assuming to be clothed with authority merely to facilitate the perpetration of wrong." Great difficulties were also encountered in disposing of cases that involved the application of the Mexican municipal law. The actual legislation of Mexico, as it then existed, was found to be "exceedingly imperfect," and hardly to afford "a system of laws." What ordinances of Spain, or decrees of the Code of the Indies, were in force after the independence "was not explicitly declared by any act brought to the notice of the board;" and the decisions of the tribunals tended rather to confuse than to clear up this matter. Moreover, "the shiftings of political power caused a like instability in the tribunals; their records were voluminous and obscure; and it was sometimes exceedingly difficult to ascertain the true state of facts, even as they appeared before the courts, or the distinct principles of law upon which these courts placed their adjudication." Such was the statement of the American commissioners.[1] Under the circumstances their reports to the umpire covered more than fifteen hundred closely written foolscap pages; and the reports of the Mexican commissioners were fully as voluminous.

End of the Commission.

By Article III. of the convention it was provided that the commission should terminate its duties within eighteen months from the time of its meeting. It therefore came to an end on February 25, 1842, no provision for the extension of its existence having been made. Eighty-four claims had been presented, and of these thirty had not been finally decided. Of the cases referred to the umpire sixteen remained undecided, but in all the undecided cases the reports either of the American or the Mexican commissioners were made only on or after the 19th of February, when it was too late for the umpire, who was then engaged in the examination of prior reports, even to read them; but in none of the undecided cases was the report of the Mexican commissioners later than that of the American, while in most of them it was from ten to twelve days earlier. This difference in time was, however, of little practical importance, since the umpire, who was barely able to act upon the

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 235–236.

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cases already before him, could not have decided the new cases if both reports had been submitted on the day on which the earlier one was presented. Several cases had also remained unacted upon by the commissioners. The state of the business and the practical results of the board's labors may be gathered from the following table:

	Amount.
Amount of claims decided by the board without reference to the umpire.	
Amount claimed	$595,462.75
Amount allowed	439,393.82
Rejected on their merits at the board.	
Amount claimed	51,492.25
Decided by the board not to be within the convention.	
Amount claimed	9,278.26
Claims on which the board differed, which were reported to the umpire for decision, and on which allowance was made.	
Amount claimed	5,844,260.44
Amount allowed by American commissioners	2,334,477.44
Amount allowed by Mexican commissioners	191,012.94
Amount allowed by the umpire	1,586,745.86
Rejected by the umpire on the merits.	
Amount claimed	59,967.40
Amount allowed by American commissioners	57,754.42
Decided by the umpire not to be within the cognizance of the board.	
Amount claimed	88,351.78
Amount allowed by American commissioners	86,080.01
Returned by the umpire undecided.	
Amount claimed	1,864,939.56
Amount allowed by American commissioners	928,627.88
Cases submitted too late to be considered by the board.	
Amount claimed	3,336,837.05
Total awarded by the umpire	1,586,745.86
Total awarded by the American commissioners, on reference to the umpire	2,334,477.44
Total awarded by Mexican commissioners, on reference to the umpire	191,012.94

Unfinished Business and its Cause.

February 26, 1842, the day after the close of the commission, the Mexican commissioners addressed a note to Mr. Webster, for the purpose of placing on file in the Department of State an explanation which they had sought to have recorded on the minutes of the board, but to the entry of which the American commissioners had objected. The purport of the explanation was that they had constantly endeavored to accomplish the decision of the claims embraced by the convention; that, in

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spite of these endeavors and of the notices repeatedly published, the claimants had become active in the presentation of their claims only during the last two months of the commission; that many claims had been presented in the last month, and that some had been filed even on the last day; and that, while the necessary result of these conditions was that much business remained unfinished, the Mexican Government, "from the beginning of the convention to the expiration of the labors of the mixed commission, had religiously fulfilled all the engagements contracted in that agreement." The American commissioners, on being furnished by Mr. Webster with a copy of this note, replied that, while a number of important claims had not been adjusted, the responsibility for this partial failure was a question to be settled by an appeal to the facts stated in the minutes of the board. They then referred to the prolonged discussion of the question of access, and to the "indirect and circuitous" mode of communication to which claimants were finally restricted, as, in their opinion, "in some measure" causes of failure. They also stated that "many cases" presented to the board in time to have been finally acted on were suspended, "some of them" at the instance of the Mexican commissioners, in order that documents might be obtained from Mexico; and that, though "most of them were decided," the time employed upon them when they were at length brought up for action prevented action upon others. They further adverted to the fact that several cases were for some time suspended on the allegation of the Mexican commissioners that they had been withdrawn from the cognizance of the board; and to the circumstance that the differences of opinion on the merits of cases involved the necessity of consuming much time in preparing elaborate reports to the umpire. And finally, they remarked that if the board could have continued in session two months longer all the claims presented to it would have been adjusted. Upon the statement of the Mexican commissioners as to the great delay in the presentation of claims, they made no comment, except to say that it was probable that the claimants at first waited for the promulgation of rules on the subject, and that, for some time after the claimants ascertained how their papers might be presented to the board, "there were not so many claims prepared for its action as could have been conveniently disposed of."

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Present conditions render it easy to form calmer judgments concerning Mexican affairs than were possible in 1842; and, without regard to the propriety or impropriety of entering on the minutes such an explanation as the Mexican commissioners sought to record, it is proper to say that the proceedings of the board furnish very cogent evidence of the sincerity of the efforts of those commissioners and of their government to carry the convention into effect. Out of the four months that elapsed from the meeting of the commission till the adoption of the resolution directing the presentation of claims through the Department of State, two months and a half were spent by the secretaries in preparing an alphabetical index of documents already presented by that Department. In spite of public notices, the claimants were so late in appearing that the board in June 1841, nearly ten months after its first meeting and six months after the establishment of the mode of presenting claims, caused to be sent to the persons who seemed from an examination of the papers on the files to be interested in cases which had not been prepared, and which were not known to be in the way of being prepared, the following circular:

"WASHINGTON, *June 16, 1841.*

"CLAIMS ON MEXICO.

"Notice is hereby given to all persons having claims upon the Republic of Mexico, which were submitted by the Convention of April 11, 1839, to the mixed commission now sitting in the City of Washington, that more than half the time limited by the said Convention for the session of the said Commission has already expired, and that it will close its labors within nine months from this date, yet not one-half of the claims which it was organized to adjust have been prepared for its consideration. In consequence of a want of prepared cases, the business of the Board has been delayed. Claimants are, therefore, hereby urged to complete the preparation of their cases with the least possible delay, to the end that the commission may be enabled to accomplish the objects for which it was instituted.

"By order of the Board of Commissioners."

While the statements of the Mexican commissioners as to the delay in the preparation of claims were not in fact controverted, the contents of this circular strongly support their view as to the effect of that delay in preventing the completion of the work of the commission. That view also derives support from the records of the umpire, to whom forty-seven cases were submitted after January 3, 1842. Where it became

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necessary to obtain papers from Mexico, the process was necessarily attended with delay; but we have the statement of the American commissioners that the most of the cases in which that process was employed were fully decided. It is true that in one case, that of William S. Parrott, it was strongly intimated that the Mexican Government had not exerted itself to send certain papers which had been asked for, but its general course in such matters did not enforce the suspicion. On the contrary, in their final report the American commissioners, in discussing another question, say: "The Mexican commissioners were furnished with documents by their government, which were declared and appeared to be originals, taken from the courts of justice and the executive departments; and a considerable part, also, of those sent by Mexico, on requisition, were undoubtedly the original records."[1] When we consider the insecurity of the means of transportation in Mexico at the period in question, the readiness disclosed by this statement to send out of the country to a distant foreign place the originals of important public records in order to avoid delay is a fact upon which comment is superfluous. To the cases alleged by the Mexican commissioners to have been withdrawn by the United States from the cognizance of the board we shall refer hereafter;[2] but it suffices here to say that the American commissioners addressed an inquiry on the subject to the Department of State on the 12th of November 1841, and that the first reply of that Department was made on the 23d of December and was inconclusive.

Suspension of the Board's Sessions.

In August and September 1841 a suspension of the proceedings of the board took place in consequence of the resignation of Mr. Rowan as a commissioner. On the 9th of the former month the Mexican commissioners, having heard of Mr. Rowan's resignation, formally stated that they considered it essential to the regular conduct of business that his place should be filled, and they moved that the sessions of the board be suspended till his successor should be appointed. On motion of Mr. Marcy, further action was postponed till the 11th of August. On the 12th the board was declared by the Mexican commissioners to be *de facto* suspended till the appointment of Mr. Rowan's successor, and it did not meet again till the 20th of September,

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 237.

[2] *Infra*, 1241.

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when Mr. H. M. Brackenridge appeared and filed his commission, together with an oath taken before a justice of the peace.[1] Whether any delay in the completion of the business of the board is to be ascribed to this prolonged vacancy is a question which the records do not answer.

Disposition of Papers.

By the act of June 12, 1840, it was provided "that the records, documents, and all other papers in the possession of the commission, or its officers, or certified copies, or duplicates thereof, shall be deposited in the office of the Secretary of State." While this law seemed to assume the right to require the commissioners to make a certain disposition of their records, the American commissioners "did not insist upon the validity of the act of Congress, so far as it attempted to prescribe duties to the board, but they contended that the documents, papers, etc., should be left at the disposal of the two governments."[2] In this contention the Mexican commissioners did not concur; and a resolution was adopted directing the secretaries to return to the Department of State the papers transmitted to the board on or before August 26, 1840, in cases not acted on by it. The American commissioners then proposed that all the papers which had at any time come to the board from the Department of State should be returned to it. To this proposition the Mexican commissioners declined to accede, and no conclusion was reached. On February 26, the day after the close of the commission, the American members informed Mr. Webster that their Mexican colleagues "intended to retain, not only the papers sent to the board from Mexico, on requisitions made pursuant to the convention, but also Mexican records which had been procured without the intervention of the board." On the 2d of March Mr. Webster brought the matter to the notice of the Mexican commissioners, and requested them to transmit to the Department of State the originals or copies of all papers in their possession which might have been used in the consideration of claims before the board, the orig-

[1] Mr. Brackenridge, like Mr. Rowan, was born in Pennsylvania, but though he had for some time resided in Florida, he was when appointed again a citizen of his native State. He had been active in politics, in diplomacy, and in law, and had once filled a judicial station. He was also well known as an author.

[2] Report of Messrs. Marcy and Brackenridge, S. Ex. Doc. 320, 27 Cong. 2 sess. 238.

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inals, if they insisted upon retaining them, to be returned when copies should have been made. The Mexican commissioners replied that at the commencement of the labors of the commission it was agreed that all papers should be presented both in English and in Spanish, and that as a result each side possessed a complete set of papers; that it was upon these papers that the commissioners on each side had made their decisions, and that, as the provisions of the act of 1840 had been fulfilled with regard to the United States, the Mexican commissioners should be allowed to retain for their government the papers in their possession. In the cases held not to be within the jurisdiction of the board, they stated that they had taken the pains to separate and return to the archives of the commission all the original documents. And in conclusion they declared that although they had opposed, as they were bound to do, the proposition to leave with the board all the documents, the effect of which would have been "to defraud their own government of its right to know what had been done, and to examine the bases and proofs on which have been founded the decisions so onerous to its treasury," yet, they had been so far from wishing to deprive any claimant of the documents on which he based his claims, that they might on their part "ask for an exchange, or for the delivery, of various important original documents which remained annexed to the English documents presented by the claimants."

The subject does not appear to have been further discussed.

Services of the Umpire.

Accompanying the message of President Tyler to the Senate of June 13, 1842,[1] there were several communications in which there were passages reflecting upon the umpire, Baron Roenne. In a letter to the Department of State of March 31, 1841, the agents of certain claimants, taking time somewhat by the forelock, protested against his residing at New Brunswick, in New Jersey, or at any other place than Washington, while engaged in the duties enjoined upon him by the convention. Some time afterward one of the same agents protested in the same manner against some of his decisions, and still later charged him with having "disregarded his duty and broken the convention" by his decision on certain matters submitted to him. In a message to the Senate of August 8, 1842,[2] Presi-

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 16, 20, 21.

[2] S. Ex. Doc. 412, 27 Cong. 2 sess.

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dent Tyler, referring to these letters, stated that, as the resolution had called for all communications addressed to the Department of State by any of the claimants, the papers in question were copied and transmitted without attracting attention. Had they been noticed, their transmission to the Senate, if they had been transmitted at all, would have been accompanied by a disclaimer on the part of the Executive of any intention to approve such charges. "The Executive," said President Tyler, "has no complaint to make against the conduct or decisions of the highly respectable person appointed by his sovereign umpire between the American and Mexican commissioners."

The decisions of Baron Roenne were expressed in the form of simple awards, stating his conclusions, but not the reasons on which they were based. He declined to accede to the request of the American commissioners, in a certain case, to communicate to them, before his final decision, the objections which he was understood to entertain to a particular claim, on the ground that the convention did not authorize him to do so.[1] On a certain occasion, the agent of a claimant against whom he had rendered an award wrote him a letter for the purpose of showing that his decision was erroneous. He sent the letter to the commissioners with a request that they inform the writer that the duties of the umpire were, by Article VII. of the convention, restricted to the decision of the points on which the commissioners could not agree, and that he could not enter into any correspondence in regard to claims with the claimants or their agents.

By the same article it was provided that authenticated copies of the proofs should accompany the reports of the commissioners to the umpire in cases of difference. As a strict compliance with this provision would have entailed great labor, expense, and delay, the umpire at the instance of the board consented to receive, instead of copies, the papers used by the commissioners, and to return them with his decision. This was done in all cases.

Baron Roenne's Reports.

Mr. Webster, as Secretary of State, on March 16, 1843, wrote to Mr. Wheaton, who was then minister of the United States at Berlin, that it was understood that Baron Roenne made in each case decided by him a report to his government of the

[1] MSS. Dept. of State.

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facts and principles on which his conclusions were founded. Mr. Wheaton was instructed to signify to the Prussian minister for foreign affairs the wish of the United States to possess, confidentially, copies of the reports.[1] The minister for foreign affairs, Baron von Bulow, declined to give them, on the ground (1) that the general principles involved in the cases had formed the subject of a correspondence between the Prussian minister for foreign affairs and Baron Roenne, and (2) that the reports ought not to be communicated to the United States without the consent of Mexico. The Government of the United States then sought to obtain the report in the case of Aaron Leggett alone, and as a reason therefor stated that the claimant believed that the decision of the umpire, by which the larger part of the claim allowed by the American commissioners was rejected, was induced by evidence which was not before the commissioners and which was forged and false.[2] The Prussian Government replied that while the reports of the umpire left no room to doubt that the claimant's "supposition" that he had acted on papers which were not before the commissioners was "entirely gratuitous," Baron Roenne had been asked for further explanations on the subject, and that he had stated that the correspondence of the mixed commission in the archives of the Department of State would show that he had not in any case acted upon documents which were not known to both parties. The Prussian Government further disclosed the fact that the decision of Baron Roenne in the case of Leggett had been produced, so far as it was adverse to the claim, "by the simple circumstance that * * * the proofs * * * had appeared insufficient." But, in order to meet the wishes of the United States so far as was deemed proper, Baron von Bulow instructed Baron Gerolt, then Prussian minister at Washington, that he might read the report in the case of Leggett to the Secretary of State of the United States and the Mexican minister at that capital. More than a year had now elapsed since Mr. Wheaton was instructed to endeavor to obtain the reports, and the offer of the Prussian Government in the case of Leggett came before Mr. Calhoun, who had then become Secretary of State. Mr. Calhoun gave to the matter "deliberate attention," and "arrived at conclusions very dif-

[1] H. Ex. Doc. 83, 30 Cong. 1 sess. 52.

[2] Mr. Upshur, Sec. of State, to Mr. Wheaton, November 13, 1843, H. Ex. Doc. 83, 30 Cong. 1 sess. 54.

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ferent" from those on which the Department of State had previously acted. "I have," he instructed Mr. Wheaton, "frankly stated to the baron [Gerolt] my belief that the whole proceeding originated in error and misconception; and I have signified to him that, as this government is entirely satisfied that Baron Roenne acted in this case, as in all others, with that love of justice and integrity for which his character was eminently distinguished, it feels constrained by duty, as well as by delicacy, to decline the offer made by the Prussian Government to communicate confidentially the information which had been solicited by this government under impressions which, it is conceived, ought never to have had existence. The very supposition strikes at the root of all faith in the convention itself, and would, probably, be attended by the evil consequence of making all the other claimants unduly dissatisfied with the decisions in their cases."

The declination of the Prussian Government in 1843 to make public the reports of Baron Roenne has been steadily adhered to. "The government of His Majesty," said Baron von Marschall, imperial minister for foreign affairs, in a note to Mr. Uhl, American ambassador at Berlin, of May 22, 1897, "shares the opinion held by the Prussian Government in 1843, according to which a similar request made by the then envoy of the United States of America, Mr. Wheaton, was declined for the reason that a statement of the principles which guided Mr. Von Roenne was not permissible because they were established by a detailed correspondence between himself and the ministry. The report of the minister resident without the instructions of the ministry would, therefore, not be sufficiently clear; to make known these instructions would, however, be contrary to prevailing general principles. Moreover, Mr. Von Roenne at the time restricted himself to stating the reasons for his decisions in so far only as was necessary to justify the decisions in the eyes of his government. Completeness can not, therefore, be claimed for these statements, as it was agreed beforehand that the decisions of the umpire were to be final and without appeal, and would therefore be made known to the parties without giving any reasons. Time alone can not diminish the strength of the reasons then given against the publication of the material in question."[1]

[1] MSS. Dept. of State.

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Jurisdiction of the Board.

On several occasions, while the board was in session, Mr. Webster was appealed to in respect of some matter on which it had assumed to act. In all such cases he consistently maintained the position that it was an independent body, in whose proceedings it would be manifestly improper and unwarrantable for the Executive to intervene—a position eminently sound in law and wise in practice.[1]

November 12, 1841, the American commissioners inquired of Mr. Webster whether certain claims had, as the Mexican commissioners contended, been withdrawn from the cognizance of the board. December 23 Mr. Webster in reply inclosed an extract from an instruction of Mr. Forsyth to Mr. Ellis, minister to Mexico, of May 3, 1839, and a copy of a note of the latter to the Mexican minister for foreign affairs of November 6, 1839, and stated that, as the execution of the convention was by the convention itself and the act of Congress confided exclusively to the commissioners, it was not considered to be the province of the Department of State to express an opinion on the point. The cases in question involved the acts of various Mexican officials, such as the seizure on the high seas of the American schooner *Topaz* and the killing of her captain and crew. In some of the cases the dismissal of an officer was demanded, in others a reprimand, and in others yet an infliction of punishment, and in at least one instance an assurance was asked for that no disrespect to the flag of the United States was intended. In bringing these several matters to the attention of the Mexican Government, Mr. Ellis had declared that they were "not embraced in the convention signed * * * on the 11th of April last." Under these circumstances the Mexican commissioners, on January 16, 1842, formally inquired of Mr. Webster whether the reservation made by Mr. Ellis "positively excluded the personal interest" in the cases, and whether "there only remain to be arranged between the two governments the subjects which relate to their flag, their honor, and their prerogatives." Mr.

[1] In a report accompanying President Tyler's message of June 13, 1842, Mr. Webster stated, in response to an inquiry embraced in a resolution of the Senate, that if the Mexican Government had given any instructions to its commissioners as to the discharge of their duties, the fact had not been made known to the Department of State. (S. Ex. Doc. 320, 27 Cong. 2 sess. 1.)

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Webster, on the 21st of January, answered that while it was not "the province of the Executive of the United States to express an opinion upon the business which the convention has confided to the board of commissioners," yet he would add, for the purpose of information, that "if all claims of citizens of the United States involved in the case of the schooner *Topaz*, or in any other cases embraced by the first article of the convention, shall be considered and disposed of by the board according to the terms of the convention, it is certain that this government will not deem them a subject for any further negotiation with that of the Mexican republic." "The mixed commission under the convention with that republic," said Mr. Webster, "has always been considered by this government essentially a judicial tribunal, with independent attributes and powers in regard to its peculiar functions. Its right and duty, therefore, like those of other judicial bodies, are to determine upon the nature and extent of its own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it."[1] On this statement the personal claims in question were held by the board to be within its jurisdiction, and were duly examined.

The same position was maintained by Mr. Webster in other cases. On June 21, 1841, one of the claimants, named Santangelo, requested him to direct the diplomatic representative of the United States in Mexico to ask the government for certain papers which the commission had on an equal division refused to demand. Mr. Webster declined to grant the request, saying that the functions of the Department of State in relation to the claims were "expressly limited by the convention to the transmission to the board of commissioners of such documents as the Department may receive."[2] Subsequently, when the request was renewed, he declared that the Executive of the United States had "no right to interfere for the redress of our citizens who may suppose themselves to have been aggrieved by decisions of the commissioners under the convention with the Mexican republic. That body is, in effect, a judicial body, and it belongs to its members alone to determine the rights of claimants under the convention."[3]

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 185.
[2] Id. 17-19.
[3] Id. 20.

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Interest.

In the cases presented to the board various rates of interest were demanded; and as most of the claims were of long standing, some exceeding twenty years, the whole amount demanded on this score was very large. What was the legal rate of interest in Mexico was not satisfactorily settled. The government had not legislated on the subject, and the Spanish laws, to which it was necessary to resort, did not give an explicit answer. Five per cent per annum seemed to be the rate best supported by the evidence. But, while the legal rate appeared to be low, the conventional rate was usually very high, it sometimes being as much as 3 per cent a month. The claimants often demanded the highest conventional rate, but the allowance in all cases, except a few in which a higher rate was stipulated for in contracts made in the United States, was 5 per cent.[1]

In a communication to the commissioners of July 10, 1841, the umpire held that in the cases in which Mexico should desire to avail herself of the privilege of issuing treasury notes in payment of the awards, the principal sum and the interest adjudged up to the date of the award should together form the amount for which the notes, bearing interest at 8 per cent, should be emitted.[2]

Liability of Belligerents.

Several claims were presented to the board for supplies of money, arms, and other things to the Mexicans when they were engaged in their struggle for independence, but no objection to the allowance of such claims on the ground of their unneutral character appears to have been made. On the contrary, the Mexican commissioners concurred in their allowance, and the awards upon them were among the earliest made. In three such cases, involving claims for money, arms, and other supplies furnished in 1815, 1816, and 1817, final judgments amounting to nearly $200,000 were made directly by the commissioners themselves. Certain other claims of the same kind were referred to the umpire, not, however, upon international grounds, but only upon questions of fact or of the proper rate of interest.

The liability of the Mexican Government for property seized by the patriot forces before the recognition of Mexican independence by any foreign power was admitted in the awards.

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 237.

[2] MS. Records of the Commission.

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General Character of Claims.

The decisions of the commissioners and the umpire appear under their appropriate heads in the digest. The most of the cases involved the alleged wrongful seizure of property; and in many instances the act complained of was committed by the customs authorities. Several claims were allowed for overcharges of duties. Two claims were allowed for specie seized while in transit through the country by officers of the government, and devoted to the government's use. In certain cases awards were made on account of vessels which the government impressed into its service, while in one case an award was made for the building and in another for the repairing of a vessel for the government. One claim was allowed for the use of houses occupied by troops; one for a forced loan, and one for unjust expulsion. Several awards were rendered in favor of the claimants on the ground of their unlawful imprisonment.

It may be observed that the commissioners concurred in rejecting only three claims on the merits and four on the ground of a want of jurisdiction; and that of the latter only one was stated in such form that the board could consider it. The umpire rejected five claims on the merits and six on jurisdictional grounds. Among the latter were two cases in which it did not appear that the claim had been presented either to the Department of State at Washington or to the diplomatic agent of the United States in Mexico prior to the signature of the convention, as was required by Article I. In a number of cases in which the umpire rendered awards in favor of the claimants, the reference to him embraced only the rate of interest to be allowed, or other questions of amount, the Mexican commissioners having admitted something to be due.

Delays in Payment.

After the termination of the commission, attorneys for claimants whose demands had been rejected asked that the convention and all the proceedings under it be declared null and void, while the attorneys for the more fortunate claimants as strongly objected to such a course.[1] The Government of the United States determined to treat as final and conclusive the decisions that had already been rendered, and to enter into negotiations for the adjustment of the unfinished business. These negotiations were complicated by two causes—the Texan question and the poverty of the Mexican treasury. The former served to

[1] S. Ex. Doc. 320, 27 Cong. 2 sess. 20–30.

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render all intercourse between the two governments difficult and precarious;[1] the latter—the lack of money—rendered the Mexican Government unable to discharge its pecuniary obligations either to the United States or to other powers.[2] This circumstance made it necessary to enter into another convention for the purpose of providing for the payment of the awards under the convention of 1839. Such a convention was concluded at the City of Mexico January 30, 1843, by Mr. Waddy Thompson on the part of the United States and Messrs. Bocanegra and Gorostiza on the part of Mexico. By this convention it was agreed that the Mexican Government should, on the 30th of the ensuing April, pay all interest then due on the awards, and within five years from that day, in equal installments every three months, all the principal and accruing interest. These payments, both of interest and of principal, were to be made in gold or in silver money, in the City of Mexico, "to such person as the United States may authorize to receive them;" and for the fulfillment of this obligation the Mexican Government pledged the direct taxes of the republic, but without restricting the United States to that fund. To each payment the Mexican Government agreed to add 2½ per cent for freight and other charges.

A New Claims Convention.

By Article VI. of the convention of January 30, 1843, it was provided that a "new convention" should be entered into for the settlement of "all claims of the government and citizens of the United States against the republic of Mexico" not finally decided by the late commission in Washington, and of "all claims of the government and citizens of Mexico against the United States." Referring to this article, Mr. Upshur, as Secretary of State, July 25, 1843, directed Mr. Thompson to negotiate a new convention, which should embrace all unsettled claims that might have been presented to the late commission, whether they were actually presented to it or not. Mr. Upshur objected, however, to the inclusion of claims of the two governments with those of their citizens. Such a provision had been desired by Mexico, and it was understood that its object was to bring within the convention her complaints as to the course of the United States in respect of Texas. Mr. Thompson was instructed to insist upon its omission. When he

[1] H. Ex. Doc. 49, 27 Cong. 2 sess.; H. Ex. Doc. 266, 27 Cong. 2 sess.

[2] Br. and For. State Papers, XLI. 738, 740.

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received his instructions he at once opened negotiations, and in October 1843 Mr. Bocanegra, minister for foreign affairs, and Mr. Trigueros, minister of finance, were appointed as plenipotentiaries to adjust with him a convention. November 20 a convention was concluded.[1] By its first article it provided that all claims of citizens of Mexico against the United States, and all claims of citizens of the United States against Mexico, "which, for whatever cause, were not submitted to, nor considered, nor finally decided by the commission, nor by the arbiter," under the convention of 1839, should be referred to a board of four commissioners, two of whom should be appointed by each government. By Article V. it was provided that the claims which were considered by the umpire under that convention, but not decided by him, should be referred to the umpire under the new convention, who was to be the King of Belgium. By Article XV. all claims of either government against the other were included, but a special mode was provided for their adjustment. It was stipulated that if the commissioners should unanimously or by a majority vote render a decision on such a claim, the decision should be submitted to both governments for their acceptance or rejection; but that if the two governments could not agree, or if the board should have been unable to reach a conclusion, the whole case, and not merely the points of difference, should be referred to the umpire.[1]

The Mexican War.

The stipulations in regard to governmental claims the United States declined to approve, and the Senate struck them out. The convention, as thus amended, was presented to the Mexican Government, but that government, while not in terms rejecting it, withheld its ratifications. The difficulties as to the Texan question and as to claims progressed together.[2] In 1844 the Mexican Government ceased to pay installments under the convention of January 30, 1843. The interest due April 30, 1843, was paid, as were also the installments of principal and interest due on the 30th of July and October 1843, and the 30th of January 1844. On April 26, 1844, Benjamin E. Green was empowered by President Tyler to demand and receive the fourth installment of principal and accrued interest, which became due on the 30th of that month. A month afterward

[1] H. Ex. Doc. 158, 28 Cong. 2 sess.

[2] H. Ex. Doc. 19, 28 Cong. 2 sess.

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he wrote from the City of Mexico that the money had not been paid, and that in fact the government did not have it. One at least of the prior installments had been provided for by means of a forced loan;[1] and when the fifth became due the fourth yet remained unpaid. Orders for the payment of the money were given to the agent of the United States, but when they were presented to the Mexican treasury no money on them could be obtained; and soon afterward, in consequence of a sudden change in the government, the payment of all orders on the treasury was suspended.[2]

In December 1845 another revolution took place in Mexico, and on the 29th of that month the greater part of the garrison of the City of Mexico "pronounced" for the revolutionists. On the following day General Herrera resigned the presidency, and on January 2, 1846, General Paredes entered the capital with his troops and formed a junta for a provisional government, though the country seemed to be generally opposed to him. May 11, 1846, President Polk sent his message to Congress declaring that American blood had been shed on American soil and that war existed by the act of Mexico.[3] In the course of his message he said that "the grievous wrongs perpetrated by Mexico upon our citizens throughout a long period of years remain unredressed, and solemn treaties, pledging her public faith for this redress, have been disregarded." With the message he communicated to Congress certain correspondence between Mr. Slidell, formerly minister of the United States to Mexico, and the Mexican Government. Among the subjects discussed in it was that of claims. In a note to the Mexican minister for foreign affairs of December 24, 1845, Mr. Slidell referred to the claims not decided under the convention of 1839 and to the unratified convention of November 20, 1843. He declared that upon the reference of the latter as amended to Mexico that government had "interposed evasions, difficulties, and delays of every kind," and had never decided whether it would accept the amendments or not, though pressed by the United States to do so, and that additional claims had been presented till they together reached the "enormous aggregate of $8,491,603."

[1] H. Ex. Doc. 83, 30 Cong. 1 sess.

[2] H. Ex. Doc. 144, 28 Cong. 2 sess.; S. Ex. Doc. 81, 28 Cong. 2 sess.

[3] S. Ex. Doc. 337, 29 Cong. 1 sess.; President Polk's Administration, by James Schouler, Atlantic Monthly (1895), LXXVI. 371.

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Payment of Liquidated Claims.

By an act of August 10, 1846,[1] the sum of $320,000 was appropriated by Congress for the purpose of paying to the claimants the fourth and fifth installments due under the convention of January 30, 1843. The claimants were required to relinquish their rights to the installments to the United States, and accept in discharge of them 5 per cent scrip payable in five years. By an act of July 29, 1848,[2] the Secretary of the Treasury was directed to pay all liquidated but unpaid claims against Mexico under the conventions of 1839 and 1843, on the surrender by the claimants of their certificates under the act of September 1, 1841.[3]

Treaty of Guadalupe Hidalgo.

February 2, 1848, a treaty of peace between the United States and Mexico was signed at Guadalupe Hidalgo. The ratifications were exchanged at Queretaro on the 30th of the following May. By this treaty the United States made a large extension of their boundaries. As part of the consideration for the territory so acquired they agreed not only to pay the liquidated claims under the conventions of 1839 and 1843—an obligation executed by the act of July 29, 1848, which has just been referred to—but also to "discharge the Mexican republic from all claims of citizens of the United States not heretofore decided against the Mexican Government,"[4] and "to make satisfaction for the same, to an amount not exceeding three and one-quarter millions of dollars."[5]

For the purpose of executing this engagement as to the unliquidated claims, the United States agreed to establish a "board of commissioners," whose awards should be "final and

[1] 9 Stats. at L. 94.

[2] 9 Stats. at L. 265.

[3] By section 7 of the act of June 12, 1840 (5 Stats. at L. 383), the Secretary of the Treasury was directed, at the close of the commission under the convention of 1839, to issue certificates to the claimants for the amounts respectively awarded to them, and to receive and distribute all moneys received from Mexico under that convention. From time to time during the sessions of the commission the claimants, as awards were made to them, applied to the Secretary of the Treasury for certificates; but he did not consider himself authorized to issue any till the close of the commission. By the act of September 1, 1841 (5 Stats. at L. 452), he was authorized to issue certificates as the awards were made. (H. Ex. Docs. 51 and 57, 27 Cong. 1 sess.)

[4] Article XIV.

[5] Article XV.

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conclusive," and who should be "guided and governed by the principles and rules of decision prescribed by the first and fifth articles of the unratified convention" of November 20, 1843; and in no case were they to allow "any claim not embraced by these principles and rules."[1]

The Mexican Government engaged to furnish on the application of the board, made within a period to be fixed by Congress, and transmitted by the Secretary of State of the United States, any books, records, or documents in its possession or power, which the board should deem necessary to the just decision of any claim; but it was provided that no such application should be made till the claimant should have stated on oath or affirmation the facts which he expected to prove by the papers.

Act of March 3, 1849.

By an act of March 3, 1849,[2] the President was directed to appoint, by and with the advice and consent of the Senate, a board of commissioners to sit in Washington and examine all claims of

[1] These articles were as follows: "Article I. All claims of citizens of the Mexican republic against the government of the United States which shall be presented in the manner and time hereinafter expressed, and all claims of citizens of the United States against the government of the Mexican republic, which, for whatever cause, were not submitted to, nor considered, nor finally decided by the commission, nor the arbiter appointed by the convention of 1839, and which shall be presented in the manner and time hereinafter specified, shall be referred to four commissioners, who shall form a board, and shall be appointed in the following manner, that is to say: Two commissioners shall be appointed by the President of the Mexican republic, and the other two by the President of the United States, with the approbation and consent of the Senate. The said commissioners, thus appointed, shall, in presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations, and the treaties between the two republics * * * Article V. All claims of citizens of the United States against the government of the Mexican republic, which were considered by the commissioners, and referred to the umpire appointed under the convention of the 11th of April 1839, and which were not decided by him, shall be referred to, and decided by, the umpire to be appointed, as provided by this convention, on the points submitted to the umpire under the late convention, and his decision shall be final and conclusive. It is also agreed that if the respective commissioners shall deem it expedient, they may submit to the said arbiter new arguments upon the said claims." It is needless to say that the claims of citizens of Mexico against the United States, mentioned in Article I., as just quoted, being unprovided for in the treaty of peace, remained extinguished by the war.

[2] 9 Stats. at L. 393.

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citizens of the United States under the foregoing stipulations. It was provided that the commissioners should have a secretary versed both in English and in Spanish; and they were authorized to appoint a clerk and to make rules and regulations. All records and papers in the Department of State relating to the claims were required to be delivered to the board, and at the close of its sessions all its papers were to be deposited in that Department. The commissioners were authorized, during a year from the time of their organization as a board, to apply for papers in the possession of the Mexican Government. Each commissioner was allowed an annual compensation of $3,000; the secretary, $2,000; the clerk, $1,500. The President was authorized to make provision for contingent expenses. At the close of their labors the commissioners were directed to report a list of their awards to the Secretary of State, who in turn was required to certify a copy of it to the Secretary of the Treasury in order that the awards might be paid. It was provided that the awards should be paid either in 6 per cent stock redeemable at the pleasure of the United States, or in money, at the option of the United States. The board was required to terminate its business in two years from the day of its organization.[1]

Provision as to Contested Rights.

The act contained a special provision for the determination of contested rights in respect of the awards. By this provision a person claiming an interest in an award which had been made in favor of another person might, within thirty days from the date of the award, give notice of an intention to contest the claim to the Secretary of the Treasury; and he was required also to file with the district attorney of the United States a bond with sufficient security for the payments of costs and damages growing out of the contest. When this was done, it was provided that the amount awarded should be left in the Treasury of the United States, subject to the decision of the courts of the United States thereon; and the party claiming the sum awarded, or any part thereof, was authorized to litigate his right by a bill in equity in the circuit court of the

[1] By an act of March 3, 1851 (9 Stats. at L. 617), the Secretary of the Treasury was authorized to sell stock, bearing not more than 5 per cent interest and redeemable in ten years, for the purpose of paying the awards.

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United States for the District of Columbia. It was further provided that any injunction granted by the court on such a bill should be respected by the Treasury Department.[1]

Organization of the Board.

March 24, 1849, the following notice was published in the newspapers:

"DEPARTMENT OF STATE,
"*Washington, March 24, 1849.*

"Pursuant to the 4th section of the act of Congress, approved 3d March, 1849, entitled 'An act to carry into effect certain stipulations of the treaty between the United States of America and the Republic of Mexico, of the second day of February, one thousand eight hundred and forty-eight,' notice is hereby given that the Board of Commissioners created by that act will meet in the city of Washington on Monday, the sixteenth day of April next, to receive and examine all claims of citizens of the United States upon the Republic of Mexico which are provided for by the treaty aforesaid and which may be presented to the said Board of Commissioners, and to decide thereon according to the provisions of the said treaty, and *of the first and fifth articles* of the unratified convention concluded at the City of Mexico on the twentieth day of November, one thousand eight hundred and forty-three.

"JOHN M. CLAYTON."

At noon on April 16, 1849, the day announced in the notice, there met at the City Hall in Washington George Evans, of Maine, and Robert T. Paine, of North Carolina, who had been appointed by President Taylor as commissioners. The third commissioner, Caleb B. Smith, of Indiana, did not appear till the following day. Messrs. Evans and Paine produced their

[1] In the case of the ship *Henry Thompson*, which was returned by Baron Roenne undecided, Williams & Lord appeared as owners of the cargo. In June 1845 Williams assigned half his interest to one Warner, who in August 1845 assigned it to W. B. Hart. In October 1845 Williams assigned to Hart the other half of his interest, and about the same time Lord assigned to Hart all his interest. In June 1847 Hart, who had thus become the apparent owner of the whole claim, assigned it to W. W. Corcoran. In January 1845, however, Williams, who had not then made any assignment, assigned half of his interest to one Judson; but Judson filed no notice of the fact in the Department of State, nor did he allege any interest till 1851 when Corcoran had prosecuted the claim to judgment and received an award under the act of 1849 of about $15,000 as legal owner of the whole claim. Corcoran had in 1847 given notice to the Department of State of Hart's assignment to him. He knew nothing of the assignment to Judson. It was held that Corcoran had both an equitable and a legal title under the award of the board, and must prevail against Judson, who had only an equitable title. (Judson *v.* Corcoran, 17 Howard, 617.)

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commissions and oaths, which were read and filed.[1] The commission and oath of William Carey Jones, as secretary to the board, also were read and filed. The board was then declared to be duly organized.

It was announced that the sittings of the board would be held at the same place daily, beginning at 11 o'clock a. m., and that an opportunity would be given at the opening of each sitting for the presentation of motions, applications, and papers. It was also announced that the regular business of the board would not be taken up, nor any case be heard or acted on, till all the commissioners had met and rules of procedure had been adopted and published.

Various papers presented by claimants were ordered to be filed, and the secretary was directed to notify the Secretary of State of the board's organization and of its readiness to receive from him such records, documents, and papers as might be in the Department of State having relation to the claims to be decided.

The secretary was also directed to inform the Secretary of State that in the opinion of the board the services of a messenger were necessary, and respectfully to request that provision might be made for the employment of a person in that capacity, and for the payment of other contingent expenses.

The board then adjourned till 11 o'clock the next morning.

Further Record.

When the board reassembled on the morning of the 17th of April Mr. Smith appeared, and his commission and oath were read and filed. Two days afterward the papers in the Department of State having relation to the claims were received.

[1] The oath of Mr. Evans, which was taken before one of the judges of the circuit court for the District of Columbia, was as follows:

"I, George Evans, of the State of Maine, having been appointed by the President of the United States, by and with the advice and consent of the Senate, a commissioner under the act of Congress approved the 3rd of March, 1849, entitled 'An act to carry into effect certain stipulations of the treaty between the United States of America and the Republic of Mexico, of the second day of February, one thousand eight hundred and forty-eight;' and having been duly commissioned as such commissioner, do hereby solemnly swear that I will support the Constitution of the United States, and that I will truly and faithfully discharge the duties of my said office and well and faithfully execute the trust committed to me.

"GEO. EVANS.

"Sworn to and subscribed before me, James Dunlop, assistant judge of the circuit court of the United States, on the 4th day of April, 1849."

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April 21 a set of rules, previously submitted by Mr. Evans, was adopted. Mr. Evans then submitted rules in relation to testimony, which were adopted after consideration.

On the 24th of April the board appointed a clerk and a messenger.

During the sessions of the board two changes took place in the office of secretary. After holding the position for three months Mr. Jones was succeeded by Edward William Johnston, who was in turn succeeded during the last month of the commission by Charles W. Davis.

Close of the Commission.

June 28, 1850, the board caused a notice to be published that no memorial would be received after February 1, 1851, unless for special cause supported by affidavit; and on April 15, 1851, in accordance with the act of Congress, the business of the board was brought to a close.[1] On that day the commissioners certified their awards to the Secretary of State, and directed the transmission to him of their records and opinions. They made the following report of their proceedings:

"OFFICE OF COMMISSIONERS ON
CLAIMS AGAINST MEXICO.

"To the Honorable DANIEL WEBSTER,
"*Secretary of State.*

"SIR: The Commission instituted by virtue of the Act of Congress of March 3rd, 1849, entitled 'An Act to carry into effect certain stipulations of the treaty between the United States of America and the Republic of Mexico, of the second day of February one thousand eight hundred and forty eight,' having expired, the undersigned, appointed Commissioners in pursuance thereof, have the honor respectfully to report that they have concluded the business committed to them, by the Act aforesaid, and agreeably to its provisions they herewith transmit, to be deposited in the Department of State, the Journal of the proceedings of the Board, and all the Records, Documents and Papers which have come into its possession.

"They also report herewith in conformity with the 6th section of the Act aforesaid, a 'list of all the several awards made by them.'

Amount Awarded.

"The whole amount awarded upon all the claims allowed by the Board, is Three millions two hundred and eight thousand three hundred and fourteen dollars and ninety six cents ($3,208,314.96).

[1] April 10, 1851, the board reversed its prior decision on the claim of Joseph W. Henry, on the strength of new testimony.

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Interest. "Interest at the rate of five per cent per annum upon all claims growing out of contracts or for loss of property from the origin of the same, respectively, to the close of the Commission, has been allowed, and is embraced in the amounts awarded to the several claimants named in the list herewith transmitted.

Awards. "With a view to exhibit to claimants and others who may be interested in the sums allowed, the awards have been entered up at length, in two volumes, designating the amount of principal and of interest in each case. These volumes are also herewith transmitted.

Opinions. "The opinions, to which the Board has come, in the several cases decided, have been recorded in three volumes, which are also sent with this report.

Sessions. "The Board was organized on the 16th day of April 1849, the time appointed by the President of the United States, and has held five sessions as follows.

"The first, commencing on the 16th of April 1849 and closing on the 28th of the same month.

"The second, commencing on the 4th of June 1849 and closing on the 22nd of the same month.

"The third, commencing on the 5th of November 1849, and closing on the 27th of March 1850.

"The fourth, commencing on the 17th June 1850 and closing on the 28th of the same month.

"The last, commencing on the 18th of November 1850 and closing on the 15th of April 1851.

Memorials. "The business of the Board has been proceeded with, at its several sessions, with the utmost practicable despatch. The whole number of memorials presented is two hundred and ninety two, but as it often happened that several persons united in one memorial, this number does not accurately exhibit the number of claims which have been preferred.

Disposition of Claims. "Forty of the memorials thus presented were rejected upon inspection, as they did not set forth facts which, if proved, would constitute valid claims against the Republic of Mexico.

"Two hundred and fifty-two were received, and, of these, one hundred and eighty two were sustained by the proofs exhibited in support of the same, and the claims set forth therein were adjudged to be valid and were allowed accordingly

"The remaining seventy not being in the opinion of the Board, sustained by the proofs offered in their support, were adjudged not to be valid and were not allowed.

"The whole number of awards as appears by the list transmitted is one hundred and ninety eight.

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"No claim has been presented which has not received the careful scrutiny of the Board.

"It has not been practicable in the accumulated pressure of business, thrown upon us at the close of the Commission, to prepare as was intended, a tabular statement of the nature and amount of the several claims that have been passed upon. The Docket, herewith sent, it is believed, will furnish full information upon these points.

"In closing their labors the undersigned have the honor to tender to Mr. Webster the assurances of their high personal regard.

"GEO. EVANS
"CALEB B. SMITH
"ROBT. T. PAINE,
"*Commissioners.*"[1]

The Gardiner Case.

After the commission had adjourned and its awards were published, much dissatisfaction with its decisions was expressed by disappointed claimants and their agents. This was not in itself an unusual circumstance, but the complaints generally heard upon such an occasion were in the present instance accompanied with charges that the proceedings of the board had been irregular and that personal and official influence had been employed to obtain awards. These charges chiefly centered about the claim of George A. Gardiner, a dentist, in whose favor an award was made for $428,747.50. While his principal counsel was a former minister to Mexico, one of his associate counsel was a son-in-law of one of the commissioners. Another associate, who was a brother of the Secretary of the Treasury, was said also to be a brother-in-law to another commissioner. Another associate was a well-known friend of the Secretary of State, and still another, so rumor said, was the Secretary of the Treasury himself; and the belief was growing that the claim itself was fraudulent.

April 8, 1852, Mr. Olds, of Ohio, offered in the House of Representatives a resolution asking the President for information as to the claim and as to the allegation that a member of the Cabinet had received a part of the award.[2] This resolution encountered objection, but on the 28th of June Mr. Olds offered another to raise a committee of investigation, and this was agreed to.[3] The Speaker appointed as members of the com-

[1] S. Ex. Doc. 34, 32 Cong. 1 sess.

[2] Cong. Globe, XX. part 2, p. 1207.

[3] Cong. Globe, XX. part 2, pp. 1628, 2301, 2312.

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mittee Mr. Andrew Johnson, of Tennessee; Mr. Goodrich, of Massachusetts; Mr. Chapman, of Connecticut, and Mr. Preston King, of New York. The special object of the committee was to investigate the connection of Mr. Corwin, then Secretary of the Treasury, with the claim.[1] The committee, after due investigation, found that Mr. Corwin had, while a Senator from Ohio, been of counsel and had held an assignment of a part of the claim, but that he disposed of his interest before he became Secretary of the Treasury and had ever afterward refused either to act as counsel or to consult with other counsel in relation to the case. The committee expressed the opinion that the claim was the product of forgery and false swearing, but discovered nothing to implicate counsel in its fraudulent concoction.[2]

A committee of investigation was also appointed in the Senate, the members being Messrs. Soulé, Brodhead, Bayard, Pratt, and Clarke. It was in session for more than a year, and thoroughly investigated the merits of the claim. In his memorial to the commission Dr. Gardiner, as he was commonly called, had stated that he was a native-born citizen of the United States, and that in 1844 he was engaged in mining in the State of San Luis Potosi on a very large scale, employing 500 men and having much machinery, including steam engines. He represented that he had invested in the enterprise $330,392, and that he was making a clear profit of about $10,000 a month, when on October 24, 1846, he was, in violation of the treaty of 1831, suddenly expelled from the country on the approach of the American army, and was thus "compelled to abandon his immense establishment," which the Mexican soldiers, after rifling it of everything that could be removed, set on fire, so that it "was left a heap of ruins." He claimed $500,000, with interest, and supported his demand with books of account and affidavits showing his possession of the mine, the value of the fixtures, the monthly profits, the quantity and quality of the ore on hand, and various other pertinent matters. Some of the papers were authenticated by the Mexican

[1] Cong. Record, XXIV. part 3, pp. 2312, 2413, 2418, 2463; XXV. App. 832. 1030.

[2] H. Report 1, 32 Cong. 2 sess. By the act of February 26, 1853, sec. 3, it was made a misdemeanor for a Senator or a Representative to act as agent or attorney for prosecuting any claim against the United States. (10 Stats. at L. 170; Cong. Globe, XXVI. 23, 242, 259, 273, 288, 291, 301, 313, 365, 391, 445, 630, 649, 695, 715, 787, 805; App. 64, 67, 109, 111, 217.) See, also, act of June 11, 1864, 13 Stats. at L. 123; Rev. Stats. of the U. S. sec. 1782.

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legation at Washington. Gardiner did not exhibit a specific title deed to the mine, but he produced a certificate of Francisco Fernandez, prefect of Rio Verde, State of San Luis Potosi, that "in the book of registry of mines in his office, pertaining to the year 1844, at folio 15, is to be found an entry, bearing date July 12 of the same year, to the effect that Mr. G. A. Gardiner has denounced an old mining district of silver, etc., situated on a branch of the Sierra Madre, opposite Serro Gordo, in the Sierra of Huasteca, county of Lagunillas, in the said department," etc. It was also recited that on the same day an order was issued vesting in the petitioner "the rights and privileges conceded to restorers of abandoned mineral districts," and that the districts consisted of three shafts, designated *Trinidad*, *Dolores*, and *San José*, the whole mine being known by the name of *La Sierra*. It was also recited that "appropriate deeds and titles constituting him [Gardiner] the legitimate and sole owner of the mine" were delivered to him. On March 12, 1850, the board decided to allow the claim, reserving the question of amount. On the 15th of April it awarded to George A. Gardiner $321,560, and to W. W. Corcoran, as assignee of one-fourth of the claim, $107,187.50, making a total of $428,747.50.

In June 1852, while the Senate committee was in session, Señor José Antonio Barragan, comptroller-general of the rents of the State of San Luis Potosi, and other witnesses arrived in Washington from Mexico, and indictments were found in the courts of the District of Columbia against Dr. Gardiner for forgery and false swearing; against his brother, John Charles Gardiner, for false swearing; and against John H. Mears for transmitting false papers from Mexico.[1] It appeared

[1] Mears himself had a claim on which the commission awarded $153,300. He did not come to Washington, but was represented by Dr. Gardiner as attorney in fact.

Gardiner was first indicted only for false swearing. In this relation the following letter is of interest:

"The President has referred to this Department your letter of the 6th instant, expressing an expectation, as the counsel of Dr. Gardiner, that so much of the funds awarded to the Doctor under the Treaty of Guadalupe Hidalgo as might be necessary to indemnify bail for him, on account of the crime for which he is now imprisoned, may justly be claimed under the arrangement for his return to the United States from Europe. The President directs me to say in reply, that on recurring to his letter to you of 30th July last, he does not concur in the views which you have expressed, and does not feel authorized to yield to your request. It will

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that the seal of the prefecture of Rio Verde on Gardiner's papers was genuine, but that it was surreptitiously and fraudulently employed. The seal of the State of San Luis Potosi was, wherever it appeared on the papers, forged. It was only a clumsy imitation of the genuine seal.

While the indictments were pending the Senate committee decided to send a commission to Mexico to make on the spot an investigation of the story of Dr. Gardiner's despoilment. The commission consisted of Messrs. Henry May, James K. Partridge, and Buckingham Smith, Capt. Abner Doubleday of the Army, and Lieut. W. W. Hunter of the Navy. The committee invited Dr. Gardiner to accompany the commissioners, but, though he at first accepted the offer, he afterwards declined to go. The commissioners sailed from New Orleans for Mexico October 27, 1852. When, about the middle of December, they reached Lagunillas, in the department of Rio Verde, where the mine was alleged to be, they found that Dr. Gardiner and two accomplices had got there before them, and had been engaged in preparing their principal Mexican confederates for the investigation. One of the confederates, however, who had received only a small part of the money Gardiner

be recollected that when that arrangement was made Dr. Gardiner stood indicted for false swearing, by which it was alleged that he had fraudulently obtained a large amount of money from the Treasury of the United States. The Doctor was then in England, and a portion of the funds which he had thus obtained was in the hands of his bankers here. The United States had no means of bringing him to this country for trial. It was therefore thought that if this money had been fraudulently obtained by him it should be returned to the Treasury of the United States, and that if he were convicted of the crime with which he was charged it would be. But no trial or conviction could be had unless he voluntarily stood trial. If, then, he was permitted to use a portion of this fund to indemnify his bail, and should forfeit his recognizance, the funds thus pledged would by the very arrangement go back into the Treasury. Therefore, under the peculiar circumstances of that case, the pledge was permitted to be made. But now the Doctor has been indicted for a distinct offense, is in the custody of the law, and, if guilty (as we have a right to presume from the indictment that he is, so far as this matter is concerned, until the contrary appears), then the very fund which is here asked to be pledged to enable him to get bail is a fund which, in equity and justice, now belongs to the United States, and the effect of granting his request would be that the United States would virtually become his bail. This, in the present aspect of things, the President does not feel it right to do, and therefore directs me respectfully to decline your request." (Mr. Hunter, Acting Secretary, to Mr. J. M. Carlisle, July 7, 1852, MS. Dom. Let. XL. 220.)

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had promised him, made a full confession of the forgeries and other frauds connected with the transaction. The result of the commission's investigation were summed up at the conclusion of its report thus:

"1. That George A. Gardiner is not, and never was, a citizen of the United States.[1]

"2. That neither the said Gardiner nor John H. Mears ever owned or were interested in a silver or quicksilver mine, or any kind of mine, in the State of San Luis Potosi, in Mexico.

"3. That neither said Gardiner or (*sic*) Mears was ever expelled from that State.

"4. That during nearly the whole period of time in which said Gardiner alleges he was engaged in San Luis Potosi working his mines he was, in fact, at places remote from that State engaged as a manager of a small mining concern, as a dentist, and as a peddler in small wares.

"5. That every paper presented by both said Gardiner and Mears as coming from Mexico in support of their claims is false and forged."[2]

Dr. Gardiner returned to the United States on the same steamer as the commissioners. He was twice tried before the Senate committee made its report, and being convicted was, on his second trial, sentenced to undergo ten years' imprisonment. He immediately committed suicide. The principal prosecuting officer in the trial of Gardiner was Philip Richard Fendall, esq., then United States attorney for the District of Columbia. His argument on the second trial was published.[3] From his son, Reginald Fendall, esq., of Washington, I have the following interesting account of the closing incident of the trial:

"My father was assisted by the Hon. Henry May, of Baltimore, at that time a member of Congress from Maryland.

"Dr. Gardiner's counsel were Joseph F. Bradley and James M. Carlisle.

"Mr. May's brother, Dr. John Frederick May, was at that time the leading physician of Washington, and was present in court when the verdict was rendered.

"Immediately after it was rendered Dr. Gardiner asked for a glass of water. He was standing at the time, and he was seen to throw something into his mouth just before swallowing

[1] He seems to have been either a British or a Spanish subject.

[2] S. Report 182, 33 Cong. 1 sess. 149.

[3] Argument of Philip R. Fendall, United States attorney for the District of Columbia, on the Trial of George A. Gardiner in the Criminal Court, District of Columbia, March Term, 1853, for False Swearing: Washington, 1853.

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the water. Dr. May saw this, or else was immediately told of it. Anyhow, he hurried to the Capitol, called his brother out from the House, and told him to get an order from my father to allow no one to be with Dr. Gardiner except the jail officials. The order was given.

"Within a very short time after the case was ended Dr. Gardiner was dead. His stomach was immediately pumped, and it brought up not only a large quantity of arsenic but the paper in which it was wrapped when it was swallowed.

"It was well that the government acted so promptly and positively in the matter, because there was intense feeling about the trial and it was claimed by Dr. Gardiner's friends that he was an innocent man and that the shock of the conviction had broken his heart.

"Quite a number of exciting incidents occurred during the trial, one of which was a statement made by Mr. Bradley in his argument to the effect that he would rather see his house burned down, with his wife and children in it, than have the jury bring in a verdict of conviction."[1]

The report of the Senate committee was presented by Mr. Brodhead on the 28th of March 1854. It recommended that the Executive be directed to take steps to test the liability in law or in equity of all or any persons who had received any of the money paid to Gardiner or Mears to refund it to the United States, and a resolution directing the institution of such proceedings was introduced.[2] Bills had, however, already been filed against Gardiner in the United States circuit court in Washington and in New York, and in July 1852 injunctions were obtained restraining Corcoran and Riggs, of Washington, who

[1] The following letter, relating to the Gardiner trial, is interesting in its bearing on the subject of diplomatic privilege:

"DEPARTMENT OF STATE,
"*Washington March 21, 1853.*

"PHILIP R. FENDALL, Esq.,
"*U. S. Dist. Attorney, &c.*

"SIR: Referring to your letter of the 28th ultimo, in which you mention the advantage that would accrue in the proper prosecution of the Gardiner case, should the Mexican minister consent to appear as a witness, I have to inform you that in reply to the earnest solicitations of this Department Mr. Larrainzar feels compelled to decline appearing publicly in this case. Besides disclaiming all acquaintance with the facts involved, the minister of Mexico thinks that he cannot consistently with his official position participate in the judicial proceedings in reference to which his presence has been invoked.

"I am, &c.,

"W. L. MARCY"

(MS. Dom. Let. XLI. 319.)

[2] Cong. Globe, XXVIII. 549, 606, 765, 2138.

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held between $90,000 and $100,000, and the New York Life Insurance and Trust Company, which held $130,500 of moneys or securities belonging to Gardiner, from handing them over. March 29, 1855, a decree in favor of the United States was entered in Washington, but the papers in the suit seem to have been lost. The bill filed in New York prayed that the award "may be adjudged and declared void, and the said George A. Gardiner may be decreed to restore, refund, and repay" the moneys received thereon from the United States; and the court on June 14, 1859, decreed "that said award be, and the same is hereby, in all things reversed and annulled." In the two suits the United States recovered in all about $250,000.[1]

Criticism of the Commission.

Both the Senate and the House committee expressed the opinion that the investigation of Gardiner's claim by the commissioners, prior to its allowance, was not so thorough as it should have been; but the Senate committee went further and criticised the commission with much severity, saying:[2]

"Whilst the committee are of opinion that the commissioners have in general exhibited decided ability in the opinions prepared by them, they can not but express their regret that there were irregularities in their proceedings scarcely compatible with a judicial inquiry, and still less with a judicial determination which was intended to be a final disposition of claims in which were involved the rights of the citizens on the one side and the obligations of the Government on the other. The papers, it appears from the evidence, were kept with little care, and the mode adopted by the commissioners of deciding on the validity of the claims without making an award as to the amount, though the amount was in fact agreed upon and registered in private memorandum books by the commissioners, and, in some cases, made known on private application, was, in the opinion of your committee, calculated to excite suspicion, and ought not to have been adopted. And this course of action appears the more objectionable from the fact that claims were in some cases favorably acted upon which were represented by gentlemen whom it is difficult to suppose were employed from any benefit to be derived from professional skill. Besides, it is in evidence that such persons were related to, or had very intimate personal intercourse with, some of the members of the board of commissioners or others holding high official stations.

"The committee are also of opinion that there was palpable carelessness and neglect upon the part of the commissioners in some of the cases, and especially in those of Gardiner and

[1] H. Ex. Doc. 103, 48 Cong. 1 sess. 749.

[2] S. Report 182, 33 Cong. 1 sess. 3.

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Mears. The fact of an amount exceeding $500,000 being awarded upon a mere assertion of title, without any effort being made either by the parties to produce the title or to show its loss or destruction, or on the part of the commissioners to require such production or proof of such loss or destruction, they being authorized to require it, is evidence of want of attention, if not of gross neglect."

These animadversions upon the conduct of the commissioners have on various occasions, some of them comparatively recent, served as the basis of injurious statements in the press and elsewhere touching the commission's action, which would not, perhaps, have been made if those who uttered them had carefully considered the committee's report or had been acquainted with the characters of the men whose course was brought into question. Though Mr. Paine, who was specially charged with the papers in the Gardiner case, was not a man of great distinction, his character and his connection with the claim were, so far as the evidence shows, absolutely unimpeached even by so much as a suspicion. The other commissioners, Mr. Smith and Mr. Evans, to whom the report refers in what it says touching the employment of persons related to or having intimate personal intercourse with some of the members of the board, were both men of high repute. Mr. Smith was afterward a member of President Lincoln's Cabinet, and ended his days as a United States district judge. Mr. Evans was a man of commanding ability. Ex-Senator Bradbury, of Maine, who, though a contemporary of Mr. Evans and for many years a political opponent, still survives, says of him: "Of all our New England men I rank him next to Webster." Mr. Robert C. Winthrop, who was with him in the famous "mess" on Capitol Hill, and who knew him well, called him "a really great man."[1] When he entered the Senate he was placed at the head of the Committee on Finance, "a distinction never before or since conferred upon a new member."[2] Mr. Webster declared that he understood the finances of the country as well as Gallatin and Crawford did.[3] To men of this type,

[1] George Evans: Address by Hon. William L. Putnam before the Maine State Bar Association February 14, 1894.

[2] Blaine, Twenty Years of Congress, I. 70-72. The American Review for July 1847 contains a portrait of Mr. Evans and a sketch of his career up to that time.

[3] The *Eastern Argus* (Portland, Maine) of Monday, April 8, 1867, contains a notice of Mr. Evans's death, which occurred in Portland on the preceding Saturday.

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whose lives have been without taint, posterity owes it to be careful of their reputation. It is indeed much to be desired that all officers of government, whether in judicial, legislative, or executive station, should be placed beyond the reach of personal influence. But, although it is to be deplored, it nevertheless is a fact that interested parties are, in the employment of their agents, so often swayed by other considerations than that of the "benefit to be derived from professional skill," that the public officer must be deemed unfortunate whose action, though it may bear no trace of partiality, is assailed on that ground. As to the statement in the report that the papers were "kept with little care," it may be observed that no complaint was made before the committee of the loss of any documents, though, after the papers were deposited in the Department of State and the commission had ceased to exist, some of them were fraudulently extracted by a claimant.[1] The practice of the board in withholding the announcement of its decisions perhaps was not a wise one. According to Mr. Paine, the commissioners thought that its adoption would preserve them from the applications of dissatisfied claimants and their agents, and that after a conclusion was reached evidence might be adduced which would materially affect the award. This explanation was a very obvious and reasonable one, and certainly involved nothing unlawful. Whether it justified the course of the commissioners was a practical question, not a legal or moral one.

In respect of the actual disposition of claims, it may be said that the committee found, apart from the cases of Gardiner and Mears, nothing to condemn. On the contrary, putting aside those cases for the moment, it may be said that the results of the investigation remarkably vindicated the commission. The committee actually reexamined sixty-three claims which had been decided by the commission, and heard all persons who had anything to allege against its awards. One claim agent testified that he had "heard it said" that he was not successful with his cases because he was "too honest." Another complained that the commissioners had sought evidence against his claims from the Department of State. Other causes of discontent were uttered. But, apart from the report as to Gardiner and Mears, the committee asked to be discharged

[1] H. Ex. Doc. 98, 32 Cong. 1 sess.

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from all the sixty-three cases submitted to it except those of Jonas P. Levy and José Maria Jarrero. In these cases the committee, against the opinion of Mr. Bayard, recommended, on the ground of a "plain mistake in law," the passage of a bill to refer the claims to the accounting officers of the Treasury for reexamination and settlement. The bill was passed, but, after the Fifth Auditor of the Treasury had reported in favor of allowing Levy $54,669.40, Mr. Guthrie, then Secretary of the Treasury, being of opinion that the claim was groundless, referred it to the First Comptroller, who disallowed every item of it. Levy again appealed to Congress, and secured a reference to the Court of Claims, which also reported the case adversely.[1] On July 22, 1868, Mr. Sumner, from the Senate Committee on Foreign Relations, submitted a report reviewing and rejecting the claim.[2] Mr. Frelinghuysen presented to the Senate, June 11, 1874, another adverse report,[3] and Mr. Ben. Wilson submitted to the House, April 16, 1880, a similar report.[4] The decision of the commission in this case appears to have stood remarkably well the ordeal of reexamination, after it was declared to involve a "plain mistake in law."

In another case, that of Alexander A. Atocha, the committee was equally divided, Messrs. Soulé and Brodhead voting to reverse the board's decision, and Messrs. Bayard and Pratt to sustain it. Atocha continued to appeal to Congress, and finally obtained the passage of an act to refer his case to the Court of Claims.[5] The ground of his claim was his alleged wrongful expulsion from Mexico. He was a personal friend of Santa Anna and a financial agent of his administration, and he was at Santa Anna's house when the revolution which gave rise to the claim began. The Mexican Government, in a note to Mr. Shannon, then United States minister to Mexico, who had protested against the expulsion, justified it on the ground that Atocha "was one of the principal agents who wrought against the government, as is notorious, and as his excellency, Mr. Shannon, himself well knows." Mr. Shannon did not reply to this charge, and it was chiefly upon his tacit

[1] Court of Claims Report 173, May 4, 1858, 35 Cong. 1 sess. vol. 3.

[2] S. Report 183, 40 Cong. 2 sess.

[3] S. Report 432, 43 Cong. 1 sess.

[4] H. Report 1123, 46 Cong. 2 sess.

[5] Act of February 14, 1865, 13 Stats. at L. 595; S. Report 70, 38 Cong. 1 sess.

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admission of it that the commissioners relied in rejecting the claim. After the adjournment of the commission the claimant produced a dispatch from Mr. Shannon to the Government of the United States denying the truth of the charge and explaining why he did not reply to it. The Court of Claims rendered in favor of Atocha's administratrix a judgment for $207,852.60, to be discharged by the payment of $207,449.37, the unexpended balance of the fund of $3,250,000. The Court of Claims had before it not only Mr. Shannon's explanatory dispatch, but also a mass of testimony then recently taken in Mexico. "The case made in 1873 is," said the court, "essentially different from that made in 1851." Congress in fact set aside the award of the commission in order that the claim might be reheard on new evidence, and the decision of the Court of Claims, instead of being a reversal of the commission's decision, was virtually a judgment on a new case.

We may now consider for a moment the action of the commission in allowing Gardiner's claim, and for this purpose we may include with it that of Mears. Before the commission met Gardiner had secured the services of men of standing and ability, and, what is more to the point, had been able to effect assignments for value to persons who would not willingly have lent themselves to a scheme dependent for its success on forgery and perjury. He seems to have been a man of peculiar plausibility, and some light may be thrown on the fact of his large popular support by the reputed remark of a well-known lady that she "had known many good men," but that Dr. Gardiner was "the best man" she had ever known. His principal assignee was Mr. W. W. Corcoran, certainly a man of more than ordinary sense and discernment. His counsel were men of undoubted respectability. When his claim was first presented to the commissioners, they seem to have suspected, not that it was forged and fraudulent, but that it was exaggerated, because it did not appear how Gardiner obtained the capital to engage so extensively in mining operations. Gardiner, however, completely satisfied them on this point. He explained to them his early connections with mining speculations and operations, and his studies in chemistry and mineralogy. He told how at length he became connected with Perez Galves, the Mexican "mining king," and obtained means to carry out his undertakings. He exhibited a long correspondence between Galves and himself, all apparently genuine, but in fact

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forged. He produced a register of the products of his mines, kept by Mexican officials. At length all the doubts of the commissioners were dissipated and they considered the case one of the best established before the board. They often remarked, so the secretary of the commission testified, upon the delicacy and propriety of Dr. Gardiner's conduct, and they at length increased the amount which they had originally determined to allow him. With one exception, his proofs were apparently perfect, and in respect of that exception it is easy to entertain an erroneous impression. When the committee's report says that the board made its award without requiring the claimant to produce his "title" to the mine, or proof of its loss or destruction, it evidently refers to the deed or deeds recited in the certificate of the prefect of Rio Verde, and rejects the certificate itself as evidence of title. Obviously the commission treated this certificate, in connection with other official acknowledgments of ownership, as sufficient to establish title, at least as against Mexico. It was stronger evidence of title than that on which Sir Edward Thornton awarded larger sums on the Weil and La Abra claims, the history of which will appear in the next chapter; and while this circumstance by no means excuses the commissioners for any failure to exact the utmost proof of Gardiner's claim, it does tend to show that men of undoubted probity may, even where the evidence is not so full as may reasonably be required, deem it their duty to resolve a doubt in favor of a claimant. To err in so doing is not to be guilty "of want of attention, if not of gross neglect."

A term was fixed within which the board, under the act of 1849, was required to complete its labors, and at the expiration of that period it adjourned. The committee of the Senate reported two years afterward, in the light of the report of its own special commission to Mexico, and of Gardiner's trials, conviction, and suicide. After all these transactions were over many things appeared to be obvious or suspicious which might not have created a doubt before.

The committee found that the opinions of the board "in general exhibited decided ability." This was not strange, since many of them were prepared by Mr. Evans. It seems that he occupied a room on the third floor of the house in which the commission sat, and there wrote out opinions, sending them when completed to the other commissioners for approval.

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Decisions as to Powers and Jurisdiction.

In the case of Louis S. Hargous a claim was presented involving the settlement of certain accounts relating to contracts with the Mexican Government. In estimating the amount to be awarded it became necessary to decide how far the settlement of the accounts was to be regarded as evidence of the amount due. It was urged by claimant's counsel that the whole amount of the claim, as it was adjusted by the Mexican Government on the final settlement, should be regarded as an ascertained balance not open to question or inquiry. It was alleged to be a "solemn and full admission of the Mexican Government before there was any expectation that the United States would assume the debts due to American citizens by Mexico." The commissioners said:

"This assumption may be correct, and yet it does not follow that the whole amount admitted by Mexico to be due is a valid claim under the treaty. The power to ascertain the amount and validity of the claims is, by the terms of the treaty, conferred upon this board, organized in conformity with its provisions. In the exercise of this power it is the duty of the board to examine all the items which go to make up the claim, and if any of them shall be found to be of such a character as not to be embraced within the meaning of the treaty, they should be excluded.

"It is contended by the claimant's counsel that the liability of the United States under the treaty is to pay the claims of every class and description existing at the date of the treaty, and admits of no exception. In construing this clause of the treaty the board has not been governed by the literal meaning of the words used. A construction giving to the terms used a meaning and effect sanctioned by numerous precedents, based on a similar clause which may be found in several treaties, has appeared the best means of carrying out the true intent of the contracting parties. In accordance with this construction several claims have been rejected which were held by citizens of the United States at the date of the treaty, and which were unquestionably claims binding upon the Mexican Government. The claims of F. M. Dimond, Parrott & Wilson, May, administrator of Slacum, and heirs of Colonel Young, were of this description. These claims were rejected because they were not American in their origin. It was held by the board that without this essential character they were not embraced in the treaty."

In one of the memorials presented to the board it was set forth that in 1817 Augustus P. Chateau and Julius de Mun made an expedition to the head waters of the Arkansas River;

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that they carried a large quantity of merchandise and a number of men for the purpose of trading with the Indians and trapping for furs; and that, being within territory claimed by the United States, they and their property were there forcibly seized by an armed force sent out by order of the governor of New Mexico and carried into Santa Fé, where they were imprisoned and their goods confiscated by order of a military court. This seizure took place in May 1817, and complaint thereof was laid before the Secretary of State of the United States early in the following year. Demand for redress was immediately made by the United States upon the King of Spain, and indemnity sought for the injured parties. It did not appear that reparation was promised by Spain, but when the board of commissioners under the Florida Treaty of 1819 was organized, for the purpose of ascertaining the amount and validity of the claims against Spain, which the United States had undertaken to pay, the claim in question was presented to the board by the parties in interest. The board rejected the claim, but gave no reason for so doing. The claimants, however, in a letter to the Secretary of State of the United States of May 1825, alleged that their claim was rejected on the ground that it was not embraced in the treaty of 1819. This view appears to have been adopted by the Government of the United States, for on May 27, 1825, instructions were sent to the minister of the United States in Mexico to demand redress from that government. On these facts the commissioners under the act of 1849 said:

"The United States, by the treaty of 2d of February 1848, having assumed to pay the claims of their citizens against Mexico, and having through the different departments of the government recognized this claim specifically as one for which Mexico was liable before the said treaty was concluded, it only remains for this board to examine its justice and amount. The evidence shows that the wrong was committed upon territory claimed at the time by the United States, and that the parties injured were then pursuing a peaceful and legitimate business. It is true that Spain also claimed this territory, but she had no possession of it by occupancy or otherwise, and citizens of the United States, temporarily there and for the purposes of trade, interfering in no way with the rights of Spain, were there with the permission and under the protection of their own government. * * * The evidence in the case clearly shows that the seizure was made, and that, too, upon grounds which this board is compelled to decide wholly insufficient to justify the act, or to give jurisdiction to a foreign court over

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the claimants or their property. It was clearly a wrong; * * * and this board is of opinion and does decide the aforesaid claim of Pierre Chateau, jr., to be a valid claim under the treaty of 2d February 1848."

In the case of William S. Parrott, whose claim remained undecided by the commission under the convention of 1839 because the American commissioners, owing to the failure of the Mexican Government to furnish certain important papers, refused to join in submitting it to the umpire, it was contended before the commissioners under the act of 1849 that the "refusal of Mexico to furnish the papers in question warranted an award in favor of the claimant to the full extent of his demand." The commissioners said:

"The board can not at this time decide what may be the effect of a refusal on the part of Mexico to furnish any documents, records, or other proofs in her possession which a claimant may deem necessary to a just decision of his claim. They are, however, clearly of opinion that a refusal to furnish such proofs to the mixed commission, under the treaty of 1839, does not present a sufficient reason to authorize this board to award to a claimant 'the full extent of his demand,' on a statement by him of what such records or documents would have proved.

"The statement of the Secretary of State, in his instructions to our minister in Mexico (referred to in the argument before this board) of the construction which the government would place on such refusal, furnishes no rule of decision binding on this board."

Procedure and Practice.

Several memorials presented to the board were signed and sworn to by a person who, as the commissioners observed, could have had "no personal knowledge upon the subject of them."[1] The rules of the board required the statement and the oath of the claimant himself, and this requirement could not, said the commissioners, "be performed by any other person, especially where the injury is of the character set forth in these memorials, and many of the facts must be exclusively in the knowledge of the party complaining."[2] The commissioners observed, however, that "extreme cases" might "possibly occur when a strict adherence to this rule would obviously operate to do

[1] Memorials of James W. Zacharie.

[2] The memorials alleged that the claimants were expelled from Mexico and subjected to various other wrongs, and that they had never become subjects of the Government of Mexico, or taken an oath of allegiance thereto.

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injustice," and that when such cases arose they would be "considered and disposed of according to their peculiar circumstances." Such a case was held to have been established where the claimant, who had "not been in the United States since the organization of the board," was still "absent at sea, on a voyage to China," and where "the documents filed with the board" contained "sufficient evidence" to "establish the validity of the claim independent of the allegation or oath of the party himself."[1] So, also, in another case, where the memorial was not "subscribed and sworn to by the claimant himself," the commissioners admitted it upon "evidence that the claimant, whose residence for some years had been in Chihuahua, Mexico, has removed to California, and that all efforts to obtain his signature and oath have been unavailing by reason of remote residence and the uncertainties of communication with that State." Moreover, there was, among the proofs filed in the case, a statement of the claim made and subscribed and sworn to by the claimant on May 12, 1848, before the organization of the board. "This statement," said the commissioners, "contains many of the particulars required by our rules. The proofs in the case, which are shown to be entitled to our confidence, supply the omissions, and we are satisfied that all the material facts are established, independent of the oath of the claimant. We therefore decide to receive the memorial. The claim grows out of the expulsion of Douglass from Chihuahua in September 1846, and is similar in all respects to those of George East, William Meservy, and others, already allowed by the board."

On the other hand, in yet another case, the memorialist, Pierre Bonfils, asserted that he was the attorney of one Jacques Leno, and as such presented the claim. It appeared, however,

[1] Case of Frederic Freeman. The claim in this case grew out of the alleged illegal imprisonment of Freeman at Tabasco in 1832. When the memorial was first presented the commissioners, February 28, 1850, rejected it, because it was "subscribed and sworn to by an attorney of the claimant and not by the party himself." April 10, 1851, they decided, as above stated, to admit it, and then said: "He [Freeman] was at that time [1832] steward on board the schooner *Consolation*. The circumstances of the case are stated in the opinion of the board on the claims of Philo B. Johnson, Mary Hughes, and some others, where it was decided that the outrages complained of constituted a valid ground of claim against Mexico. In conformity with those decisions the board now decides that the claim of Frederic Freeman set forth in his memorial is valid, and allows the same accordingly."

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that the power of attorney under which he acted was given in February 1842, and was limited to the disposal of the property which his principal had in the city of New Orleans. The commissioners said:

"We have frequently decided that memorials must be subscribed by the claimants themselves and verified by their own oaths. In a few instances these rules have been relaxed, where it appeared that the claimant from his absence or remote residence could not have had knowledge of what was required, and where it was also clearly proved by other and independent testimony that the grounds of claim were in every particular sustained. This case does not come within the scope of these exceptions. The memorialist resides in New Orleans; the principal, Leno, is alleged to live in Tabasco. No reason is shown why the principal did not or could not prefer the claim in his own name and support it by his own oath."

The commissioners repeatedly decided that claims originally belonging to parties who had since deceased must be presented by their legal representatives, and not by their heirs. "The board," said the commissioners, "has not the means of deciding questions touching the distribution of intestate estates, which depend upon local laws and involve inquiries as to domicil and many other topics of which we are furnished with no evidence. Besides, it may happen that the rights of creditors are involved, who are entitled to be paid before any distribution can be made. We are, therefore, of opinion that the memorials of Rufus K. M. Baynum and others [heirs of James P. Baynum, deceased] be not received."[1]

The commissioners did "not usually deem it necessary to look beyond the letters of administration for proof of the death of the party in whose right the claim had its origin, assuming that the court which granted them had sufficient evidence of that fact." But in one case the "circumstances" were "so peculiar" that they thought "further proof" might "properly be required." The claim in question originated in 1841. "Certain papers" were "produced as evidence, appearing to be originals;" but "they were not verified as such, and therefore could not be received as satisfactory proof." The commissioners further said:

"It appears from them [the papers] that in 1844 McKenny [the original claimant] was in the City of Mexico, presenting

[1] The same action was taken, for the same reasons, upon the memorial of George A. Porter and others, the "surviving children" and "heirs at law" of "Ann P. Boulden, formerly Ann P. Porter, who died in the year 1838."

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the claims now set up to that government for adjustment, and that he deposited the papers with Mr. Black, the United States consul there, authorizing him to settle the same for the sum of $20,000. A letter from Mr. Black, dated September 10, 1849, is among the papers, to the effect that he does not know where McKenny then was, that he had addressed a letter to him at Comitau, but had received no reply. The inference is thence drawn that McKenny is not now living, and upon that inference alone it is understood the administration of his effects has been granted. . It is a matter of serious question whether the orphans' court of this district has power to grant administration upon the estates of persons who have died elsewhere leaving no local property to be administered upon. But upon that we give no opinion. We however feel at liberty to require evidence of the death of the party, before we receive a memorial in the name of an administrator, where, as in the present case, it appears there is nothing but a mere presumption arising from not having received a reply to a letter addressed to him."[1]

A question was raised as to whether any claim at all had been presented to the board in a certain case. The commissioners said:

"No memorial has been filed in this case, and the only evidence before the board that Mr. Buchanan intended to present a claim is furnished by a letter of Hon. Andrew Ewing, addressed to the board, in which he says: 'Enclosed you will please find the papers in a claim relating to Henry R. Buchanan, a citizen of Tennessee, against Mexico, for spoliations committed on his property by Governor Armijo, the Mexican governor of Santa Fé, at the close of the celebrated Mier expedition.' The papers accompanying Mr. Ewing's letter present no claim against the government of Mexico."

June 12, 1849, Aaron Leggett addressed a letter to the commissioners, asking that an application be made to the Mexican minister in Washington for a certain paper which was alleged to be in his possession. The commissioners declined to grant the request, saying that Article XV. of the Treaty of Guadalupe Hidalgo of February 2, 1848, pointed out the only mode which the board could pursue in obtaining proofs supposed to be in the possession of the Mexican Government. Mr. Leggett then made oath to the truth of the statements contained in his letter, and requested the board to apply to the Mexican Government in the manner prescribed by the treaty. June 22,

[1] Memorial of Walter S. Cox, administrator of James G. A. McKenny. Mr. Cox was appointed administrator of the estate of "James G. McKenny, late of Comitan, Mexico," on March 11, 1851, by "the judge of the orphans' court for Washington County, District of Columbia."

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1849, the commissioners decided not to grant the request, on the ground that, though the papers relating to Mr. Leggett's claims against Mexico, as preferred to the mixed commission under the convention of 1839, had been transmitted to the board by the Secretary of State of the United States, the claimant had not as yet presented a memorial to the board setting forth the claims which he intended to prefer before it, and that, in the absence of such a memorial, they could not perceive that the paper specified by Mr. Leggett, which was the report of the Mexican commissioners to the umpire under the convention of 1839, was "necessary to the decision of any claim" which he might prefer.

Effect of Convention of 1839.

By Article I. of the convention of 1839 the jurisdiction of the commission organized thereunder was, as has been seen, limited to claims against Mexico, statements of which, soliciting the interposition of the Government of the United States, had been presented "either to the Department of State or to the diplomatic agent of the United States at Mexico" prior to the signature of the convention. No such restriction was imposed upon the commissioners under the act of 1849. "The mixed commission," said those commissioners, in a case before them, "refused to consider the claim * * * on the ground that it had not been presented to the State Department or to the minister of the United States in Mexico previous to the date of the treaty. No objection to the examination of the claim by this board exists on that ground." The claim was allowed.[1]

But by Article X. of the convention of 1839 it was agreed that the decisions of the umpire should be "final and conclusive;" and by Article XII. the United States agreed "forever to exonerate the Mexican Government from any further accountability for claims" which should "either be rejected by the board or the arbiter," or which, "being allowed by either," should "be provided for by the said government in the manner before mentioned;" that is to say, by payment of the awards either in cash or by the issuance of treasury notes. The commissioners under the act of 1849 applied the bar of these stipulations in various cases. Thus, in the case of the claim of Manuel de Cala, growing out of his imprisonment and the seizure

[1] Memorial of Samuel St. John. The same decision was made in the cases, among others, of Nicolas Ricardi, Thomas B. Colleret, and Charles Danforth, surviving partner of Goodwin, Clark & Co.

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and confiscation of his vessel, the schooner *Rebecca and Eliza*, and her cargo, the American commissioners under the convention of 1839 allowed $52,000, while the Mexican commissioners declined to allow anything. The umpire awarded $5,867. It was alleged before the commissioners under the act of 1849 that this award was made solely on account of the confiscation of the vessel and the imprisonment of De Cala, and that the value of the cargo was by some unaccountable oversight wholly overlooked by the umpire. The commissioners said:

"This board has no means of knowing upon what grounds the decision of the umpire was made; nor has it any power of correcting his errors, mistakes, or omissions, even if there was clear evidence of the existence of such errors or omissions. The whole claim of De Cala was submitted to the umpire, and in his decision he recapitulated minutely the several items allowed by the American commissioners, and immediately states the amount for which, in his opinion, Mexico should be held responsible. * * * The board is of opinion that the decision of the umpire was final and conclusive, and that by the terms of the convention of 1839 Mexico was released from any further claim or liability growing out of the transactions upon which it was founded."

Charles Callaghan presented a claim to the commission under the convention of 1839 for injuries sustained by the detention of the brig *Ann* at Vera Cruz in 1829. Upon a disagreement between the American and Mexican members of the board, the case was referred to the umpire, who awarded to the memorialist the full amount reported in his favor by the American commissioners. This amount was paid to him in the same manner as all the other awards under that convention. He presented a claim, however, to the commissioners under the act of 1849 upon the ground (1) that the American commissioners and the umpire did not allow him a rate of interest large enough to indemnify him for being deprived for so long a period of his capital; (2) that he had employed an attorney to prosecute his claim under the convention of 1839, to whom, by agreement, he paid 25 per cent of what was received, for which amount he claimed reimbursement, and (3) that he sold below par some of the United States 5 per cent stock which he received on the award, and was entitled to reimbursement for the discount. The commissioners dismissed the claim, saying that it was "sufficient to remark that, by the provisions of the convention of the 11th April 1839, Mexico was forever acquitted and discharged from all further accountability for claims which should be rejected either by the said board or by the umpire,

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or which, being allowed by either, should be provided for by the Government of Mexico in the manner therein stipulated. This claim is of that description."

In one case a memorialist, whose claim was adjudicated by the umpire under the convention of 1839, contended that this adjudication should not be regarded as conclusive, (1) because he had united with several other claimants against Mexico "in a protest against the conclusion of that convention," and (2) because the claim was improperly presented to the commission thereunder by "a person having no authority to do so, and who was not furnished with all the documents necessary to sustain it." The commissioners, under the act of 1849, said:

"The first objection is wholly frivolous, and the second is not sustained by the proofs which were before the former board. Much of the testimony appears to have been furnished by the present claimant himself. The claim was in part, at least, in his name, filed by one having or assuming to have full authority to do so. The memorialist must have been aware that the claim was pending, and could have furnished the documents for no other purpose than to sustain it. It does not appear that he gave any notice to that board that the attorney representing him was not authorized to do so. We can not regard it in any other light than as having been definitely settled by the former board, agreeably to the terms of the convention of 1839, and consequently Mexico was wholly discharged from all further liability on that account."[1]

In the case of William S. Parrott, in which the American commissioners, under the convention of 1839, refused to join in submitting the claim to the umpire because certain essential documents, for which the board had applied to the Mexican Government, had not been furnished, the commissioners, under the act of 1849, held that the claim could "be regarded in no other light than as one of the class of claims which were presented to the mixed commission, and which were not decided or referred to the umpire upon a difference of opinion between the Mexican and American commissioners. All such claims," they continued, "must come before this board as new cases, to be decided upon the proofs to be submitted by the parties, in conformity with the rules prescribed by the board."

Claim of Aaron Leggett.

Of all the claims before the commissioners under the act of 1849, the claim of Aaron Leggett had attained the greatest notoriety. It was pronounced by the commissioners to be a "claim novel in

[1] Memorial of A. T. Brittingham.

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its character and circumstances," presenting questions that had "not arisen in any case yet considered" by them, and "implicating in no small degree the integrity and good faith of some of the functionaries of Mexico and other persons who were parties to the transactions" out of which it grew. The memorial to the commissioners was prepared by William L. Marcy, and among the documents filed by the memorialist there was an opinion by Chancellor Walworth.[1] The claim raised an interesting question as to the powers of the commissioners touching a case in respect of which an award was made by the mixed commission under the convention of 1839.

Leggett was a claimant before that commission for an indemnity for losses sustained in 1832 by the forcible seizure and impressment into the Mexican military service of a steamer called the *Bellona*, with which he was navigating the waters of the Tabasco River under an exclusive privilege for the period of ten years obtained in 1831. The injuries resulting from this interruption of his commercial operations were alleged to be very great, ending in his entire ruin and bankruptcy. It appeared that he had entered into extensive arrangements and operations for obtaining and shipping logwood from the Tabasco waters to Europe and to the United States, and the object of the steamer was to tow vessels of small draft laden with logwood from places up the river where it was cut to the mouth of the river and across the bar, where it was to be taken on board of vessels of larger size and thus sent abroad. Leggett had made contracts for cutting large quantities of the wood, had also sent out small vessels to be employed as lighters upon the rivers, and had chartered large vessels, ships and brigs, to be brought to the bar, near the mouth of the river. The steamer arrived in the Tabasco River in June 1832, and the other vessels soon after; and everything seemed likely to result favorably when, in consequence of a general revolution which then broke out, extending to the State of Tabasco, the steamer and some of the smaller vessels were taken possession of and pressed into the Mexican service for the transportation of troops, supplies of war, and other purposes. In consequence of this the whole undertaking was

[1] Opinion of Chancellor Walworth on the claim of Aaron Leggett, under the Mexican Treaty of February 1848. New York: S. W. Benedict, No. 16 Spruce street. 1849.

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broken up. The vessels which Leggett had chartered, having lain by for some months, and the time of their charters expiring, departed in ballast, and Leggett was compelled to pay large sums as damages to the owners for nonperformance of the charter parties. Some of his vessels were greatly injured, and the steamer, after she was finally surrendered to him, sank and was totally lost, as he alleged, in consequence of injuries she had sustained in the Mexican service. Being unable, by reason of his heavy losses, to place another steamer on the river, he lost his exclusive right of steam navigation, which was granted to another person.

The claims presented by Leggett to the mixed commission embraced all the losses resulting from these proceedings, including items for the damages he was obliged to pay to contractors for cutting and furnishing wood and to the vessels chartered by him, for the loss of the profits on the several cargoes which he had ready to supply to these vessels, and for the general breaking up of his business. His claim was accompanied by a vast mass of testimony. The Mexican and the American commissioners differed in opinion in regard to the validity of the claim, the former rejecting it entirely and the latter reporting to the umpire in favor of it, and fixing the damages to which he was entitled at the sum of $407,079.41, exclusive of interest.

The umpire decided in favor of the claim, awarding damages to the amount of $99,487.94; but there was nothing to show the particular items of claim allowed by him, nor the manner in which his computation was made, nor whether interest was included.

Leggett alleged that the result at which the umpire arrived was produced by false, forged, and spurious evidence, of which he had no knowledge or means of knowledge until after the award was made. The evidence thus characterized purported to be a record of testimony taken before the judge of the court of primary jurisdiction at Tabasco, in November 1834, by order of the executive government of Mexico, in which there was an alleged deposition of "Pieper & Lobade," a commercial firm of Tabasco, and an alleged letter of Dennis Gahagan, Leggett's agent, written in reply to one from Pieper, and introduced among the documents by Pieper at Gahagan's solicitation. The deposition and letter went strongly to show that

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Leggett's losses were very small, that he had no means to carry on the extensive operations which he had projected, that it was impossible to have obtained the quantity of logwood necessary to freight the vessels which he had chartered, and that his statements in regard to his claim were worthy of little confidence.

The American members of the mixed commission, though they did not suspect that the evidence was spurious, urged that it was entitled to little weight, while the Mexican members relied upon it almost entirely in opposing the claim. One of the Mexican commissioners afterward made a deposition to that effect. The evidence was regarded on both sides as the most material in the case.

After the adjournment of the mixed commission it was ascertained that Mr. Lobade was not a party to the deposition purporting to be signed by his firm, and that he possessed no knowledge whatever in regard to it. He made a deposition to that effect. It was also shown that Pieper was very inimical to Leggett, and that he was very active in the proceedings before the judge at Tabasco. Mr. Gabagan deposed that the letter purporting to have been written by himself was a forgery. Other parts of the evidence in question were shown to be spurious. Opinions were obtained from three lawyers of Tabasco, to whom the record was submitted, to the effect that the whole proceeding was irregular and illegal; that some of the witnesses were incompetent; that Leggett was entitled to be notified of the time and place and to be present when the witnesses were sworn; and that there were various other fatal objections to the document as evidence before the tribunals of Mexico.

Leggett contended that the just amount of his claim before the mixed commission was largely diminished by means of this spurious proof, and that Mexico, having introduced and used it for that purpose, was responsible for the damages which he had thereby sustained. The commissioners under the act of 1849, to whom this argument was addressed, said:

"There is no reason to suppose that the umpire had any suspicion that the document was not genuine, * * * and it is presumed that he acted upon it as such and gave it the weight which he thought belonged to it. What that was, in his opinion, we are wholly unable to determine. It is not competent for us to revise the proceedings or opinions of the

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umpire, nor to reopen cases by him decided. Under circumstances like these disclosed here we can not doubt that a court of chancery would set aside awards or other legal proceedings between parties and order a new trial of the whole case, but we have no such power.

"The application for redress is made to us upon the ground of a new and independent wrong, distinct from the original grounds of claim preferred to the former board, and the extent of damages claimed is the diminution of the award made by the umpire in consequence of the false testimony interposed by Mexico to defeat his just demand."

On this ground the commissioners held that Leggett was entitled to an award, but they declared that they were "at a loss to determine by what rule or upon what principle to estimate the damage." The claimant had, they observed, very soon after the decision of the umpire was made known, applied through his government to that of Prussia for a copy of the detailed report made by the umpire to his sovereign, which was understood to contain the grounds of his decision in the case, but this was refused. It was not, therefore, the fault or neglect of the claimant that they were not in possession of the materials which would enable them to estimate the extent of the loss sustained with more precision. They also referred to the history of the claim and to the labor and expense involved in its prosecution, and they finally awarded $75,000 as principal, together with $34,296 as interest, in all $109,296.

Leggett presented a claim to the mixed commission under the convention between the United States and Mexico of July 4, 1868, on the ground of the alleged insufficiency of this award. This claim the commission, January 20, 1872, dismissed.

Contract Claims.

It was repeatedly decided by the board that claims growing out of contracts were included in the renunciation of the treaty of Guadalupe Hidalgo, and therefore were proper subjects of allowance. In making this decision the board declared that it had followed the rule of construction adopted by the commissioners under the treaty with Spain of 1819, called the Florida Treaty, as well as that of the mixed commission under the treaty with Mexico of 1839.[1] Moreover, the "broad and comprehensive terms" used in Article XIV. of the treaty of Guadalupe Hidalgo left "no room to doubt that it was the

[1] Memorial of Louis S. Hargous.

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intention of the two governments to provide as well for the settlement of claims * * * founded in contract" as of those based upon torts. This construction "was given to the treaty of 11th April 1839, by the joint commission organized in accordance with its provisions, and that commission adjudicated and allowed numerous claims of citizens of the United States which rested wholly upon contract." The "first and fifth articles of the unratified convention of the 20th of November 1843, by using the same terms which were employed in the convention of 11th April 1839, sanctioned the construction which had been given to those terms by the joint commission;" and the treaty of Guadalupe Hidalgo, for the execution of which the board was organized, provided that "the first and fifth articles of the unratified convention" should "be followed as the rule of construction."

In one case a claim was made on account of a contract for war steamers. It appeared that in 1844 one Rubio contracted with the Mexican Government to furnish four war steamers, for which he was to receive $500,000. Before anything had been done by him in execution of the contract he transferred his interest in it to L. S. Hargous & Co. The transfer was ratified by the government. Two of the steamers were built and afterward sold for account of the Mexican Government. The government consented to the sale and was credited with the proceeds. The price agreed to be paid for these vessels was therefore held to be a valid claim. The two other steamers had not been built, but it was alleged that Hargous & Co. had given security for their delivery. The original contract with Rubio specified no time within which the vessels were to be delivered, but $150,000 were to be paid by the government in thirty days after the execution of the contract, "and the other payments as the work progressed." Orders were issued by the Treasury for the whole amount, but they were not paid, and it was in consequence of this default that the two steamers first mentioned were sold, the government agreeing to bear the loss. In 1846 a final liquidation and settlement of the account was made. The government then agreed to give an order on its Treasury to cover the whole amount of the claim presented, including the price of the two steamers not built. Hargous & Co. agreed to accept this order, and surrender the orders before received and remaining unpaid, as well as the original vouchers and contracts, besides giving security for the

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delivery of the steamers at a subsequent time. In accordance with this agreement the papers were surrendered and the security for the steamers was given.

Claimant's counsel contended that there was but one contract in relation to the steamers—the original contract in 1844. The commissioners did not concur in this conclusion. The old contract, it was admitted, had, they said, been violated by the government. A new agreement was made. The "original orders, contracts, and vouchers" were surrendered. A new mode of payment was agreed upon; security for the delivery of the vessels was given and accepted. Nothing, in short, of the original contract was left but the price of the vessels. This was, then, a new contract, and the rights accruing to Hargous & Co. growing out of this transaction could only be based on this contract. The commissioners thought it "a very singular omission" that none of the witnesses specified the time agreed upon for the delivery of the vessels, when the last agreement was made and security for their delivery was given. Whether the time had elapsed or not could not be ascertained from the evidence. It was admitted, however, that they had not been delivered; and this being the condition of matters at the date of the treaty, the question arose, said the commissioners, Was the liability of Mexico for the purchase money of the vessels not delivered assumed by the United States? The contract was an executory one, not performed on either side. Whether there had been any violation of its terms by Hargous & Co. could not be ascertained from the evidence. The Government of Mexico had failed to pay the money agreed upon, which failure, it was not unreasonable to infer, furnished the other parties with an excuse for not delivering the vessels. The real cause might have been the existence of the war. But, whatever the fact might be, the "obligation of the United States to pay the claims of their citizens against Mexico must," said the commissioners, "be construed to apply only to such claims as existed * * * upon contracts then executed and for which Mexico had received a consideration. The actual indebtedness of Mexico, at the date of the treaty, for services rendered, or money or property then received, was transferred to the United States. The obligation to pay for property thereafter to be delivered, upon a contract wholly unexecuted, remained unchanged." The commissioners also said:

"Another objection to this item of the claim grows out of the fact that the contract was made during the war between

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the United States and Mexico. The new agreement to deliver the vessels, accompanied with security for its performance, was made while the two nations were at war. The contract was, for this reason, absolutely void.

"It is contended that Mexico could not have avoided the contract upon that ground, and therefore the United States can not. We have before shown that the liability of the United States under the treaty is not coextensive with that of Mexico anterior to its date. It is not necessary now to inquire whether Mexico could avail herself of the illegality of the contract to avoid its obligation. If it shall be conceded that she was justly responsible for its performance, it does not follow that the responsibility was transferred to the United States by the treaty.

"A question involving a principle somewhat similar was decided by the court of appeals of the State of Maryland in the case of Gill, trustee, *v.* Oliver et al. The suit grew out of contested claims to an award made by the mixed commission under the treaty of 1839 with Mexico. The claim before the mixed commission was for supplies furnished to General Mina in 1816 in aid of the expedition in favor of Mexico against the authority of Spain. One of the parties interested in the award had made an assignment under the insolvent laws of Maryland in 1817. The trustee for the creditors brought an action to recover his interest in the awards, upon the ground that all his claim passed to the trustee by virtue of the assignment for the benefit of his creditors. The court held that the original contract with Mina in 1816, being in violation of the neutrality act of Congress, was illegal and void, and therefore did not create such a debt as would pass to the assignee by the insolvent laws of Maryland.

"But when the Mexican Government, about 1825, adopted the contracts of General Mina and acknowledged its liability to pay those entitled, the court regarded it as a renewed obligation which was purged of the illegality which tainted the original contract, and it therefore constituted a legal and valid claim. This claim, it was held, passed by a subsequent assignment, unaffected by any claim of the trustee in insolvency.

"The case before us commends itself less favorably to a court of law or equity than the claim based upon the original contracts with General Mina. In that case an act of Congress passed to preserve the neutrality of the country was violated, but the supplies furnished were not to be used against the United States. In the present case the vessels of war were to be furnished to a nation then at war with the country of the person making the contract. By every principle of national law, as well as justice, such a contract was absolutely void, and no pretended claim growing out of it can be enforced.

"We do not wish by these remarks to be understood as impeaching in the slightest degree the patriotism or purity of

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purpose of Mr. Hargous, the claimant. It is in evidence before the board that the settlement and the renewed obligation and security to furnish the steamers were effected by Mr. Voss, who was not a citizen of the United States. At the very time these transactions occurred the claimant was detained in custody by the Mexican Government as a prisoner for no other reason than that he was an American citizen. It is also in evidence that after he was released he fully vindicated his patriotism by most efficient aid to the Army of the United States in Mexico. These facts, however, do not change the legal question. Voss was his partner, and the business was transacted and the contracts were made in the name of the firm. The claimant's interest in the matter is as much affected by what was done by his partner as though it was done by himself. He can not now claim the benefit of a contract made by another in his name which he had no legal right to make himself.

"It is only necessary to say further, to express the views of the board, that such a contract, being absolutely void when made, so far as regards the claimant, acquires no force or validity by virtue of the treaty. The United States in assuming to pay the claims of their citizens incurred no liability to pay claims based upon contracts which the parties could not legally make. The claim growing out of the contract for the steamers was one which the Government of the United States, in the absence of any treaty, could never have interposed its authority to enforce. It is such a claim as a citizen of the United States could not have acquired, consistently with his obligations to his country.

"The counsel contends that the claimant is entitled to damages, if not to the price of the two steamers not delivered. The evidence presents no ground upon which any damages can be awarded. All the rights of the parties growing out of the contract made in 1844 were surrendered upon the final settlement in 1846. The claimant can only look to the obligation of the Mexican Government given upon that settlement for redress. So far as the United States is bound under the treaty to pay that obligation he is entitled to an award. For any other claims growing out of it he must look to Mexico. * * *

"In every view of the subject the board is of opinion that all claims growing out of the contract for the two steamers is not valid and must be disallowed."[1]

[1] The money awards of the commissioners under the act of 1849 are given in the following table:

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Claimant.	Principal.	Interest.	Total.
Daniel Collins	$3,625.00	$2,809.37	$6,434.37
Dexter Watson	750.00		750.00
Nathan C. Folger, assignee of Charles Guenet	1,185.65	829.95	2,015.60
Franklin C. Gray	2,404.16	1,332.29	3,736.45
Lewis M. Dreyer	667.25	177.93	845.18
Samuel St. John	2,000.00	1,900.00	3,900.00
Elisha H. Saulnier	12,000.00	2,950.00	14,950.00
Nicholas Ricardi	3,000.00	3,037.50	6,037.50
Richard S. Coxe, trustee of Union Land Company	40,606.40	18,272.70	58,879.10
Richard S. Coxe, trustee of Trinity Land Company	34,356.64	29,202.60	63,559.24
William H. Sumner, George Curtis, and Anthony Dey, trustees	25,000.00	25,000.00	50,000.00
John and Peter Laffler, surviving partners	25,000.00	6,125.00	31,125.00
George and Peter Laffler	1,000.00	575.00	1,575.00
Ann B. Coxe, executrix, Nathaniel Coxe	40,684.00	69,671.35	110,355.35
Calvin J. Keith, administrator of Samuel Elkins	47,649.33	81,633.64	129,282.97
Louis S. Hargous	457,375.26	73,307.03	530,682.29
William S. Parrott *a*	71,000.00	43,750.00	114,750.00
David Douglass	2,000.00	450.00	2,450.00
Sidney Udall	2,000.00	500.00	2,500.00
Louis S. Hargous	60,000.00	12,000.00	72,000.00
John M. Togno	3,500.00	612.50	4,112.50
Aaron Leggett	75,000.00	34,296.00	109,296.00
Christian Abby	2,228.00	1,169.70	3,397.70
Franklin Cooper, assignee of William Barton	890.00	467.25	1,357.25
John Christian	902.00	472.50	1,374.50
Joseph Bolles	1,850.00	971.25	2,821.25
Andrew Myer and Joseph Myer, executors	799.20	1,345.30	2,144.50
Rhoda McRae	7,146.00	4,234.50	11,380.50
Isaac Graham	25,000.00	13,125.00	38,125.00
Joseph W. Henry	1,500.00	300.00	1,800.00
Frederic Freeman	750.00		750.00
John Parrott	50,000.00	13,541.00	63,541.00
Michael Dougherty	4,500.00	5,625.00	10,125.00
Ferdinand Clark	38,578.79	48,207.50	86,786.29
Franklin Chase	27,500.00	6,073.00	33,573.00
John E. Gary, administrator of Louis P. Cook, gross award of	2,816.66		2,816.66
Daniel E. Smith	1,500.00	1,875.00	3,375.00
Edward M. Robinson, executor of Fleming	1,096.45	537.48	1,633.93
George A. Gardiner *b*	350,000.00	78,750.00	428,750.00
Isaac D. Marks	3,000.00	750.00	3,750.00
James W. Zacharie, assignee of Francis Chete	3,000.00	3,975.00	6,975.00
Andrew J. Brame	839.00	203.40	1,042.40
Joseph Bosque	5,000.00	6,750.00	11,750.00
William B. Hatch	227.50	90.05	317.55
Margaret Ward, administratrix of Elliot Ward	1,000.00	850.00	1,850.00
John Bronte	5,000.00	2,175.00	7,175.00
Jeremiah C. Ferry and James W. Angus	7,801.00	1,365.00	9,166.00
James W. Zacharie, assignee of A. C. Bredall, gross award of	10,000.00		10,000.00
John Belden	71,550.00	34,881.00	106,431.00
John Powell, assignee of Thomas Powell	5,874.26	7,048.64	12,922.90
Jesse E. Bacon, administrator of William I. Russell	1,000.00	1,100.00	2,100.00
John Bronner, receiver of the Pelican Insurance Company	1,584.02	349.80	1,933.82
Peter Kerr	3,662.50	2,632.35	6,294.85
William Murphy	10,000.00	2,500.00	12,500.00
Benjamin Burn	2,500.00	478.50	2,978.50
Andrew Wylie, jr., administrator of Samuel Baldwin	50,000.00	25,000.00	75,000.00
John H. Mears	125,000.00	28,125.00	153,125.00
George N. Downs and George S. Owen	774.00	167.70	941.70
James L. Rudolph	1,000.00	250.00	1,250.00

a The commissioners added to their award the following: "And it appearing that the said William S. Parrott has assigned the sum of $88,000, part of the said amount, to George Douglass and Edgar V. Van Winkle, in trust for the benefit of creditors named in said assignment, and has requested an award to be made to them for that amount, do hereby award to the said George Douglass and Edgar S. Van Winkle the said sum of $88,000, and to the said William S. Parrott the sum of $26,750, being together the whole amount of the claim allowed."

b This award contains the following: "And it appearing that the said George A. Gardiner has assigned one-fourth of the said claim to William W. Corcoran, and requested that an award may be made in his name for that proportion of the amount allowed, do award to the said George A. Gardiner the sum of $321,562.50, and to William W. Corcoran the sum of $107,187.50, being together the whole amount allowed on said claim."

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Claimant.	Principal.	Interest.	Total.
Sanforth Kidder	$120.00	$40.25	$160.25
Francisco del Hoya, administrator Francis Arenas	10,000.00	9,000.00	19,000.00
Jessie E. Brown, schooner *Alert*	1,000.00	1,100.00	2,100.00
Joseph Andrews	800.00	920.00	1,720.00
Jonas P. Levy	3,000.00	675.00	3,675.00
John Claiborne, administrator of Thomas Hassam	2,000.00	1,500.00	3,500.00
Elisha Riggs	8,400.00	4,830.00	13,230.00
Jose Maria Caballero	1,760.00	1,309.00	3,069.00
Theophilus Labruere	2,598.21	1,199.28	3,797.49
John T. Bullock, administrator of Edward Hill	29,621.25	7,405.31	37,026.56
Jonah Rogers, administrator of Augustus Rogers	3,800.00	2,850.00	6,650.00
Thomas O. Larkin	12,516.62	3,958.61	16,475.23
Thomas O. Larkin and Talbot H. Green	3,711.87	896.65	4,608.52
Joseph B. Eaton	2,414.75	618.45	3,033.20
Benjamin T. Reed	6,212.62	1,825.92	8,038.54
Margaret P. Hallet, administratrix of John Hallet	2,195.94	1,907.56	4,103.50
Henry Stevens	1,000.00	250.00	1,250.00
Charles Danforth, surviving partner of Godwin, Clark & Co	14,407.38	10,294.97	24,702.35
Hannah Ulrich	833.33	347.70	1,181.03
Lucius H. Armstrong and James Jackson	4,322.33	1,080.55	5,402.88
George W. Van Stavoren	7,260.41	1,784.83	9,045.24
James S. Thayer, administrator of James Treat	729.93	295.57	1,025.50
Frederic E. Radcliffe, administrator of Augustus Radcliffe	729.93	295.57	1,025.50
Samuel Jobson	4,477.80	1,090.96	5,568.76
Edward Hoffman	750.00	281.25	1,031.25
John A. Robinson	12,062.48	4,117.36	16,179.84
Volney Ostander	660.00		600.00
Charles Stillman	3,650.00	912.50	4,562.50
George W. Van Stavoren	1,275.00	765.00	2,040.00
William Richardson	2,804.00		2,804.00
Rufus K. Turnage	2,260.00	208.00	2,468.00
William S. Underhill	600.00	205.00	805.00
Lewis H. Polock	3,019.00	1,584.50	4,603.50
Ann Y. Kelly, administratrix of William H. Lee	2,740.37	936.13	3,676.50
William S. Meservey	5,000.00	1,000.00	6,000.00
Frederic Bange and Albert Southmayd	2,855.98	713.99	3,569.97
John C. Jones	2,921.75	2,040.22	4,961.97
Alpheus B. Thompson	5,255.74	2,204.63	8,060.37
James Kelly	2,000.00		2,000.00
John P. Schatzell	5,000.00	1,250.00	6,250.00
Henry Gisner	500.00	125.00	625.00
George S. Miller	1,000.00	250.00	1,250.00
Henry Breese	1,000.00	250.00	1,250.00
Joachim Fox	500.00	125.00	625.00
Pierre Suzeneau, administrator of Emile Suzeneau	500.00	125.00	625.00
Adolph Suzeneau	500.00	125.00	625.00
French Strother	1,000.00	250.00	1,250.00
Elisha D. Smith	2,500.00	625.00	3,125.00
George East	5,000.00	1,000.00	6,000.00
Archibald Stevenson	14,500.00	2,900.00	17,400.00
Simeon Remer	1,000.00	250.00	1,250.00
Sanforth Kidder	1,500.00	375.00	1,875.00
Schooner *Susannah*, James H. Clay	2,816.66		2,816.66
Brig *Splendid*, Atlantic Insurance Co	2,375.00	1,645.12	4,020.12
James Cochrane	750.00		750.00
Mercantile Insurance Co	10,654.54	15,282.16	25,936.70
Ship *Henry Thompson*, Richard and John Hartshorn *a*	900.00	801.30	1,701.30
John Galbraith, assignee of Francis B. Webster *b*	600.00		600.00
Mary Hughes, administratrix of George Hughes	20,000.00		20,000.00
Henry Cheatham	660.00		660.00
Daniel Davis	500.00		500.00
Schooner *Essex*, Thomas B. Cottrell	200.00	140.00	340.00
Henry May, administor of Ann P. Bouldin	22,656.53	18,567.09	41,223.62
New Orleans Canal and Banking Co	2,571.00	1,799.70	4,370.70
Malcom Sandeman & Co	832.64	582.82	1,415.46
James Reed	6,625.00	4,637.50	11,262.50
James Reed, assignee of Frederic A. Sawyer	376.25	245.00	621.25
James Reed, assignee of Bennet & Sharp	9,415.63	6,590.94	16,006.57
James Reed, assignee of Brandon, McKenna & Wright	3,799.50	2,659.72	6,459.22

a This award was divided, Harding receiving $243 and Hartshorn $1,458.30.
b Of this award $480 was allotted to Galbraith and $120 to C. P. Van Ness and Francis A. Dickins.

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Claimant.	Principal.	Interest.	Total.
William H. Rogers	$853.98	$602.88	$1,456.86
Richmond Sherwood, administrator of Oran Sherwood	6,453.66	4,517.49	10,971.15
James Love, administrator of Pallas Love	650.00		650.00
Pierre Chouteau, jr., administrator de bonis non	30,380.00	51,392.00	81,772.00
John W. Simonton and John A. Heath	2,193.83	886.66	3,080.49
Philo B. Johnson	750.00		750.00
Harrison C. Allensworth	650.00		650.00
James M. Gatewood	600.00		600.00
Silas M. Knight	750.00		750.00
David Hull	500.00		500.00
Hezekiah D. Maulsby, administrator of George C. Alfred	1,000.00		1,000.00
Desha Burton	3,367.00	1,176.54	4,543.54
John W. Burton	2,124.97	744.75	2,869.72
James I. Kendall	1,652.96	457.07	2,110.03
Daniel Slack and George W. Hathaway	3,499.54	1,329.67	4,829.21
Augustus Leftwich, assignee of Charles R. Kennedy	2,139.20	1,035.44	3,174.64
Henry P. Bates, administrator of Johnson H. Halford	1,277.00	193.90	1,470.90
Roderic T. Higginbotham	2,900.00	1,505.00	4,405 00
James Reed, assignee of Andrew Moore	7,168.93	4,318.25	11,487.18
Schooner *Orient*, John Baldwin	42,000.00	29,400.00	71,400.00
Schooner *Orient*, Asa Fish, Charles Mallory, Stephen Morgan, George Wolff, Simon Fish, Henry Ashley, Lyman Dudley, and others	5,000.00	3,500.00	*a* 8,500.00
Norman Sherwood	1,000.00		1,000.00
Hiram Couch	660.00		660.00
Robert C. Patterson	650.00		650.00
Nathan Barkley	800.00		800.00
James C. Duvall, administrator of Z. M. P. Duvall	800.00		800.00
Stewart Foster, administrator of Charles Foster	840.00		840.00
Samuel Collins	660.00		660.00
Nathan Barkley, administrator of Moses Nolan	425.00		425.00
Margaret Meade, administratrix of Richard W. Meade	2,500.00	3,291.66	5,791.66
Schooner *Felix*, James Johnston, administrator of I. P. Wallace	2,550.00	3,261.87	5,811.87
Ship *John*, Benjamin Holbrook	500.00	387.50	887.50
John Belden	4,208.33	1,134.54	5,342.87
Schooner *William A. Turner*, James O'Flaherty	5,555.00	2,666.25	8,221.25
Ship *Henry Thompson*, William W. Corcoran, assignee of B. B. Williams and Joseph H. Lord	8,136.00	6,915.00	15,051.00
Dorcas Ann Plumer, administratrix of Robert Plumer	2,905.20	2,312.06	5,217.26
Schooner *Patrick B. Hayes*	2,880.33	3,312.23	6,192.56
William Homan	110.00	77.75	187.75
Schooner *Gardiner*, William H. Freeman, administrator of Edmund B. Freeman	542.00	379.40	921.40
Schooner *Cornelian*, Chauncey Child, Hezekiah Child	6,400.00	2,586.66	8,986.66
Schooner *Cornelian*, John Smith	1,000.00	400.00	1,400.00
Schooner *Topaz*, John Wilkins, executor of Samuel Lowder	8,100.00	7,837.50	15,937.50
Schooner *Topaz*, Samuel Thurston, administrator of Henry Ryder	2,900.00	2,803.66	5,703.66
Schooner *Superior*, George B. Fisk	2,500.00	2,947.92	5,447.92
Schooner *St. Croix*, William D. McCarty, assignee of John Woolsey	1,500.00	1,157.81	2,657.81
Schooner *Gardiner*, John A. Bradstreet, Nathaniel M. Whitmore, administrator of Simon Bradstreet; Joseph Adams, assignee of William B. Grant; James R. Byron, assignee of William B. Grant	6,347.00	4,442.90	*b* 10,789.90
Schooner *Eclipse*, John N. Swasey, John Curtis, administrator of Abner Curtis; William Lewis, Jonathan Farnham, and Abner Lane	*c* 4,043.00	*d* 3,066.66	7,109.66
George Y. Wethered	2,500.00	625.00	3,125.00
Charles H. Cooper	1,621.00	851.00	2,472.00
Sanford Stark, executor of Jesse Craig	532.00		532.00

a This was divided by the commission as follows: Asa Fish, $1,062.50; Charles Mallory, $1,062.50, and so on, giving each his share up to the total amount of the award.

b This was divided as follows: John A. Bradstreet, $2,697.47; Nathaniel Whitmore, $2,697.47; Joseph Adams, $4,046.21; James R. Byron, $1,348.74.

c Additional to Abner Lane, $100.

d The board then awarded severally to the claimants as follows: John N. Swasey, $1,421.93; John Curtis, administrator of Abner Curtis, $1,421.93; William Lewis, $1,421.93; Jonatham Farnhan, $1,421.93; Abner Lane, $1,521.94.

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CHAPTER XXVIII.

UNITED STATES AND MEXICAN CLAIMS COMMISSION: CONVENTION OF JULY 4, 1868.

General Arbitral Agreement.

We have seen that by the Treaty of Guadalupe Hidalgo the United States discharged Mexico from all claims of citizens of the United States which arose prior to February 2, 1848, the date of the signature of the treaty. By Article XXI. of the same instrument the contracting parties, with a view to secure the peaceful adjustment of future differences, engaged that, if any disagreement should thereafter arise between them, they would not resort to reprisals, aggression, or hostility of any kind, until the government which deemed itself aggrieved should have "maturely considered in the spirit of peace and good neighborship whether it would not be better that such differences should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation." And it was further provided that if arbitration should be proposed by either party, it should be "acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."[1] This provision

[1] The text of the article is as follows: "Article XXI. If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good

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for the future proved to be not untimely, for within the next twenty years each country was destined to be the scene of disorders which taxed to the utmost the resources of diplomacy.

Pressure of Foreign Claims.

The war between the United States and Mexico had scarcely come to a close when foreign powers renewed their pressure upon Mexico for the settlement of claims. Indeed, while the war was still in progress a convention was concluded between Mexico and Spain for the payment of the latter's demands.[1] In 1851 a new convention was signed because the old one had not been fulfilled.[2] Similar engagements with other powers remained unexecuted. Foreign war and intestine strife rendered the nation unable to meet its obligations. Various percentages of the receipts of the custom-houses were pledged for the payment of the foreign debt, but they were not always collectible even by the government itself.[3] On May 15, 1856, Ignatius Comonfort, in the exercise of powers conferred upon him by the plan which was published at Ayutla and amended at Acapulco, proclaimed, as Vice-President of the republic, a provisional constitution.[4] In the following year the present federal constitution of Mexico was adopted. Comonfort took an oath to support it and was elected constitutional President for the four years beginning December 1, 1857. On the 17th of the same month he sought to overthrow the constitution, and placed himself in the hands of the Clerical party. It was then that Benito Juarez, who had been governor of the State of Oaxaca, and who as chief justice of the republic was *ex officio* Vice-President, came to the front as the leader of the Liberal party. He strove to stem the tide of reaction, but as the City of Mexico was in the hands of the Church party, he was compelled to fly from the capital. He established his government first at Queretaro, then at Guanajuato, and then at Guadalajara, but

neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

[1] July 17, 1847, Br. and For. State Papers, XLVIII. 1301.

[2] Br. and For. State Papers, XLVIII. 1303.

[3] Br. and For. State Papers, XLI. 738, 740, 745, 751; XLVIII. 1301, 1303; XLIX. 1253; L. 1124; LI. 617.

[4] Br. and For. State Papers. XLVII. 1067.

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at last he was compelled to leave the country. In the City of Mexico a military government had been set up by General Zuloaga in place of that of Comonfort, but Zuloaga was soon succeeded by General Miramon, who had from the beginning been the favorite of the Church party. The diplomatic corps at the City of Mexico, who had entered into relations with the Zuloaga government, continued them with the government of Miramon. In 1858 Juarez returned to Vera Cruz and established a government; but in the same year the United States, because of the complaints of ill treatment of American citizens, broke off diplomatic relations with Mexico altogether.[1]

Convention between France, Great Britain, and Spain.

October 31, 1861, France, Great Britain, and Spain entered into a convention with reference to combined operations against Mexico for the enforcement of claims. The ratifications were exchanged at London November 15, 1861. The claims which it was sought thus to enforce were of various kinds. Complaints were made by the British Government of

[1] "It does not appear, upon an examination of the records of this Department, that any answer was made to the dispatch of Mr. Forsyth of January 1858 in relation to his recognition of the government of Zuloaga; nor has there been found any communication from the Juarez government in regard to the action of Mr. Forsyth adverted to." (Mr. Hunter, Second Assistant Secretary, to Mr. Ashton, December 7, 1870, MS. Dom. Let. vol. 87, p. 204. The following instructions of Mr. Cass relate to the subject of recognition in Mexico at the period in question: To Mr. Forsyth, July 15, 1858; to Mr. Churchill, December 27, 1858; to Mr. McLane, March 7 and April 25, 1859.) "In reply to your letter of the 16th instant, inquiring whether General Robles presented to this government any new letter of credence as minister of the Zuloaga organization, or was formally received as such by the President or the Secretary of State, I have to inform you that upon a careful examination of the files of this Department it does not appear that General Robles presented a letter of credence to this government from Zuloaga. From the period of Mr. Forsyth's dispatch to which you refer, of January 29, 1858, to the time of General Robles's return to Mexico, in August 1858, considerable correspondence passed between him and Mr. Cass, but none relating to the recognition by this government of Zuloaga. It may be pertinent to add that on the 29th of March 1858 General Robles addressed a note to Mr. Cass, informing him that he had received a letter from Zuloaga to President Buchanan announcing his election to the Presidency of Mexico and requesting him to appoint a time when he could deliver it in person to the President. In reply, Mr. Cass named a time when he agreed to accompany him to the Executive Mansion for the purpose stated." (Mr. J. C. B. Davis, Acting Secretary, to Mr. Ashton, September 20, 1871, MS. Dom. Let. vol. 90, p. 559.)

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the seizure by generals of the Constitutional party of large sums of money belonging to British subjects, and of various other wrongs inflicted on such subjects.[1] August 24, 1860, Earl Russell instructed Mr. Matthews, the British representative, to break off relations with the government of General Miramon and retire with his legation to Jalapa. After Matthews's withdrawal the legation building in the City of Mexico, which was still under lease by the British Government, was entered and robbed of about $600,000 belonging to British bondholders.[2] March 30, 1861, Sir C. L. Wyke was sent as British minister to Mexico, and, the Constitutional government having triumphed, was directed to enter into relations with it if it had acknowledged the liability of Mexico for the claims of British subjects. On November 21, 1861, a convention was concluded for the settlement of British claims, but it was rejected by the Mexican Congress.[3] The French and Spanish demands embraced large claims, which were either recognized or created by the Miramon government, and the justice of which Juarez refused to admit. Among the French claims there was one for $15,000,000 worth of bonds issued by Miramon through the agency of Jecker, a Swiss banker, for the purpose of raising a loan of $750,000. The bonds fell into the hands of Jecker's French creditors. Claims to the amount of $12,000,000 were made for torts on French subjects. Combined with the demands touching the Spanish pecuniary claims, there was a complaint that the Spanish minister was abruptly dismissed by the Juarez government.[4]

Hostile Operations.

By the convention of October 31, 1861, the contracting parties agreed to concert the measures necessary for seizing and occupying the various fortresses and military positions on the Mexican littoral, in order to give more efficacious protection to the persons and property of their subjects, as well as to secure the execution of the obligations contracted toward them by the Mexican republic. But they also agreed that they would not, in the employment of measures of coercion, make any acquisition of

[1] Br. and For. State Papers, LII. 272.

[2] Br. and For. State Papers, LI. 548.

[3] Br. and For. State Papers, LII. 405.

[4] Wharton's Int. Law Dig. I. 312; "The French in Mexico," speech of His Excellency M. Billault in the *Corps Législatif* February 3, 1863, printed in London, 1863.

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territory, or take any particular advantage, or exercise in the domestic affairs of Mexico any influence incompatible with its political independence. It was further agreed that a commission of three persons, one to be chosen by each of the contracting parties, should be created, with full power to determine all questions that should arise as to the disposition of any moneys which might be recoverable from Mexico, having regard to the respective rights of the contracting parties. And finally, in order that their proceedings might not seem to have an exclusive character, they agreed to communicate a copy of the convention to the United States and to invite that government to accede to it.[1]

Hostile operations were begun in May 1862. On the 8th of that month a French blockade was declared of the ports of Tampico and Alvarado, and on the 28th the port of Mazatlan also was blockaded. The commissioners of the allied powers had their first meeting in Mexico January 9, 1862, the Spanish commissioner being General Prim and the British representatives Sir C. L. Wyke and Commodore Dullop. At this conference the commissioners seem to have acted harmoniously.[2] On April 11, 1862, however, Wyke reported that things had taken an unfavorable turn in consequence of the French having extended protection to General Almonte and other leading men of the Reactionary party who had been banished from the country. On this question of the intervention of the French in the domestic affairs of Mexico the concert of the powers was destroyed. The United States had declined to join them in coercive measures; and as Great Britain and Spain refused to accede to the policy of intervention, France was left to pursue her way alone.[3]

Claims of the United States and Mexico.

During all these years of turmoil and conflict in Mexico the complaints of citizens of the United States had been steadily accumulating. In an instruction to Mr. Corwin, minister to Mexico, of April 6, 1861, Mr. Seward said:

"I find the archives here full of complaints against the Mexican Government for violations of contracts and spoliations and cruelties practiced against American citizens. These complaints have been lodged in this Department from time to

[1] Br. and For. State Papers, LI. 63.

[2] Br. and For. State Papers, LIII. 396.

[3] Br. and For. State Papers, LIII. 530, 573; LIV. 538, 539, 542, 944.

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time during the long reign of civil war in which the factions of Mexico have kept that country involved, with a view to having them made the basis of demands for indemnity and satisfaction whenever government should regain in that country sufficient solidity to assume a character for responsibility. It is not the President's intention to send forward such claims at the present moment. He willingly defers the performance of a duty which at any time would seem ungracious until the incoming administration in Mexico shall have had time, if possible, to cement its authority and reduce the yet disturbed elements of society to order and harmony. You will, however, be expected, in some manner which will be marked with firmness as well as liberality, to keep the government there in mind that such of these claims as shall be found just will in due time be presented and urged upon its consideration.[1]

Claims of Mexican citizens against the United States also had arisen, and while the civil war existed in the United States they continued to spring up. But the greater part of them, relating to Indian depredations, the movements of filibusters, and other injurious acts, long antedated that period.

Convention of July 4, 1868.

On July 4, 1868, Mr. Seward, as Secretary of State of the United States, and Mr. Romero, as envoy extraordinary and minister plenipotentiary of Mexico, concluded a convention for the adjustment of all claims of the citizens of either country against the government of the other. An examination of its provisions will disclose the fact that it was framed on the lines of the convention between the United States and Great Britain of February 8, 1853, which Mr. Seward, in view of the success of the London commission, adopted as a model for his claims treaties. It provided that "all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the Mexican republic, arising from injuries to their persons or property by the authorities of the Mexican republic, and all claims on the part of corporations, companies, or private individuals, citizens of the Mexican republic, upon the Government of the United States, arising from injuries to their persons or property by the authorities of the United States," which had been "presented to either government for its interposition with the other" since February 2, 1848, and which remained unsettled, as well as any other claims which might be presented within a specified time, should

[1] Dip. Cor. 1861, p. 65.

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be referred to two commissioners, one to be appointed by the President of the United States, by and with the advice and consent of the Senate, and the other by the President of the Mexican republic. Every claim was required to be presented to the commissioners within eight months from the day of their first meeting; but it was stipulated that, for reasons satisfactory to the commissioners, or, if they should differ, to the umpire, the period might be extended for not more than three months.

Any vacancy in the commission was to be filled in the same manner as the original appointment was made.

Provisions as to the Commissioners.

The commissioners were required to meet in Washington within six months after the exchange of the ratifications of the convention, and, before proceeding to business, to "make and subscribe a solemn declaration," which should be entered on the record of their proceedings, that they would "impartially and carefully examine and decide, to the best of their judgment and according to public law, justice, and equity, without fear, favor, or affection to their own country, upon all such claims above specified as shall be laid before them on the part of the governments of the United States and of the Mexican republic, respectively."

The commissioners were also required "to examine and decide upon every claim within two years and six months from the day of their first meeting."

Provisions as to an Umpire.

After having met and made the necessary declaration in regard to the performance of their duties, it was provided that the commissioners should "then name some third person to act as an umpire in any case or cases on which they may themselves differ in opinion;" and in case they should be unable to agree on such third person, it was stipulated that they should "each name a person," and that "in each and every case" in which they should "differ in opinion as to the decision which they ought to give" it should be "determined by lot" which of the two persons so named should "be umpire in that particular case." The person or persons chosen to act as umpire were required to make and subscribe a solemn declaration in a form similar to that already made and subscribed by the commissioners. Any vacancy in the post of umpire was to be filled in the same manner as the original appointment.

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Mode of Investigating Claims.

The person or persons to act as umpire having been named, it was provided that the commissioners should "conjointly proceed to the investigation and decision of the claims which shall be presented to their notice, in such order and in such manner as they may conjointly think proper, but upon such evidence or information only as shall be furnished by or on behalf of their respective governments." They were "bound to receive and peruse all written documents or statements which may be presented to them by or on behalf of their respective governments in support of or in answer to any claim."

The contracting parties thus expressly adopted the mode of procedure which formed a subject of difference between the commissioners under the convention of 1839—the mode of requiring the claims and evidence to be presented through one or the other of the two governments; and they empowered the commissioners conjointly, or, if they differed, the umpire, "to decide in each case" whether any claim had or had not "been duly made, preferred, and laid before them, either wholly or to any, and what, extent, according to the true intent and meaning" of the convention. But, in order to facilitate the examination of claims, they provided that the commissioners should, if required so to do, hear "one person on each side on behalf of each government on each and every separate claim;" and to this end they further stipulated that it should be "competent for each government to name one person to attend the commissioners as agent on its behalf, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof."

Should the commissioners fail to agree in opinion upon any individual claim, they were directed to "call to their assistance the umpire whom they may have agreed to name, or who may be determined by lot, as the case may be;" and "such umpire, after having examined the evidence adduced for and against the claim, and after having heard, if required, one person on each side as aforesaid," was required to "decide thereupon finally and without appeal." It was provided that the decision of the commissioners or of the umpire, as the case might be, should be "given upon each claim in writing," and should be "signed by them respectively;" and that it should

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"designate whether any sum which may be allowed shall be payable in gold or in the currency of the United States."

Record of Proceedings.

The commissioners and the umpire were required to keep "an accurate record and correct minutes of their proceedings, with the dates;" and they were authorized to "appoint two secretaries versed in the language of both countries to assist them in the transaction of the business of the commission."

Provisions as to Expenses.

It was agreed that each government should pay its own commissioner, and that the amount paid, which should be the same in the case of each commissioner, should not exceed $4,500 a year in United States currency. The salary of each secretary was not to exceed $2,500 a year in the same currency. The compensation of the umpire was to be determined at the close of the commission. And finally, it was stipulated that the whole expenses of the commission, including contingent expenses, should be defrayed by a ratable deduction on the amount of the sums awarded by the commission, not to exceed 5 per cent on the sums so awarded, and that the deficiency, if any, should be "defrayed in moieties by the two governments."

Act of Congress.

By an act approved April 7, 1869, Congress provided for carrying the convention into effect. It authorized the appointment of a commissioner at a salary of $4,500, of an agent at a salary of $4,000, and of a secretary at a salary of $2,500. The President was empowered to make provision for contingent expenses and for advances to the umpire. The commissioner of the United States was authorized, in conjunction with the commissioner of Mexico, to make rules and regulations for the government of procedure. The Secretary of State was directed to transmit to the commission all papers in his custody relating to the business before it, and it was provided that at the close of the commission its records should be deposited in the Department of State. A saving clause was, however, inserted to the effect that this provision should not prevent the Mexican commissioner from depositing "certified copies or duplicates" of papers produced on behalf of his government instead of the originals. In case a witness whose testimony was deemed by either party to be important should refuse to testify, the commissioners were empowered to issue a commission to some

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suitable person to take his testimony; and it was provided that, if he should be in the United States, he might be compelled to appear and testify in the same manner as was prescribed in the case of a commission issued from a court of the United States.[1]

First Meeting of the Commissioners.

The ratifications of the convention having been exchanged February 1, 1869, the commissioners were, as we have seen, required to meet in Washington "within six months" after that day. On July 31, 1869, the period in question being about to expire, Mr. William Henry Wadsworth, who had been appointed commissioner on the part of the United States, appeared at the Department of State, exhibited his commission, and made and subscribed a declaration in the words of the convention.[2]

Mr. Joseph Hubley Ashton appeared as agent and counsel of the United States, and Mr. Caleb Cushing as agent and counsel of the Mexican republic.

Mr. Francisco G. Palacio, the commissioner appointed by Mexico, had not arrived, and in this conjuncture it became necessary to adopt some measure for the purpose of avoiding any future objection to the organization of the commission. To this end the advocates of the two governments entered into the following stipulation:

"CITY OF WASHINGTON, *July 31, 1869.*

"Whereas it is provided by said convention that the commissioners shall meet at the city of Washington within six months after the exchange of ratifications, which ratifications were exchanged on the 1st day of February, 1869;

"And whereas on this 31st day of July, 1869, the commissioner of the United States being here present, ready to proceed in the discharge of his duties, the commissioner for the

[1] 16 Stat. L. 7. For appropriations, see 16 Stat. L. 250, 475, 480, 495; 17 id. 474; 18 id. 327. The compensations allowed were at the following rates annually: Commissioner, $4,500; umpire, $6,000; agent (of the United States), $4,000; secretary, $2,500; legal assistant to the United States agent, $3,000; two clerks, $1,400 each; two translators, $1,500 each; messenger, $600; assistant messenger, $300.

[2] Mr. Wadsworth, though a native of Kentucky, came of New England ancestry. He was born at Maysville, Kentucky, July 4, 1821. A lawyer by profession, he served in the legislature of his native State, and was a member of the House of Representatives in the Thirty-seventh and Thirty-eighth Congresses. His opinions show him to have been a man of strong and independent views, of clearness of apprehension, and of high appreciation of the principles of international conduct.

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Mexican Republic, appointed and on his way here, has not yet arrived;

"And whereas it is desirable to remove, so far as may be, all cause of future exception, if any exist, to the proceedings of the commission by reason of the premises;

"Now, therefore, comes the undersigned as counsel for the Mexican Republic, and stipulates and agrees that the commissioner for the United States, if in his discretion he see fit to do so, may adjourn from day to day, until the commissioner for the Mexican Republic shall appear, and then the commission may be organized and the commissioners may proceed to make and subscribe the declaration required by the convention, to select an arbiter, or arbiters, to adopt regulations and to issue notice to parties to come in and present their respective petitions, without objection to the organization, proceedings or final action of the said joint commission.

"C. CUSHING,
"Counsel for the Mexican Republic.

"As counsel for the United States I concur in the above.

"J. HUBLEY ASHTON,
Agent of the U. S."

This stipulation having been made, "the commission," no quorum being present, adjourned to the 10th of August, when, Mr. Palacio having arrived, the commissioners proceeded to enter their declarations, to make and publish rules, and to transact other business. But in all the proceedings the commissioners were considered as having met on the 31st of July, and this was the day assumed as that of their first meeting in the conventions extending the duration of the commissioners' functions.

Extensions of the Commission.

As the commissioners were considered to have held their first meeting July 31, 1869, the two years and six months prescribed by the convention of 1868 as the limit of the board's duration expired on the 31st of January 1872. On April 18, 1871, however, a convention was concluded by which it was provided that the duration of the commission should be extended not exceeding a year from the time previously fixed for its termination. By a convention of November 17, 1872, the time was further extended for an additional term of not more than two years. This term also proving to be insufficient, a new convention was signed November 20, 1874, by which the existence of the commission was prolonged till January 31, 1876; and a further period of six months was allowed to the umpire in case

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he should not, on the termination of the commissioners' functions, have decided all the cases referred to him. By a new convention of April 29, 1876, the umpire was allowed till November 20, 1876, for the completion of the business before him.

In each of the extensions of the functions of the commissioners it was provided that the period originally fixed in the convention of 1868 for the presentation of claims to the commission should not be considered as altered.

The principal cause of the extensions of the time of the commission is well described in the following extract from the final report of the agent of the United States:

"It is not surprising that the commission required more than the time originally allowed for the completion of the task assigned to it. It was not until June 30, 1870, that its dockets were fully made up, and then they disclosed the existence of over 2,000 cases to be investigated and decided. The area of time covered by these cases was over twenty years. The transactions involved in them had occurred principally in the territory of the Mexican republic, where the evidence both for the claimants and the defendant governments was chiefly to be obtained. The proofs were to be taken in two languages, those adduced by the Mexican Government being wholly in the Spanish language, and when presented they were to be translated into English for the use of the commission. The documents accompanying the claims, when referred to the commission, contained very meagre information in regard either to the citizenship of the claimants or the merits of their cases. In very few instances had the claims undergone any examination previous to their reference to the commission, and no case was ready for hearing, even on the part of the claimant, when it came before the commission. It may be said that all the work of preparing the cases for hearing, as well on the part of the claimants as on the part of the governments, was to be done after the cases were placed upon the dockets.

"Justice to the governments defending against the claims required that they should be allowed time for investigating the facts and obtaining evidence in answer to the claimants' proofs; and after the presentation of the defensive evidence the same consideration rendered it proper that the claimants should be allowed some opportunity to file rebutting evidence.

"It was unfortunate that no provision could be made for printing the records and the arguments in all the cases. The rules of the commission required nothing to be printed except the memorials. The proofs and the arguments were in all cases, except the few instances when the claimants or the governments incurred the expense of printing, submitted in writing, and the commissioners, as well as the umpire and counsel, were obliged to study them in the original manuscripts.

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"The proof, if printed and bound, would no doubt have filled at least 300 octavo volumes of six hundred or eight hundred pages each.

"The Spanish proofs generally, and very often the English documents, were required to be translated before the cases were ready for submission.

"As disagreement between the commissioners was the rule and agreement the exception, the decision of the umpire was invoked in a large proportion of the contested cases; and in all the cases referred to the umpire two separate and independent hearings occurred upon the proofs and arguments.

"The commissioners deemed it proper, at the outset of their labors, to give reasons for their judgments and action, in carefully prepared opinions; and this practice was followed by each of the gentlemen who acted as umpire. The opinions of the commissioners and the umpire are recorded, and they will be found to contain valuable contributions to the law of international reclamations."

Changes in the Commission.

In 1872 Mr. Palacio resigned and was succeeded as Mexican commissioner by Gen. Leon Guzman. The latter took his seat at the board June 24 in that year, presented his credentials, and made and subscribed a solemn declaration in the same form as the other commissioners had done. But immediately afterward he became involved in a difficulty which ended in his withdrawal.[1] He was succeeded by Mr. Manuel Maria de Zamacona, who took his seat at the board August 19, 1873.

Mr. Wadsworth served as commissioner on the part of the United States from the first meeting of the commissioners to the last.

The Umpires.

January 10, 1870, the commissioners, after numerous consultations, offered the post of umpire to William Cullen Bryant. He declined in the following letter:

"OFFICE OF THE EVENING POST,
41 NASSAU STREET, COR. LIBERTY,
New York, January 12, 1870.

"To Messrs. FRANCISCO G. PALACIO and WM. H. WADSWORTH.

"GENTLEMEN: I esteem myself highly honored by being thought of as an umpire in the adjudication of claims under the convention of July 4, 1868, between the United States and

[1] Mr. Fish, Sec. of State, to Mr. Nelson, July 22, 1872, MS. Inst. to Mexico, XVIII. 317. This instruction related to the character of the difficulty, but did not direct the making of any representations to the Mexican Government.

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the republic of Mexico. I find, however, that it will be impossible for me, on account of other and pressing engagements, to give to the duties of such a trust the time and the thought which they will require, not to speak of my own doubts of my qualifications to fill the place; and therefore I can do no less than express my best acknowledgments for the partiality which suggested my name, and decline the office.

"I am, gentlemen, with great regard and respect, your obedient servant,

"W. C. BRYANT."

Early in February 1870 Mr. Fish wrote to Dr. Francis Lieber, of New York, that he and Mr. Mariscal, the Mexican minister, had agreed in nominating him as umpire, and that the commissioners had adopted their nomination;[1] and in due time the commissioners offered him the position. At first Dr. Lieber declined it, his reason being the peculiar provisions of the convention in regard to the umpire's compensation. By Article VI. it was provided that the amount to be paid to the umpire should be determined "by mutual consent at the close of the commission," but that in the mean time "necessary and reasonable advances" might be made by each government on the "joint recommendation" of the commissioners. Dr. Lieber thought that the dependence of the umpire upon the commissioners in respect of his compensation might involve him in unpleasant discussions and render his position undignified. Subsequently, however, after having been assured by Mr. Mariscal that the matter could be settled by the two governments, he recalled his declination, and in the following letter accepted the post:

"NEW YORK, *June 25, 1870.*

"GENTLEMEN: Having sent you my declaration, officially attested, I would now, in order to complete your records, add that, after the hesitation which occurred, I accept the umpireship of the United States and Mexican Claims Commission.

"I am, with great regard, gentlemen, your obedient servant,

"FRANCIS LIEBER."[2]

[1] Perry's Life and Letters of Francis Lieber, 394. Mr. Fish's letter is dated "February, 1870."

[2] The declaration, which was taken on the 22d of June before John A. Shields, a United States commissioner, reads thus: "I will impartially examine and decide, to the best of my judgment and according to public law, justice, and equity, without fear, favor, or affection to the one or the other country, or to any citizens or aliens thereof, upon all such claims as shall have been laid before the commissioners mentioned before on the part

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After Dr. Lieber had been acting as umpire for more than a year, preparing his opinions and performing the other duties of his office in New York, Mr. Cushing, "in behalf of the Mexican republic," and "in obedience to express instructions of the President of the Mexican republic," moved the commissioners that "no case or question of dissent between them" should thereafter "be sent out of the city of Washington, or other place at which the commissioners themselves sit, for the examination of the umpire." In support of this motion Mr. Cushing represented that "the arbiter ought to reside, or at least perform all his official acts, at the city of Washington," for the reason (1) that it was "the duty of the commission as a whole to perform all its legal acts at the city of Washington;" (2) that by the convention the commissioners, if they should fail to agree, were directed to "call to their assistance" the umpire, who, after having examined the evidence adduced on each side, and after "having heard, if required, one person on each side on behalf of each government, and consulted with the commissioners," was to render a final decision; (3) that the Mexican republic, though it desired to be heard before the

of the governments of the Mexican republic and of the United States, respectively, and on which the said commissioners shall not have been able to agree."

In estimating the decisions of Dr. Lieber as umpire it is necessary to bear in mind that in at least some cases he did not profess to be guided by any definite rules. Thus in the case of Marcos Schaben *v.* Mexico, No. 100 (MS. Op. I. 522), he said: "The extent of the authority and consequent duty of umpires varies under different circumstances. In some cases he must strictly limit himself to a decision according to law and equity of those points in which the parties differ. * * * At times, however, and especially when nothing distinct has been expressed by the appointing parties, the authority and duty of the umpire comprehend the conciliatory arbitrament, that power and duty which is possessed by the judges of peace in several countries of the European continent, for instance in Prussia since the year 1826. It is the office of peacemaking by mutual cessions, and the courts of these judges are real courts of arbitration and conciliation so strongly recommended by me. (Reflections on the Changes which may seem Necessary in the Present Constitution of the State of New York, a copy of which I deposited in the Congressional Library.) These *Aulæ Pacificæ*, as they might well be styled, have proved the greatest blessing in all the countries in which they have been introduced. Does an international umpire possess both the attributes which I have pointed out? Nowhere have his duties and the limitation of his authority been made the subject of masterly and comprehensive inquiries which command general respect, by their intrinsic worth and strength, like the works of a Grotius. No tacit understanding of the profession can be supposed on this subject, and the convention of the 4th of July 1868 leaves it naturally untouched. When it became known in Europe that I had been honored with the umpireship between Mexico and the United States, the

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umpire in all important cases, could neither expect its agent to "pass his time in going to and fro between New York and Washington," nor have "two separate agents, one at Washington and the other at New York;" and, finally, (4) that the words "consulted with the commissioners" meant that the umpire should have had "*oral communication* with them in each case," which could not conveniently be done unless the commissioners and the umpire all acted at the same place.

To this communication Mr. Ashton, after expressing his surprise that it should have been made, replied (1) that the convention expressly authorized the commissioners to choose the umpire, and, consequently, that "neither government had or has any right to dictate or control the action of the commissioners in reference to the umpire, before or after his selection in the manner provided by the treaty;" (2) that the umpire named by the commissioners had been "engaged for a year past in the performance of his duty in a mode approved by the commissioners, without any objection in that behalf on the part of the Mexican republic, through its counsel or otherwise"—a circumstance which might give rise to the thought "in the

suggestion that I should write a treatise on umpireship and arbitration reached me from several quarters. The subject becomes daily more important, the more our whole race inclines to a preference of arbitration to mere diplomatic decision or the arbitrament in the field. I shall give my decision in the present case as an umpire possessed of full authority, including that of the conciliatory arbitrament, as I have called it. As, however, I do not know in what precise sense and meaning of the word the commissioners nominated me to their respective governments, I consider it to be my duty to declare, should the commissioners agree in declaring to me, after the perusal of this paper, that they meant the umpire of the present commission should give his awards exclusively according to law and equity, as understood in jurisprudence, and not consider the attribute of the European judge of peace an element of his own authority, I shall take back this decision and render another accordingly."

In the case of Josefa Thoré de Lespés v. Mexico, No. 596 (MS. Op. II. 627), after having first dismissed the claim and then refused a motion for a rehearing, he said: "Nations have often practiced, heaven be thanked, international charity, but it hardly appears in the law of nations or international justice and equity. Nevertheless, since claimant appears to be a widow with many children in great distress, and since it would appear that the Mexican Government used in times of national anxiety a steam tug, in part the property of De Lespés, the late husband of the claimant, the umpire would say in anticipation that, while he reaffirms his previous decision, he would agree with the Mexican and American commissioners if they should prove to be of one mind in allowing $1,000 to be paid by Mexico to claimant in settlement of demand."

The commissioners did not accept this suggestion; but if they had both been inclined to accept it, it is not improbable that they would have deemed themselves unauthorized by the convention to do so.

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minds of some" that the present suggestion was due to dissatisfaction with the umpire's decisions; (3) that, although the umpire was not a member of the commission, and was not expressly required to meet the commissioners, his decisions, being given in writing and, like the decisions of the commissioners, filed in the city of Washington with the records of the commission, were to be considered as official acts performed at the place where the commissioners held their sessions; (4) that the term "consult" did not necessarily imply "oral communication," but was satisfied by written communications, such as often take place between clients and their counsel in the form of letters and opinions; and that when the umpire had read and considered in each case the opposing opinions of the commissioners, together with all the evidence, and had held with them such other communication in writing as either might desire, he had, in the language of the convention, "consulted with the commissioners."

Here the discussion ended.

October 2, 1872, Dr. Lieber died suddenly at his home in New York. At this time the sessions of the board were suspended, and they were not resumed till August 19, 1873, when Mr. Zamacona appeared at the board as the successor of General Guzman. On that occasion Mr. Ashton formally announced Dr. Lieber's decease, and, with the concurrence of the Mexican agent, moved that the commissioners proceed to appoint a new umpire. The commissioners stated that they had already been considering the subject; and on October 13, 1873, they offered the post to Sir Edward Thornton, then British minister at Washington. On the 16th of the same month Sir Edward replied that he would accept the trust if his government would grant him permission to do so, and on the 18th he notified the commissioners of his acceptance, at the same time returning with his signature a declaration, similar to those previously made, which they had sent him.[1]

The Agents.

As agent on the part of the United States the President named Mr. Joseph Hubley Ashton, of Pennsylvania, who, as Assistant Attorney-General of the United States for a number of years, had been connected with many cases involving important principles of international law. Mr. Ashton was at different times

[1] Says Mr. Ashton in his final report: "The cases were investigated by Sir Edward Thornton with conscientious care, without the aid and the facilities afforded by printed records and printed arguments; and the four hundred and odd opinions from his pen in the records of the commission

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assisted in the performance of his duties by Mr. William Marvin, of New York, and Mr. Charles P. James, of Ohio.

The first agent for Mexico was Mr. Caleb Cushing. He was succeeded in April 1872 by Mr. Manuel Aspiroz, who was in turn succeeded by Mr. Eleuterio Avila. Mr. Avila served from August 1873 to the close of the commission.

An idea of the onerous duties of the agents may be gathered from the following passage in Mr. Ashton's final report:

"The evidence in the cases of the American claims against Mexico was taken and the special arguments in those cases on the facts were prepared by the private agents or counsel of the claimants, the agent of the United States assuming no responsibility in regard to the proofs.

"In many cases of that class, however, involving general or important questions of law, especially of public law, affecting classes of cases, the agent of the United States deemed it his duty to prepare such arguments upon those questions as he thought would be useful to the commissioners and the umpire.

"A considerable period of time, at the outset of the commission, before the completion of the proofs, was occupied in the discussion of general questions of law raised by way of exceptions, or motions to dismiss in the nature of demurrers to the memorials.

"This discussion was conducted almost wholly by written or printed arguments between the agents of the two governments.

"But in the cases of the Mexican claims against the United States the duty and responsibility of preparing the defense of the government devolved throughout entirely upon the agent of the United States. He endeavored to make a thorough investigation of those claims through all accessible sources of information, and to collect and present to the commission all evidence in answer to them in the possession of the government, or obtainable by the examination of witnesses cognizant of the transactions. With this view special agents, by his advice, were sent out to Mexico by the government, charged with the duty of investigating several of the more important classes of Mexican claims in the localities where they were

manifest the labor, ability, diligence and intelligence with which he performed his arduous duties."

In the case of Francis Rose *v.* Mexico, No. 344, MS. Op. VII. 418, Sir Edward Thornton was asked to reconsider his decision on the question of forced loans on the ground that his predecessor had decided the question differently. He declined to admit the force of the argument, saying that if the matter was to be settled in that manner he did not see "why it should be referred to the present umpire at all." He considered that the only object in so referring it was that he should "express his unbiassed opinion upon the matter."

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said to have arisen, and much valuable and important testimony was thus obtained and laid before the commission on the part of the United States."

The Secretaries.

Messrs. George G. Gaither, of Kentucky, and J. Carlos Mexia, of the City of Mexico, were the first secretaries of the commission. Mr. Gaither, however, soon resigned. The last meeting at which he appears is that on January 31, 1870. The commission did not meet again till the 20th of the next June, and on that day Mr. Randolph Coyle, of the city of Washington, appears as American secretary. He continued in the discharge of the duties of the office till the close of the commission.

July 2, 1872, the commissioners ordered that the persons employed in making translations for the commission "be placed under the exclusive control and direction of the two secretaries to the commission, who are hereby authorized to make such apportionment of the work to be done as will, in their opinion, best insure its prompt dispatch."

Suspension of the Commission.

Besides the delay attending the disposition of a great mass of undigested business, a suspension of functions in one instance stayed the progress of the commission. Among the claims presented to the board by the Mexican Government, 366 were for compensation for losses and injuries inflicted by Indians coming from the United States into Mexico between February 2, 1848, and December 30, 1853, when the Gadsden Treaty was concluded. These were commonly known as the Indian depredation claims, the principal or typical one being that of Rafael Aguirre *v.* The United States (No. 131, Mexican Docket), and they involved in the aggregate more than $31,000,000. October 10, 1870, Mr. Ashton moved to dismiss all the claims for want of jurisdiction. On May 8, 1872, the commissioners made an order, applicable to all the claims, as follows:

"The agent of the United States having filed his motion to dismiss all of said claims, and to reject them for reasons assigned; and the commissioners, after full consideration of the motion, being unable to agree, Mr. Commissioner Wadsworth being in favor of allowing the motion and rejecting the claims, and Mr. Commissioner Palacio being in favor of denying the motion and recognizing the claims, as appears from the disagreeing opinions of the said commissioners now filed herein, these claims are now ordered to be certified to the umpire of this commission for his decision on the said motion of the agent of the United States.

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"The Mexican secretary will transmit the said claims with the accompanying proofs and documents, the motion of the agent of the United States, the arguments of counsel *pro* and *con*, and the opinions of the commissioners, with a certified copy of this order."

When General Guzman on June 24, 1872, took his seat at the board as Mexican commissioner, this order had not been executed. On the contrary, it seems that General Guzman, having previously arrived in Washington, had as early as the 13th of June taken possession of the papers, receipting for them to Mr. Palacio, and when he appeared at the board he requested of Mr. Wadsworth an opportunity to examine them, for the purpose of ascertaining whether it might not be possible to dispose of the claims without a reference to the umpire. To this request Mr. Wadsworth assented. On the 8th of July General Guzman placed in his hands a written opinion, in which he maintained that the cases could not be decided by the commission, and besought Mr. Wadsworth to unite with him in an appeal to the two governments to dispose of them. Mr. Wadsworth refused to do so, and asked that the order of the 8th of May be executed. This General Guzman declined to permit, maintaining (1) that as the order had not been executed when he took his seat at the board he had a right to disregard it, and (2) that the granting of his request for an opportunity to examine the papers amounted to a rescission of the order. Mr. Wadsworth controverted these positions and offered to submit the disagreement to the umpire, but General Guzman insisted that the order was null and void, and declared his purpose so to treat it. Under these circumstances Mr. Wadsworth, on July 20, 1872, presented a written protest against the "forced interruption and suspension of the labors of the commission," and invited the attention of the governments, through their agents, "to the questions and the difficulties raised by the course which Commissioner Guzman has deemed proper to take." General Guzman refused to treat the protest as having been filed until it should have been translated; but he stated that he was willing to remain in session till the translation should be made, if necessary. The commissioners, however, were unable to agree as to whether the commission should adjourn, or as to whether the session should continue until the protest should be translated. At this stage of the proceedings Mr. Wadsworth rose, and General Guzman declared the session suspended till he should be able to acquaint himself with the content of the paper.

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The board did not meet again till August 19, 1873, when Mr. Zamacona appeared as commissioner in place of General Guzman, and made and subscribed the usual declaration.[1]

Disposition of the Indian Depredation Claims.

The commission having thus been reorganized, Mr. Avila, the agent of Mexico, on October 28, 1873, moved that the order of the 8th of May 1872 be revoked, that the case of Aguirre be sent to the umpire alone, and that each claim when ready be submitted separately. Being unable to agree as to this motion, the commissioners on the 30th of October 1873 referred their disagreement to the umpire. On the 25th of November Sir Edward Thornton rendered the following decision:

"RAFAEL AGUIRRE *vs.* "THE UNITED STATES. } No. 131.

"The transmission of this case to the umpire under the order of May 8, 1872, having been delayed, and the agent of Mexico having moved to revoke the said order, and the commissioners having differed in opinion thereupon, and referred the question to the umpire for decision, without filing opinions, the umpire rendered the following decision, viz.:

"The undersigned, umpire of the United States and Mexican claims commission, has had under consideration the question submitted to him by the two secretaries of the commission on the 1st instant, whether the order made by the commission on May 8, 1872, (marked L in the case of Rafael Aguirre) should be revoked.

"The fact of the submission to him of this question compels him to believe that the commissioners have reserved to themselves the right of revoking any order which may have been made by them or at least this particular one. The umpire thinks that they undoubtedly have the right to do so.

"He is also of opinion that the commissioners ought not to dismiss or recognize by one decision a large class of claims, as is proposed by the respective commissioners in the above-mentioned order, by virtue of an abstract principle which is supposed to cover the whole of those 366 claims; nor to submit to the umpire a difference of opinion with respect to the whole of these claims collectively.

"Such a mode of proceeding seems to him to be contrary to the letter and spirit of the convention of July 4, 1868, and

[1] During the suspension of the commission a digest in Spanish of the leading principles announced in its decisions was published in the City of Mexico. (La Comision Mixta de Reclamaciones Mexicanas y Americanas, por José Ignacio Rodrigues: City of Mexico, 1873.)

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to the principles of justice and equity, in accordance with which the convention requires of them to examine and decide upon the claims submitted to them.

"The convention directs that 'should they' (the commissioners) 'fail to agree in opinion upon any individual claim, they shall call to their assistance the umpire, &c., and such umpire after having examined the evidence adduced for and against the claim' (that individual claim), 'and after' &c.

"Again: 'The decision of the commissioners and of the umpire shall be given upon each claim in writing.'

"The contracting parties evidently intended that the commissioners should consider and decide upon one claim at a time, with reference to its individual merits, and that in the event of their differing in opinion the umpire should decide upon the difference with regard to that particular claim. The same spirit is preserved in other parts of the convention. Article 3 lays down that 'The commissioners shall be bound to examine and decide upon every claim' &c. Article 4 states that 'When decisions shall have been made by the commissioners and the arbiter in every case' &c.

"The true meaning of the words 'every claim' is 'each one of all the claims,' and is hardly rendered by the Spanish words 'todas las reclamaciones.' The more exact counterpart of the English text would have been 'cada una de todas las reclamaciones.'

"And so 'every case' signifies 'each one of all the cases.'

"Nor can the umpire believe that the claim that the damages alleged were committed by the authorities of the United States, or that the United States are liable for the depredations of Indians, whether it be admitted or disallowed, would embrace every one of the 366 claims in question, or that it would be fair and just either towards the United States or the claimants not to examine and decide upon each one of them separately with due regard to its individual merits.

"The umpire is therefore of opinion that the above-mentioned order of May 8, 1872, ought to be revoked.

After receiving this decision, the commissioners ordered the secretary in charge of the papers in the case of Rafael Aguirre to proceed without delay to deliver them, together with the arguments of counsel and the opinions of the commissioners, to the umpire. In due time the umpire disallowed the claim, on the ground that the release of the United States by the Gadsden Treaty from "all liability on account of the obligations contained in the eleventh article of the treaty of Guadalupe Hidalgo," touching the prevention of Indian incursions into Mexico, operated as a discharge from any pecuniary claims on account of those obligations as well as from the special duty which they imposed. After receiving this decision, which in

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principle covered all the cases in question, the commissioners filed in each of the other 365 claims the following dismissal:

"The commissioners having examined this case and found that it falls within the decision of the umpire, made in case No. 131, Rafael Aguirre against the United States, dismiss the present claim, the Mexican commissioner subscribing the order, notwithstanding his personal opinion to the contrary, in obedience to the said decision of the umpire."

Last Meeting of the Commissioners.

The commissioners held their last meeting January 31, 1876. They had then disposed of all the claims which had been submitted to them. Before they declared their sessions to be at an end, Mr. Zamacona, on behalf of himself and his colleague, published and filed a paper containing the following statement:

"The Commissioners, in obedience to the requirements of the Convention, have written and signed their decisions and opinions in each case, besides recording them, in separate books, where they will all be found, except such disagreeing opinions as have not yet been recorded in cases now before the Umpire. The Commissioners will certify the opinions already recorded in the books, and the respective Secretaries will do the same with the opinions in the hands of the Umpire when he shall have returned the cases.

"The decisions of the Umpire to this date, so far as they have been returned into the Commission, have been placed on its files and recorded in its books.

"The Commissioners with the assistance of the Secretaries have kept an accurate record and correct minutes of their proceedings and of the proceedings of the Umpires to this date, and kept in good order the archives of the Commission and as the labors of the Umpire have not been concluded, they remain in the charge of the Secretaries, who have held them in their immediate custody, and subject to whatever agreement the two Governments may come to in regard to the manner in which the archives of the Commission are to be disposed of.

"The Secretaries will take notice of this announcement and will communicate a copy of it to the Agent of the United States and to the Agent of Mexico, in order that they may transmit it to their respective Governments.

"Washington January 31, 1876.

"W. H. WADSWORTH.
"M. DE ZAMACONA."

Final Proceedings of the Umpire.

On the 1st of March 1876, at a meeting of the American and Mexican secretaries and agents, the American secretary announced that he had received a communication from the umpire referring to the fact that the secretaries had transmitted to him on

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the 5th ultimo various motions of the agent of Mexico and of the United States, respectively, having for their object the amendment and modification of certain awards and the rehearing of several others. The umpire said that he already had before him a number of new cases and would still receive several more, which were to be sent to him under orders of the commissioners. He thought it incumbent upon him to examine and decide upon all these cases before taking into consideration the motions of the agents for amendments and rehearings. He therefore declined for the moment to consider whether there ought to be any amendments or rehearings, and returned the motions referred to with the papers, and begged that the agents would not transmit any such motions until all the fresh cases ordered by the commissioners to be sent to him should have been disposed of. On the 18th of September 1876 the umpire, in a letter to the American secretary, pointed out that he had then only two more cases upon which his decision was required. These were No. 398 against the United States and No. 839 against Mexico. He said that he had already written his decisions upon these cases, and as soon as they were copied should forward them to the respective secretaries. He inquired whether the Mexican secretary or the American had any further communication to make to him. On the following day the American secretary replied, saying that the agents of the United States and Mexico had from time to time filed with him motions for rehearings, amendments, etc., accompanied generally by briefs and in some cases by evidence. These motions he transmitted to the umpire, who subsequently rendered decisions upon them. He closed his labors November 20, 1876, on which day the last entry appears in the journals.

Disposition of Claims.

As has been seen, the convention limited the period for the presentation of claims to the eight months following the first meeting of the commissioners, who were, however, authorized to extend the period by not more than three months. On July 8, 1869, before the first meeting of the commissioners took place, Mr. Fish issued the following circular:

"DEPARTMENT OF STATE,
"*Washington, July 8, 1869.*

"The Convention lately concluded between the United States and the Republic of Mexico provides that all the claims

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on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of the Mexican Republic, arising from injuries to their persons or property by authorities of the Mexican Republic, which may have been presented to the Government of the United States, for its interposition with the Government of the Mexican Republic, since the signature of the treaty of Guadalupe Hidalgo of the 2nd of February, 1848, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in the said Convention, shall be referred to a mixed Commission, which is to meet in the city of Washington.

"Citizens of the United States having claims against the Mexican Government, arising from injuries to their persons or property, which are to be referred to the said mixed Commission, and those who may present claims within the time limited in the Convention from the day of the first meeting of the said Commission, are recommended and advised to forward to this Department full statements of the said claims, under oath, accompanied by such other proofs as they see fit to present.

"J. Hubley Ashton, Esquire, has been appointed, in accordance with the provisions of the Convention, on behalf of the United States, agent and counsel, to take charge of and conduct all proceedings in the presentation of claims offered through the Government of the United States. He will take charge of and submit to the Commission all proofs furnished by the several claimants, their agents or counsel, under such rules as may be prescribed by the Commisson, and will, under like rules, argue each case upon proof so submitted, and such brief of argument as may be furnished to him in like manner. His compensation will be paid by the Government, and his services will be free to all claimants.

"Claimants are also informed that the services of private counsel will be limited to the preparation of cases for presentation and argument; but they are advised that their interests may be promoted by the employment of counsel to prepare briefs of argument for the use of the agent of the Government, and otherwise to assist him, within the limitation stated, in presentation of their cases.

"Claimants are required, in every case, to furnish to the Department satisfactory proof showing—

"1. That they are citizens of the United States.

"2. The time when the claim arose.

"3. The present owner or owners of the claim.

"4. The name and address of the person authorized to act for the claimants and to correspond with the Department on the subject of the claim.

"On application to the Department, by letter or otherwise, circulars will be sent to claimants, containing substantially the general rules, as to the mode and form of proof, which

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have been adopted by Commissions organized under Conventions between the United States and foreign governments for the adjustment of claims.

"HAMILTON FISH,
"*Secretary of State.*"

Instructions also were sent to the consuls of the United States in Mexico to send in any claims which they might receive;[1] and on February 23, 1870, Mr. Fish issued another circular, which was as follows:

"DEPARTMENT OF STATE,
"*Washington, D. C., February 23, 1870.*

"The Convention between the United States and the Republic of Mexico of the 4th of July, 1868, provides for a final settlement, by a Joint Commission, of all claims on the part of the corporations, companies, or private individuals, citizens of one country against the Government of the other, arising from injuries to their persons or property, which may have been presented to either Government for its interposition with the other, since the signature of the treaty of Guadalupe Hidalgo, between the two countries, of the 2d of February, 1848, and which yet remain unsettled, as well as all such claims as may be presented within eight months from the day of the first

[1] "DEPARTMENT OF STATE, *Washington, December 9, 1869.*

"*U. S. Consul at* ———, *Mexico.*

"SIR: Immediately after the receipt of this instruction, you will give notice in all the public journals in your district, and in such other way as you see fit, that the time for the presentation of claims against the Republic of Mexico, before the joint commission now sitting at Washington, will expire on the 31st of March next, unless good cause for extension is shown; and you will call upon such claimants as desire to present their claims, with their proofs and evidence in support of the same through you, to appear before you at an early day. You will receive all claims so presented, and will take and verify all proofs in support of the same, which may be proffered by the claimants, and will, without delay, transmit the same to this Department, through the minister of the United States at Mexico, or by such other safe mode of conveyance as shall occur, in order that the same may reach the Department before the 30th day of March next. You will also notify all claimants who prefer to present their claims and proofs, authenticated in the manner provided for by the rules of the commissioners, of which a copy is inclosed, that they are at liberty to do so, and that the Department will, in like manner, take charge of and present claims and proofs so authenticated; but no claim can be received by the commission which is not presented through one or the other of the governments.

"I am, sir, your obedient servant,

"J. C. B. DAVIS,
"*Assistant Secretary.*"

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meeting of the Commissioners. That period expires on the 31st day of March, 1870. The Convention also provides that all claims arising out of any transaction of a date prior to its ratification are to be hereafter forever barred and inadmissible, whether presented to or laid before the Commissioners or not

"In this state of facts, it has been considered by this Department as advisable not to withhold from presentation to the Commissioners any of the claims of our citizens, but to refer them to the Commissioners for decision. It has accordingly referred, and will continue to refer, to the Joint Commission all claims of the corporations and citizens of this country which may be presented in due time, without special examination of their merits.

"It is not, therefore, to be inferred, from the fact of presentation, that the Government thereby expresses any opinion upon the merits of the claims presented, either as regards the facts of the case, which in most instances remain to be fully developed before the Commissioners, and of which the Department therefore cannot judge, or as regards the principles of law to be invoked in their support. The responsibility of deciding questions of fact and law rests with the Commissioners, but it has been and is the purpose of this Department to interpose no obstacle to the submission of any claim with such proofs and arguments in its support as the claimant may furnish.

"Claimants desiring further information are referred to J. Hubley Ashton, Esq., the agent and counsel of the United States, who is to be addressed at 355 H street, Washington, D. C.

"HAMILTON FISH,
"*Secretary of State.*"

The presentation of American claims by the Department of State to the commission began soon after the latter's organization, and continued as the claims were from time to time received at the Department. In the end it appeared that the greater part of the American claims laid before the commission were first brought to the notice of the United States after the conclusion of the convention. The claims filed in the Department of State prior to that time numbered 330. Within the eight months ending March 31, 1870, which time was originally allowed for the presentation of claims to the commission, the number of American claims so presented was 894. Before the expiration of that period, however, the commissioners, in the exercise of the authority conferred upon them by the convention, extended the time for presenting claims till June 30, 1870; and within the three additional months 123 American claims were presented. The whole number of claims against Mexico

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was 1,017. The number of claims against the United States was 998, of which 90 were presented to the commission after March 31, 1870. The whole number of claims presented to the commission was 2,015. The practically enforced transmission of "claims" to the commission both by the United States and by Mexico without examination naturally resulted in the dismissal of many cases on jurisdictional grounds.

It is a curious coincidence that the number of United States and of Mexican claims rejected should have been the same. Of the claims against Mexico 831 were dismissed or disallowed, while awards were made in favor of the claimants in 186 cases. Of the claims against the United States 831 were dismissed or disallowed, while the awards made in favor of the claimants numbered 167. A hundred and fifty of these awards, however, were made in one class of claims, known as the Piedras Negras claims, which were disposed of by the commissioners as one case, so that the number of cases, distinct in fact or in principle, in which awards were made against the United States was only 18.

So, also, in some instances large numbers of claims were practically dismissed or disallowed under one decision. The most remarkable example of this kind was that of the claims against the United States known as the Indian depredation claims, which were 366 in number, and which were, as we have seen, at length dismissed by the commissioners under a decision of the umpire, made in the leading case, on a motion made by the agent of the United States to dismiss it. In what were known as the Bagdad cases, upward of a hundred claims against the United States were dismissed by the commissioners under a decision on the merits made by the umpire in the leading case.

The mode in which the claims were disposed of may be seen by the following table:

	American docket.	Mexican docket.
Decided by Commissioners Wadsworth and Palacio	227	314
Decided by Commissioners Wadsworth and Zamacona	353	504
Decided by Dr. Lieber, umpire	20	15
Decided by Sir Edward Thornton, umpire	398	62
Cases consolidated with other cases	12	13
Cases withdrawn	7	0
Total	1,017	998

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Of the American claims decided by Commissioners Wadsworth and Palacio, awards in favor of the claimants were made in 40, while 187 were dismissed. Of the Mexican claims the same commissioners allowed 154 and dismissed 160. Commissioners Wadsworth and Zamacoña allowed 3 American claims and dismissed 350, while they allowed 8 Mexican claims and dismissed 586.[1]

The records of the commission, so far as they remained in the possession of the United States, were deposited in the Department of State, which considers itself without authority to give them up except by act of Congress.[2] The records and files of the agent of Mexico, comprising all the documents relating to the claims of Mexican citizens against the United States, were, on the dissolution of the commission, transferred to the custody of the Mexican legation and were not deposited in the Department of State.[3]

Mode of Paying Awards.

Touching the manner in which the awards should be paid, the convention provided that when the decisions of the commissioners and the umpire should have been rendered in every case laid before them, "the total amount awarded in all the cases decided in favor of the citizens of the one party" should "be deducted from the total amount awarded to the citizens of the other party;" that "the balance, to the amount of three hundred thousand dollars," should be paid "at the City of Mexico or at the city of Washington, in gold or its equivalent, within twelve months from the close of the commission, to the government in favor of whose citizens the greater amount may

[1] Report of Mr. Ashton, S. Ex. Doc. 31, 44 Cong. 2 sess. 15. Mr. Ashton calls attention to the fact that while Sir Edward Thornton appears by the foregoing table to have decided 460 cases, he stated in his final opinion that he had decided 464. Mr. Ashton explains that this discrepancy of 4 cases no doubt arose from the fact that several cases were referred to Sir Edward Thornton twice; first upon some preliminary question, such as citizenship, and again upon the merits.

In the case of Albert Speyers Dr. Lieber, as umpire, awarded $23,000, on condition that the claimant prove his American citizenship. This the latter failed to do, and April 10, 1872, the umpire decided: "I can allow no award in favor of the United States for Moritz or Albert Speyers." (Mr. Uhl, Acting Sec., to Mr. McAleer, May 22, 1894; Mr. Gresham, Sec. of State, to same, July 2, 1894, MS.)

[2] Mr. Bayard to Mr. Buck, February 11, 1887, MS. Dom. Let.

[3] Mr. Porter, Acting Sec., to Mr. Cruz, January 7, 1887, MS. Dom. Let.

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have been awarded, without interest or any other deduction" than that for the expenses of the commission; and that "the residue of the said balance" should "be paid in annual installments to an amount not exceeding three hundred thousand dollars, in gold or its equivalent, in any one year, until the whole shall have been paid."

This mode of payment, while at first blush apparently a simple one, was in reality clumsy and complicated. Without affecting in the slightest degree the pecuniary liability of either government to the other, it required each to pay a certain sum to its citizens from its own treasury, while it obliged the government in whose favor the larger amount was awarded to divide each award, and from time to time, as the installments fell due, pay part from its own funds and the rest from the moneys received from the other government. But, in the case of the present commission, the payment of the awards was further complicated by the fact that they were made in different moneys. As the convention provided that the decision should in each case designate whether the sum allowed should be "payable in gold or in the currency of the United States," some of the awards were made in United States currency, others in gold coin of the United States, and others yet in Mexican gold; and in several awards in favor of citizens of the United States certain items were allowed in United States gold and others in United States currency.[1] In some cases Dr. Lieber made his awards payable in "gold" or in "Mexican currency." July 24, 1871, he made the following declaration:

"Having used in my decisions and awards, repeatedly, the expression 'Mexican Currency' or 'Gold,' and finding that Mexican Currency might be understood to mean Mexican Silver, and that Gold is not sufficiently definite, I now declare,

[1] Mr. Ashton, in a report to Mr. Fish of November 23, 1876, said: "I have called attention to the fact that in several of the American cases portions of the amounts respectively awarded are expressed in the currency of the United States, and other portions of those amounts are expressed in gold coin of the United States. In all the cases of this class, with one exception, the sums respectively awarded in the currency of the United States were allowed for costs." (S. Ex. Doc. 31, 44 Cong, 2 sess. 7.) November 20, 1876, the agents of the United States and Mexico filed a stipulation agreeing that in the cases in which the commission and the first umpire had allowed the sum of $100 for costs, without expressing in what kind of money it should be paid, it should be payable in United States currency.

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before the publication of said awards, that wherever I have used the expressions aforesaid, namely Mexican Currency or Gold, they shall be taken as equivalent to the expression Gold Coin of the United States of America, and as meaning the same.

"New York, July 24, 1871.

"FRANCIS LIEBER."

This declaration was received by the commissioners July 26, 1871, and on the same day they made the following order:

"The commissioners in their awards heretofore having sometimes used the expressions 'in gold' or 'Mexican currency,' it is now ordered that these expressions, wherever they occur in such awards, shall be taken as equivalent to the expression 'in gold coin of the United States,' and so far as may be necessary such awards are now modified to conform to this decision."

Subsequently, Sir Edward Thornton in certain cases made awards in "Mexican dollars." The agent of the United States, deeming these words ambiguous, moved that the awards be amended so as to render their meaning certain. On this motion Sir Edward Thornton delivered, January 25, 1875, the following decision:

"With reference to the suggestion addressed to the Umpire by the agent of the United States concerning the nature or kind of currency in which his awards in several cases are made payable, he begs to state that where he made use of the term 'Mexican Dollars,' which he admits is not sufficiently precise, he meant Mexican Gold Dollars, of which there are sixteen to the Doubloon or '*onza de oro*.'

"The Umpire is not of opinion that the framers of the convention intended to prohibit the use of Mexican gold coin in the awards made by the Commission. If the word *gold* had referred to the United States, he thinks that the words 'in gold or currency of the United States' would have been a more proper phraseology; he believes that in the convention 'gold' meant gold coin of either one country or the other, and as the claims referred to originated in Mexico, and as it is to be designated whether the awards shall be payable 'in gold or in the currency of the United States,' it seems more proper that with regard to such claims the awards should be payable in Mexican Gold Dollars."[1]

Interest.

Wherever interest was deemed by the commissioners or the umpire to be due as part of the indemnity awarded, it was allowed from a specified time up to a date usually described as "the conclu-

[1] Bark *Emily Banning* et al. v. Mexico, Nos. 136, 137, and 138, Am. Docket, MS. Opinions, IV. 7.

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sion of the labors of the commission," or "the date of the final award." This mode of rendering awards necessitated a subsequent computation of the amount in every case in which interest was allowed, besides leaving it doubtful when the interest would cease to run.[1] On September 30, 1874, the agent of Mexico moved that the commissioners declare that the phrase "to the conclusion of the labors of the commission" should be taken to mean to the end of the two years and six months fixed by the convention of 1868. On the 3d of October the commissioners decided that it included "not only the two years and a half of the first period agreed to, but also the subsequent extensions." April 2, 1875, the agent of Mexico renewed the subject by moving (1) that in all awards up to the 28th of the preceding January the interest should cease to run on that day, and (2) that in future, when interest should be allowed, it should run only to the date of the decision. On the 11th of June the commissioners announced their rejection of these motions.

Thus the matter stood till January 25, 1876, when the commissioners, on the eve of their final adjournment, ordered that in all cases in which they had allowed interest "to the close of the labors of the commission," it should be calculated to the date of the last decision which the umpire should render within the time limited for the completion of his labors by the convention of November 20, 1874. The time prescribed by that convention for the completion of the umpire's labors was July 31, 1876.

On January 31, 1876, Sir Edward Thornton, writing to the commissioners on the subject of their final adjournment, which was to take place on that day, said:

"You will observe that in making awards where interest is allowed I have laid it down that this interest should be paid from a certain date in each case 'to the date of the final award.' This latter date I consider and decide to be, as far as my awards are concerned, the date of the last award which I shall make in accordance with the terms of the convention of November 20, 1874; that is, of the last award which I may sign on or before the 31st of July next."

[1] "It would have been more satisfactory," said Mr. Ashton in his preliminary report, "if the commissioners and the umpires had deemed it convenient to make their awards, in cases in which they allowed interest, definite, by computing the interest and awarding a certain aggregate amount in each case." (S. Ex. Doc. 31, 44 Cong. 2 sess.)

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July 31, 1876, Sir Edward Thornton formally declared that his award made on that day in the case of Geronimo de la Garza *v.* Mexico, No. 993, American Docket, was the decision contemplated in the order of the commissioners of the 25th of the preceding January, and that the words "to the date of the final award," as used by himself, should be taken to refer to the same decision. It was thus at length established that where interest was allowed by the commissioners or by Sir Edward Thornton it was to be computed to July 31, 1876.

But there yet remained certain cases in which Dr. Lieber had awarded interest from a certain day "to the close of the labors of the commission," but in which, owing to his death, he made no decraration as to his intentions. On the suggestion of the agents of the two governments Sir Edward Thornton, November 17, 1876, decided that in all such cases interest should be calculated to July 31, 1876.

Thus all uncertainty as to the time to which interest should be computed was finally removed by the authoritative adoption of a uniform day for all cases.

Not infrequently interest was allowed on certain items in a claim and disallowed on others; and "in several cases awards were made of particular sums bearing interest from different dates, subject to certain deductions or credits, with interest from various dates." Such things tended to complicate the calculations of the total amounts of the various awards. But it appears that the secretaries of the commission performed the work with so much expertness that their computations, though made separately, produced in every instance the same result.[1]

Pecuniary Results of the Commission.

The claims of citizens of the United States against Mexico, including damages and interest where they were claimed, amounted to the enormous sum of $470,126,613.40. The awards against Mexico, in the three kinds of money in which they were payable, aggregated the following amounts:

United States currency	$402,942.04
United States gold coin	426,624.98
Mexican gold coin	3,296,055.18
Total in three moneys	4,125,622.20

[1] S. Ex. Doc. 31, 44 Cong. 2 sess. 7.

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The claims of citizens of Mexico against the United States amounted to $86,661,891.15. The awards against the United States aggregated the following amounts:

United States currency	$89,410.17
United States gold coin	10,559.67
Mexican gold coin	50,528.57
Total in three moneys	150,498.41

Thus, after deducting the amounts awarded in favor of citizens of the United States from the amounts awarded in favor of citizens of Mexico, there remained due from Mexico to the United States the following sums:

United States currency	$313,531.87
United States gold coin	416,065.31
Mexican gold coin	3,245,526.61
Total in three moneys	3,975,123.79

By Article VI. of the convention, it was stipulated that the whole expenses of the commission, including contingent expenses, should be defrayed by a ratable deduction not to exceed 5 per cent on the sums awarded, and that the deficiency, if any, should be defrayed in moieties by the two governments. December 14, 1876, Mr. Fish and Mr. Mariscal met at the Department of State for the purpose of adjusting the expense account. They determined that the compensation of the umpire should be at the rate of $6,000 a year. Deducting, therefore, the advances to Dr. Lieber, which were made at that rate, and which amounted to $12,279.44, there remained the sum of $18,550 yet due as compensation of the umpire, one-half of which was payable by each government.

The total expense account was found to stand as follows:

Paid by Mexico:		
Salary of commissioner from July 1, 1869, to January 31, 1876, 6 years and 7 months, at $4,500		$29,625.00
Salary of secretary from May 1, 1869, to December 31, 1876, 7 years and 6 months, at $2,500		18,750.00
Umpire, Dr. Lieber, from September 6, 1869, to October 1, 1872, at $3,000	$6,139.72	
Umpire, Sir Edward Thornton, from October 17, 1873, to November 20, 1876, 3 years and 1 month	9,275.00	
		15,414.72
Total amount paid by Mexico		63,789.72
Paid by the United States:		
For same services, same rates and time	63,789.72	
Also joint contingent expenses	51,159.02	
Total amount paid by the United States		114,948.74
Total amount of expenses		178,738.46
Moiety of expenses		89,369.23

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Computation had disclosed the fact that the total expenses would be defrayed by deducting from the amount of the awards 4.17992 per cent, which on $4,125,622.20, due by Mexico, yielded $172,447.75, and on $150,498.41, due by the United States, yielded $6,290.71; together, $178,738.46.[1] It still remained, however, to adjust this charge between the two governments, so that each might bear its proportion of the expenses, as provided by Article VI. Deducting from $172,447.75, representing the percentage on the awards to be paid by Mexico, the sum of $114,948.02 disbursed by the United States on account of the joint expenses of the commission, there remained a balance in favor of Mexico of $57,499.01. By a subsequent understanding the Mexican Government deducted the whole of this balance from the first installment, which was discharged by the payment to the United States January 31, 1877, in the city of Washington, of $242,501 in the gold coin of the United States. In reality the sum actually due, when reduced to United States gold, was only $238,567.06, and the excess of $3,933.94 was credited to Mexico in the payment of the next installment.

But before the second installment was paid the two governments, with a view to obviate the inconveniences and uncertainties arising from the fact that, while the awards were payable only "in gold or its equivalent," they were expressed in three kinds of money, entered into the following agreement:

"First. The Government of Mexico shall be held to discharge the obligation imposed upon it under the convention by paying in currency of the United States or its equivalent the proportion of the awards expressed in currency, and the respective gold awards in gold or its equivalent, having regard to the relative value of the gold coinage of the two countries.

"Second. That for the calculation of the eqivalence of value the gold dollar of Mexico shall be held equal to $98\frac{3239}{10000}$ cents in gold coinage of the United States.

"Third. That an annual payment shall be held to comprise $23,662.05 in currency of the United States, $31,400.18 in gold coin of the United States or its equivalent, and $244,937.77 in gold dollars of Mexico or their equivalent, thus extinguishing claims to the amount of $300,000 (nominal) each year.

"Fourth. That the first installment having been computed and satisfied in gold, Mexico shall now pay, to the end of equalizing the account, two currency installments, or $47,324.10 in currency, and shall pay besides in gold coin of the United States a sum sufficient, when taken in conjunction with the previous payment, to extinguish two annual payments of the awards severally due in gold as above set forth.

[1] H. Report 27, 45 Cong. 2 sess.

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"This amount is found to be:

In gold coin of the United States	$62,800.36
In gold dollars of Mexico, reducing the same to the equivalent value in United States gold coin at a stipulated rate	482,007.65
Total United States gold	544,808.01
Less first installment	300,000.00
Balance	244,808.01

"In accordance with this agreement, Señor Zamacona tendered to Mr. Evarts two checks drawn by himself on the National City Bank of New York to his own order, and indorsed to the order of Mr. Evarts, one check being for $47,324.10 in currency and the other $244,808.01 in gold, for which check Mr. Evarts gave receipt according to annexed form.

"Mr. Evarts took occasion to express his satisfaction at this prompt payment on the part of Mexico.

"Señor Zamacona declared that Mexico desired not to be precluded by the fact that the actual payments of the two installments had been made at the city of Washington from claiming that future payments might under the convention be rightfully made at the City of Mexico.

"Mr. Evarts asserted that the alternative of the convention as to the place of payment was only open until the award should show to which nation the balance would prove to be payable, and thereupon the payment would be fixed as at the seat of government of the nation receiving the payment. Mr. Evarts, however, assented that the question should stand upon the terms of the convention, unprejudiced by the past payments.

"MANUEL MA. DE ZAMACONA.
"ALVEY A. ADEE.

"WASHINGTON, *January 31, 1878.*"

"RECEIPT FOR THE SECOND INSTALLMENT.

"DEPARTMENT OF STATE,
"*Washington, January 31, 1878.*

"Received of Don Manuel Ma. de Zamacona, confidential agent of the Mexican Government, two checks drawn by himself upon the National City Bank of New York to his own order, and by him indorsed to the undersigned, one check being for two hundred and forty-four thousand eight hundred and eight dollars and one cent ($244,808.01) gold, and the other for forty-seven thousand three hundred and twenty-four dollars and ten cents ($47,324.10) currency, which checks, taken together, when paid, will be a discharge of the balance of the indemnity this day due from that Republic to the United States under the convention between the two governments of the 4th of July 1868, according to an adjustment this day made of the

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payment of the first installment in connection with the present payment.

"WM. M. EVARTS,
"*Secretary of State.*"[1]

We have seen that after deducting the awards payable by the United States in Mexican gold from those payable by Mexico in the same coin, there remained due from Mexico to the United States on such awards the sum of $3,245,526.61 in Mexican gold. At the rate of exchange agreed upon, this sum was equivalent to $3,193,400.25 in United States gold, and the amount of Mexico's original net indebtedness in United States gold and currency stood thus:

United States currency	$313,531.87
United States gold	416,065.31
Mexican gold, reduced to United States	3,193,400.25
	3,922,997.43
Deduction on expense account	57,499.01
Total net indebtedness	3,865,498.42

The proportionate amounts required to make up the nominal sum of $300,000, the amount of the annual installment under the convention, were as follows:

United States currency	$23,662.05
United States gold	31,400.18
Mexican gold	244,937.77
Total	300,000.00

Reducing the proportion in Mexican gold to the standard agreed upon, the account stood thus:

United States currency	$23,662.05
United States gold	31,400.18
Mexican gold, reduced to United States	241,003.82
Annual installment, United States gold and currency	296,066.05

Under this arrangement the net indebtedness of Mexico was discharged as follows:

First installment	$238,567.06
Twelve installments, United States gold and currency	3,552,792.60
Final installment	74,138.75
Total	3,865,498.42

[1] H. Ex. Doc. 103, 48 Cong. 1 sess. 156–159.

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Weil and La Abra Cases.

Of the whole sum awarded against Mexico more than one-fourth was allowed on two claims, those of Benjamin Weil, No. 447, American docket, and La Abra Silver Mining Company, No. 489. The amount awarded in favor of Weil was $487,810.68 in Mexican gold, or according to the protocol of January 31, 1878, $479,975.95 in gold coin of the United States; the amount awarded in favor of La Abra Company was $683,041.32 in Mexican gold, or $672,070.99 in gold coin of the United States. The two awards aggregated in the gold coin of the United States the sum of $1,152,046.94.

The claim of Weil, who was a naturalized citizen of the United States, of French nativity, was for damages for the seizure of cotton. In his memorial he alleged that in September 1864 he imported into Mexico a large train of carts containing about 1,914 bales of cotton, and that the cotton was seized on the 20th of that month between Laredo and Piedras Negras, and appropriated by General Cortina, of the Mexican Liberal forces. For this alleged wrong he claimed $334,950 in gold, with interest from September 30, 1864, at the rate of 12 per cent. The evidence accompanying his memorial consisted of an affidavit made by himself in New Orleans in September 1869, and of affidavits made by certain other persons from time to time from 1869 to 1872.

Commissioners' Opinions on the Weil Claim.

The opinion of Mr. Wadsworth on the claim of Weil was very brief. It was as follows:

"In the face of so many witnesses of respectability, I am unwilling to decide that the facts detailed by them are not true.

"I must decide on the proofs and documents filed in the case, and nothing else. These remain without contradiction by the government, and to remove all misapprehension I state that I am willing to give every opportunity in my power, as a commissioner, to the government to make a full and ample investigation of the claim, and respond to it, and very much wish that this might be done.

"But as this is declined I must act on the proofs before me. It is now my decision that the United States must have an award for the value of the property at the time and place of its seizure, with interest. And the umpire can finally dispose of the case."

The opinion of Mr. Zamacona was fuller. Observing that it was well known that the Government of the United States did not neglect its diplomatic claims, he said that when a demand

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was presented for three or four hundred thousand dollars, with a statement that ten or twenty years before a scandalous robbery was committed in Mexico; that all the documents which might have established it had been lost; that the victim of the outrage had borne it in silence, and had only just now obtained the means to prove it, he could not help thinking of the many facilities which existed for obtaining false testimony for the establisment of fraudulent claims. These remarks, said Mr. Zamacona, applied to the present claim. The evidence consisted of affidavits of certain persons who said they witnessed the seizure, of others who said they saw the cotton carried toward the Mexican frontier, and of others who said they had heard of the seizure after it had taken place. Neither the papers relating to the purchase of the cotton, nor the vouchers for the expenses incurred in its transportation, nor the certificates of any custom-house entry, nor the draft of any letter, petition, or protest made at the time of the alleged robbery had been produced. It was alleged that they were all lost; but no one could fail to see that it was a very easy matter to replace them if they ever existed. The claimant, said Mr. Zamacona, placed much stress on the absence of defensive testimony on the part of Mexico. This was a statement which was far from true. Evidence had been forwarded, but it was delayed by the difficulty of obtaining negative proof. It was too late to be admitted under the rule then in force, and the American commissioner had proposed to admit it if the claimant was allowed to rebut it by new evidence. But, in view of the approaching end of the commission, the advantages of such an arrangement would be altogether on the side of the claimant, who would be advised of the weak points in his case and enabled to put in a lot of manufactured documents in the expiring moments of the commission when there would be no possibility of further investigation. Mr. Zamacona further said:

"The demonstration made by the undersigned has to a certain extent been useless, because the question involved in this case has been discussed and very correctly decided by the umpire in another similar case. The considerations expressed by that officer, when he decided the case of Jaroslowski, No. 896, are very applicable to this case. The following are his words:

"'It is said that the Mexican officers gave Wolf a receipt for the said goods, and that while Wolf and Cohen were on their

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way to Texas they were both attacked and robbed of everything they had. They afterwards returned to Matamoras. Why they should have crossed and recrossed in this manner the river which forms the frontier of Texas is something which is not shown by the evidence. But the absence of other evidence, which it would have been very easy for them to obtain, is even more remarkable. If the receipts of the export duties paid at Matamoras, and those for the cost of the carts and mules, were stolen from Wolf, it would have been very easy for him to have procured duplicates of those papers on his return to Matamoras. The claimant might also have worked up evidence that there was a Mexican force at the aforesaid place at the time stated and that that force took his goods; these facts must have been well known. But during all the time which elapsed from May of 1865, which was the time of the capture, up to March of 1870, it does not appear that the claimant made the least effort to obtain evidence, since he never even applied to Wolf and Cohen for their affidavits.

"'Even in the event of its being true that the claimant's goods and merchandise were captured by the Mexican troops, the umpire holds that the authorities of that country, under the general laws of war, and also according to the law of Mexico of the 16th of August 1863, had the right to seize and confiscate them. If the claimant thought that the capture was unlawful, it was his duty to have presented his claim to the Mexican Government, which he certainly might have done under the law of the 19th of November 1867.'

"The last paragraph of this quotation may be applied to this case, because the operation in which the claimant describes himself as being engaged might perhaps have been considered unlawful according to the laws of both the United States and Mexico.

"As the undersigned deems the foregoing considerations conclusive, he has not referred to others of a similar character and upon which he founds his opinion that the present claim should be dismissed."

Umpire's Award.

October 1, 1875, the umpire, Sir Edward Thornton, rendered the following award:

"The Umpire considers that the facts put forward by the claimant are sufficiently proved, viz, that the cotton belonged to him; that it was seized and taken by troops belonging to the Mexican Government and under the command of General Cortina; that the place at which the seizure took place was between Piedras Negras and Laredo, which must therefore have been in one of the Mexican States of Coahuila and Tamaulipas; and that the cotton which was avowedly on its way to Matamoras for export was seized on or about the 20th of September, 1864.

"These facts are not disproved by evidence on the part of the defence.

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"The argument of most weight which has been suggested by the latter is that all communication with points occupied by the enemy was forbidden. But there is no proof that any of the territory through which the cotton had passed, or was intended to pass, was occupied by the enemies of the Mexican Government. It is true that the States of Coahuila and Tamaulipas were under martial law; but that state of things did not justify the Mexican authorities in seizing the goods of private persons and neutrals without giving them compensation; or if they thought it necessary to seize the cotton in order that it might not fall into the hands of or even pay duty to the enemy, they were still bound to indemnify its owner.

"The Umpire has been unable to discover any proclamation or other manifesto by the Mexican Government to the effect that either Coahuila or Tamaulipas was occupied by the enemy, and it is a historical fact that the city of Matamoras was first occupied by the French forces on the 26th of September 1864.

"The Umpire is therefore of opinion that the claimant was committing no illegal act in transporting his cotton through Coahuila and Tamaulipas with destination to Matamoras on the 20th of September 1864, and that as it was seized by Mexican authorities, the Mexican Government is bound to indemnify the claimant.

"The claimant asserts that there were 1,914 bales of cotton. The witnesses agree that there were not less than 1,900, which latter number the Umpire will therefore adopt.

"The average weight of each bale is shown to be 500 lbs. and the value 35 cents per lb. But with regard to the value it must be remembered that the cotton was still a long way from Matamoras when seized, and that there is always some risk of damage being done to it during the journey. The Umpire therefore thinks that it will be fairer to put the value at 30 cents the lb.

"The Umpire therefore awards that there be paid by the Mexican Government on account of the above mentioned claim the sum of two hundred and eighty-five thousand Mexican gold dollars ($285,000) with interest at six per cent. per annum from the 20th of September 1864 to the date of the final award."

Commissioners' Opinions on La Abra Claim.

The claim of La Abra Silver Mining Company was for damages for being dispossessed of a mine in Mexico and for the seizure of ores by the Mexican authorities.

The opinion of Mr. Wadsworth on the claim was merely formal, since the case must, as he said, go to the umpire for decision.

Mr. Zamacona compared the claim to that of Dr. Gardiner. When it was first presented to the Department of State it was

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represented, said Mr. Zamacona, by only two lawyers, and the amount demanded was $1,930,000. Three months later another lawyer came in, and it was swollen to $3,000,000. When the brief was submitted there were four lawyers, and the claim had grown to $3,962,000. It appeared that the sale of the mine was made on September 25, 1865, for the sum of $50,000. In March 1868 its value had risen to $2,500,000. It was strange how the value could have increased so enormously while, according to the company's statements, the enterprise had encountered nothing but difficulties and embarrassments. The history of the company, as related by itself, was an uninterrupted series of struggles with the populace and the authorities of the place, each vying with the other in rapacity and malevolence. Mr. Zamacona entered into an examination of the testimony, declaring at the end that the most of it evidently was obtained by fraud, and that the final result of the gigantic claim was nothing. It verged almost on the absurd.

Umpire's Award.

Sir Edward Thornton delivered his opinion on the claim December 27, 1875. He said that, in spite of the evidence to the contrary, he was convinced that the local authorities exhibited toward the agent of the company a spirit of bitter hostility and encouraged their countrymen to behave in like manner. He thought the evidence showed that the local authorities were determined to drive the claimants out of the country. So determined was this hostility that it would have been useless to appeal to the courts of justice. He was of opinion that the claimants should be reimbursed for their expenditures, and also for the value of ores which they had extracted but were forced to abandon. On these sums interest should be allowed. The evidence showed that there had been invested and expended the sum of $341,791.06. From this sum there should be deducted $17,000, which had been derived from reduced ores. He was satisfied from the respectable evidence produced that a large quantity of valuable ore had been abandoned, but there was not sufficient proof that the number of tons stated by the various witnesses were actually at the mill or at the mines at the time of the abandonment. Neither books nor reports had been produced, nor had any reason been given for their nonproduction, though he could not doubt that books were kept and that reports of the daily extraction of ore were made to the company at New York. On this

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branch of the case he put the damage at $100,000, which he considered to be possibly much less than the real value of the ores. On the whole claim he allowed $358,791.06 in Mexican gold, with interest at 6 per cent from March 20, 1868, to the date of the final award, and the further sum of $100,000, with the same rate of interest from March 20, 1869.

Refusal of a Rehearing.

After these awards were made the agent of Mexico presented to the umpire a motion for a rehearing, accompanied with some new evidence and a reexamination of the old. October 20, 1876, the umpire refused the motion on the ground (1) that he had no right to consider any evidence besides "that which had already been before the commissioners, had been examined by them, and transmitted to the umpire;" (2) that, as he had already examined that evidence with all the care of which he was capable, it was not likely that a reexamination of it would alter his opinion; (3) that as his decisions had, without his wishes being consulted, been made public, and as they were known by the convention to be final and without appeal, it was probable that they had been made the basis of transactions which an alteration or reversal of them might seriously prejudice; and (4) that, in his opinion, the provisions of the convention in effect debarred him from rehearing cases which he had already decided, and deprived each government of the right to expect that any claim should be reheard. In respect, however, of the charges of fraud and perjury, he said:

"In the above-mentioned case, No. 489, the Mexican agent would wish the umpire to believe that all the witnesses for the claimant have perjured themselves, whilst all those for the defense are to be implicitly believed. Unless there had been proof of perjury the umpire would not have been justified in refusing credence to the witnesses on the one side or the other, and could only weigh the evidence on each side and decide to the best of his judgment in whose favor it inclined. If perjury can still be proved by further evidence, the umpire apprehends that there are courts of justice in both countries by which perjurers can be tried and convicted, and he doubts whether the government of either would insist upon the payment of claims shown to be founded upon perjury. In the case No. 447, 'Benj. Weil *v.* Mexico,' the agent of Mexico has produced circumstantial evidence which, if not refuted by the claimant, would certainly contribute to the suspicion that perjury has been committed and that the whole claim is a fraud. For the reason already given it is not in the power of the umpire to take that evidence into consideration, but if perjury

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shall be proved hereafter no one would rejoice more than the umpire himself that his decision should be reversed and that justice should be done."[1]

Reservation by Mexico.

At a meeting of the agents and secretaries of the commission on November 20, 1876, for the purpose of publishing the umpire's last resolutions, the agent of Mexico presented certain written statements, with a view to have them entered of record. Owing to the objection of the representative of the United States, the statements were not recorded. They all related to the status of certain awards, and one of them, which particularly referred to the Weil and La Abra cases, was as follows:

"The Mexican Government, in fulfillment of article 5 of the convention of July 4, 1868, considers the result of the proceedings of this commission as a full, perfect, and final settlement of all claims referred to in said convention, reserving, nevertheless, the right to show at some future time, and before the proper authority of the United States, that the claims of Benjamin Weil (No. 447) and La Abra Silver Mining Company (No. 489) both on the American docket, are fraudulent and based on affidavits of perjured witnesses; this with a view of appealing to the sentiments of justice and equity of the United States Government, in order that the awards made in favor of the claimants should be set aside."[2]

As the statements were not entered, Mr. Avila, the Mexican agent, transmitted them to Mr. Mariscal, by whom they were communicated to Mr. Fish. Mr. Fish in a note to Mr. Mariscal, referring to the statements generally, said:[3]

"It may be quite proper that Mr. Avila should advise you of his views as to any particular awards, or as to any points connected with the closing labors of the commission, and you may have felt it to be your duty to bring to the notice of this government those views so communicated to you.

"I must decline, however, to entertain the consideration of any question which may contemplate any violation of or departure from the provisions of the convention as to the final and binding nature of the awards, or to pass upon, or by silence to be considered as acquiescing in, any attempt to determine the effect of any particular award.

"With your appreciation of the objects in contemplation in this method of settlement of differences between the two governments, and with your intimate acquaintance with the par-

[1] H. Ex. Doc. 103, 48 Cong. 1 sess. 127–128.

[2] H. Report 27, part 2, 45 Cong. 2 sess. 29.

[3] Mr. Fish, Sec. of State, to Mr. Mariscal, Dec. 4, 1876, H. Report 27, part 2, 45 Cong. 2 sess. 30–31.

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ticular provisions of this convention, as with reference to the binding character of the awards made by the commissioners or by the umpire, you will readily appreciate my extreme unwillingness to consider that, at the moment when the proceedings relating to the commission have been brought to a close and the obligation upon each government to consider the result in each case as absolutely final and conclusive becomes perfect, the Government of Mexico has taken, or purposes to take, any steps which would impair this obligation."

To this communication Mr. Mariscal replied:[1]

"It is not my intention, nor the intention of Sr. Avila, to open any question whatever, nor to put in doubt the final and conclusive character of the above-mentioned awards. As a proof of this, Sr. Avila begins his first statement by saying 'that the Mexican Government, in the fulfillment of article 5 of the convention of July 4, 1868, considers the result of the proceedings of this commission as a full, perfect, and final settlement of all claims referred to said commission.' I beg leave to call your attention to the fact that Sr. Avila only expresses afterward the possibility that the Mexican Government may at some future time have recourse to some proper authority of the United States to prove that the two claims he mentioned were based on perjury, with a view that the sentiments of equity of the Government of the United States, once convinced that frauds have actually been committed, will then prevent the definite triumph of these frauds. It seems clear that if such an appeal should be made it will not be resorted to as a means of discarding the obligation which binds Mexico, and that, should it prove unsuccessful, the Mexican Government will recognize its obligation as before."

Mr. Vallarta, the Mexican minister of foreign affairs, approved the representations of Mr. Mariscal in the following terms:[2]

"The explanations you have given to the Secretary of State are wholly in conformity with the construction that the Mexican Government gives to the statements of its agent.

"Far from intending to elude the fulfillment of the obligations it contracted through the convention of the 4th July 1868, the same government has already given a conclusive proof of its resolution to fulfill them, having paid, amid very difficult circumstances, the first installment of the balance awarded against it.

"And however painful it may be for Mexico to give away the considerable amounts of the awards allowed in the cases of Benjamin Weil and the Abra Mining Company, when the fraudulent character of these claims is once known, if the

[1] Mr. Mariscal to Mr. Fish, Dec. 8, 1876, H. Report 27, part 2, 45 Cong. 2 sess. 32.

[2] H. Report 27, part 2, 45 Cong. 2d sess. 32.

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appeal to the sentiments of justice and equity of the United States Government, announced in the first of the statements in question, should, for any cause whatever, be ineffective, the Mexican Government will conscientiously fulfill the obligations imposed on it by that international compact."

Act of June 18, 1878.

January 19, 1877, Mr. Fish inclosed to Mr. Swann, chairman of the Committee on Foreign Affairs, a statement of the accounts of the commission, together with a draft of a bill to provide for the distribution by the Secretary of the Treasury of the moneys which should be received from Mexico under the convention; and he also inclosed the opinion of the umpire in the Weil and La Abra cases, his declaration on a motion for a rehearing, and the diplomatic correspondence which has just been cited. The bill was passed by the House on the 9th of February, and was sent to the Senate, where it was referred to the Committee on the Judiciary. It was favorably reported by that committee, but, on the suggestion of fraud in the Weil and La Abra cases, was afterward recommitted, and the session expired without further action upon it.[1]

On the 16th of the ensuing November, Congress being again in session, Mr. Evarts, who had then become Secretary of State, again communicated to Mr. Swann the bill which had previously been inclosed to him by Mr. Fish, and asked that it might be "promptly considered," in order that the Department might be "relieved from the importunities of the claimants." He adverted to the fact that Mexico had paid the first installment, but stated that he had hesitated to distribute it, though that course would have been "according to the practice of the government," because of need of legislation to make good to the fund the amount with which the United States was chargeable, and because of what had been done in Congress during the previous session.

On the 7th of November Mr. Forney, by unanimous consent, introduced in the House a joint resolution which, after reciting that the charges of fraud and perjury in the Weil and La Abra cases should be investigated, "to the end that the United States may not involuntarily be made a party to a fraud upon a friendly nation," provided that the Treasurer of the United States should pay no money on account of the two claims till

[1] Cong. Record, 44 Cong. 2 sess. 1548, 2216.

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further information should be obtained by Congress.[1] This resolution was referred to the Committee on Foreign Affairs, which on December 12, 1877, reported through Mr. Wilson that the matter was "entirely within the jurisdiction and discretion of the treaty-making power."[2] In accordance with this view, the committee recommended that the joint resolution should not pass, but amended the bill for the distribution of the money by inserting a section to the effect that nothing in the act should be construed as precluding the President and Secretary of State from making, on the application of the Mexican Government, an investigation of charges of fraud or perjury materially affecting any particular awards, or from suspending, in their discretion, "payment of the amounts which otherwise would be payable upon said claims so made the subject of inquiry or negotiation."

As there was delay in disposing of the matter in the House, Mr. Davis, of Illinois, on April 1, 1878, introduced in the Senate a bill similar to that before the House. It was considered, amended, and passed in secret session, and was then sent to the House, where it was passed with a further amendment. It was then referred to a conference committee, whose report was duly adopted. The bill was approved by the President June 18, 1878.[3] In the form in which it thus became a law, it contained the following section:

"SEC. 5. And whereas the Government of Mexico has called the attention of the Government of the United States to the claims hereinafter named with a view to a rehearing: Therefore, *Be it enacted*, That the President of the United States be, and he is hereby, requested to investigate any charges of fraud presented by the Mexican Government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them, until such case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct.

[1] H. Report 27, part 2, 45 Cong. 2 sess. 8.

[2] H. Report 27, 45 Cong. 2 sess.

[3] 20 Stat. L. 114; H. Ex. Doc. 103, 48 Cong. 1 sess. 764, 767.

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"And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards respectively shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified, or affirmed, as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims, or either of them."

Mr. Evarts's Report.

In compliance with this request Mr. Evarts, as Secretary of State, made in behalf of the President an investigation of the charges of fraud. The result he communicated to the President in the following report, which received the President's approval:

"AUGUST 13, 1879.

"To the PRESIDENT:

"I have brought to a close my examinations of the proofs, documents, and arguments laid before me on the part of the Mexican Government, both in the case of Benjamin Weil and of La Abra Silver Mining Company, and have heard oral argument, also, from counsel representing that Government. In reply to the application of the Mexican Government in respect of both of these cases, I have heard counsel in behalf of the parties interested in the awards respectively.

"The conclusions I have come to as to the proper course to be pursued by the President under the diplomatic presentation of these cases made by the Republic of Mexico, and the request made to the President by Congress, under the fifth section of the act of June 18, 1878, providing for the distribution of the awards under the convention with Mexico, are as follows:

"First. I am of opinion that as between the United States and Mexico the latter Government has no right to complain of the conduct of these claims before the tribunal of commissioners and umpire provided by the convention, or of the judgments given thereupon, so far as the integrity of the tribunal is concerned, the regularity of the proceedings, the full opportunity in time and after notice to meet the case of the respective claimants, and the free and deliberate choice exercised by Mexico as to the methods, the measures, and means of the defense against the same.

"I conclude, therefore, that neither the principles of public law nor considerations of justice or equity require or permit as between the United States and Mexico that the awards in these cases should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same between the United States and Mexico.

"Second. I am, however, of opinion that the matters brought to the attention of this Government on the part of Mexico do bring into grave doubt the substantial integrity of the claim of Benjamin Weil, and the sincerity of the evidence as to the

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measure of damages insisted upon and accorded in the case of La Abra Silver Mining Company, and that the honor of the United States does require that these two cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud.

"If such further investigation should remove the doubts which have been fairly raised upon the representations of Mexico, the honor of the United States will have been completely maintained. If, on the other hand, the claimants shall fail in removing these doubts, or they should be replaced by certain condemnation, the honor of the United States will be vindicated by such measures as may then be dictated.

"Third. The executive government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses.

"The authority for such an investigation must proceed from Congress. I would advise, therefore, that the proofs and conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the installments received from Mexico, be laid before Congress for the exercise of their plenary authority in the matter.

"Fourth. It may be that, as the main imputation in the case of La Abra Silver Mining Company is of fraudulent exaggeration of the claim in its measure of damages, it may consist with a proper reservation of further investigation in this case to make the distribution of the installments in hand.

"I have this subordinate consideration still under examination, and should you entertain this distinction will submit my further conclusions on this point.

"All which is respectfully submitted.

"WM. M. EVARTS.

"AUGUST 8, 1879.

"The foregoing conclusions of the Secretary of State are approved.

"R. B. HAYES.

"AUGUST 13, 1879."

The statement that the "main imputation" in La Abra case was "of fraudulent exaggeration of the claim in its measure of damages" seems to have betrayed a partial misapprehension as to Mexico's actual position on the subject. The Mexican Government took the ground, not only in its prior diplomatic notes, but also in the arguments of its counsel, that the claim was wholly fraudulent and groundless.[1] Nevertheless, the report

[1] H. Ex. Doc. 103, 48 Cong. 1 sess. 155, 159, 161, 192, 449, 473.

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declared that the honor of the United States required the further investigation of both cases, and pointed to Congress as the source from which the means for such an investigation must be derived. The report was duly communicated to the Senate,[1] and a bill was introduced in each house to provide for the reference of the cases to the Court of Claims. On June 9, 1880, it was reported by the Committee on Foreign Affairs favorably.[2] The next day the Senate Committee on the Judiciary reported it unfavorably, on the ground that if the two awards in question should be reopened it should be "by a new convention," in which provision should be made for the hearing of all claimants who complained of the decisions of the commission.[3]

Judicial Proceedings Attempted by Mexico.

Congress having adjourned without taking decisive action, Mr. Navarro, the Mexican minister, on July 30, 1880, informed Mr. Evarts that the lawyers employed by Mexico in Washington had thought proper to take certain measures before the courts of the District of Columbia against the promoters of the Weil and La Abra claims. He said that his government would continue to pay the installments on the awards, and that it only proposed to have recourse to one of the competent authorities of the United States to prove that both claims were based on perjury, and, when this should have been established, to appeal to the sentiments of justice and equity of the Government of the United States, to the end that fraud might not triumph. On the 4th of August Mr. Evarts replied that the proposed step was regarded as a distinct departure from the attitude previously taken by Mexico, and as a contradiction of the purpose of the fifth article of the convention of 1868, which absolutely forbade any attempt on the part of Mexico to obstruct the execution of the awards. The Mexican Government proceeded no further in the matter.[4]

Payments on Weil and La Abra Awards.

Up to this time three installments had been distributed on La Abra award, but none on the Weil. On the 3d of September 1879 Mr. Evarts, acting upon the view of the Mexican position expressed in his report of the 13th of the preceding month, advised the President that the three installments then

[1] Message of April 15, 1880, S. Ex. Doc. 150, 46 Cong. 2 sess.

[2] H. Report 1702, 46 Cong. 2 sess.

[3] S. Report 712, 46 Cong. 2 sess.

[4] H. Ex. Doc. 103, 48 Cong. 1 sess. 611, 612.

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received on La Abra claim might properly be distributed, reserving the question as to later installments. This course was taken, but the money received in the Weil case was withheld. On January 31, 1880, another installment was paid by Mexico. This installment and the four installments received in the Weil case were withheld till August 14, 1880, when the President, in the absence of the Secretary of State, directed the Acting Secretary of State to distribute them.[1] The fifth installment on La Abra claim was paid by Mr. Evarts March 5, 1881, and the fifth on the Weil claim by Mr. Blaine, then Secretary of State, on the 8th of the same month. The total amount of the distributions on La Abra claim was $240,683.06; on the Weil claim, $171,889.64.

Convention for a Rehearing

When Mr. Arthur became President all further distributions on the awards in question were suspended, and negotiations were opened with Mexico for an international rehearing.[2] To this end a convention was signed at Washington July 13, 1882, by Mr. Frelinghuysen and Mr. Romero, by which it was provided that the awards in question should be considered as set aside as to installments not paid by Mexico before January 31, 1882, and that the claims should be reheard before an arbitrator. Each government was to appoint an agent and counsel, and the arbitrator and any commissioner appointed by him were to have power to administer oaths and take testimony; and persons convicted of testifying falsely before them were to be punishable for perjury. The arbitrator was also to have power to call upon the courts of either country to compel the giving of testimony and the production of books and papers. If the claims should not be found to be fraudulent, Mexico was to pay the awards previously rendered. If it should be found that they were not wholly fraudulent, the arbitrator was to fix the amount to be paid. If they should be found to be wholly fraudulent, Mexico was to be discharged from paying further

[1] S. Ex. Doc. 109, 50 Cong. 1 sess. 4, 9.

[2] It is proper to advert to the fact that on December 9, 1881, Mr. Blaine, being still Secretary of State, in a note to Mr. Zamacona, inclosing a report of a secret agent of the Treasury bearing on the Weil claim, observed: "Permit me to say that this government can have no less moral interest than that of Mexico in probing any allegation of fraud whereby the good faith of both in a common transaction may have been imposed upon." (H. Ex. Doc. 103, 48 Cong. 1 sess. 361.)

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installments upon them, except so far as the arbitrator might find that third parties had in good faith acquired vested rights which ought to be protected.[1]

Refusal of Mandamus by Supreme Court.

While the convention was pending in the Senate, John J. Key, one of Weil's original attorneys, applied, as assignee of a part of the award, to the supreme court of the District of Columbia for a writ of mandamus to compel Mr. Frelinghuysen, as Secretary of State, to distribute the installment then in his hands. In due course the case came before the Supreme Court of the United States, by which the proceeding was, on January 7, 1884, dismissed. The opinion of the court, which was delivered by Chief Justice Waite, contained a comprehensive discussion of the principles of law involved in the case and practically determined all the questions raised by the claimant as to the power of the government to deal with the award in such manner as its international duties and its honor might require. Among other things, Chief Justice Waite said:

"There is no doubt that the provisions of the convention [of 1868] as to the conclusiveness of the awards are as strong as language can make them. * * * But this is to be construed as language used in a compact of two nations 'for the adjustment of the claims of the citizens of either * * * against the other,' entered into 'to increase the friendly feeling between' republics, and 'so to strengthen the system and principles of republican government on the American continent.' No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments, and each government holds the other responsible for every act done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this convention. * * * The presentation by a citizen of a fraudulent claim or false testimony for reference to the commission was an imposition on his own government, and if that government afterwards discovered that it had in this way been made an instrument of wrong toward a friendly power it would be not only its right but its duty to repudiate the act and make reparation as far as possible for the consequences of its neglect, if any there had been. International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good

[1] S. Report 1630, 50 Cong. 1 sess. 34.

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faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding. No technical rules of pleading, as applied in municipal courts, ought ever to be allowed to stand in the way of the national power to do what is right under all the circumstances. * * * The United States, when they assumed the responsibility of presenting the claims of their citizens to Mexico for payment, entered into no contract obligations with the claimants to assume their frauds, and to collect on their account all that, by their imposition of false testimony, might be given in the awards of the commission. As between the United States and the claimants, the honesty of the claims is always open to inquiry for the purposes of fair dealing with the government against which, through the United States, a claim has been made."[1]

Rejection of the Convention.

No further action was taken in regard to the claims in question by the executive department till May 11, 1886, when the President again brought them to the attention of Congress.[2] On the 20th of the preceding month the convention negotiated by Mr. Frelinghuysen, after pending before the Senate for nearly four years, was rejected. In view of this fact the Secretary of State, in a report accompanying the President's message, suggested that the attention of Congress should be invoked to the position of the claims under section 5 of the act of 1878, and "the duty of the Executive under an existing treaty, to which the force and effect of paramount law is given by the Constitution, in the event of the adjournment of the two Houses without further action," to the end that the government might be relieved "from any ambiguity of legislative expression, or the Executive from any uncertainty as to his line of duty." On June 15, 1886, the President, in response to a resolution, communicated to the House of Representatives the correspondence with the Mexican Government in regard to the claims since February 1884.[3]

[1] Frelinghuysen *v.* Key, 110 U. S. 63. A petition similar to that of Key was presented to the supreme court of the District of Columbia by La Abra Company. It was disposed of in connection with the case of Key. (La Abra Silver Mining Co. *v.* Frelinghuysen, 110 U. S. 63.) See the case of Rustomjee *v.* The Queen, L. R. 1 Q. B. D. (1876), 279; L. R. 2 Q. B. D. (1876–77), 69.

[2] S. Ex. Doc. 140, 49 Cong. 1 sess.

[3] H. Ex. Doc. 274, 49th Cong. 1 sess.

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Report of Committee on Foreign Relations.

June 11, 1886, Mr. Morgan, from the Committee on Foreign Relations, submitted to the Senate a report, accompanied with a bill to provide for a judicial investigation of the charges of fraud. Among the members of the committee at that time was Mr. Evarts, who stated that while he entirely concurred with the committee in reporting the bill and in urging its passage, he preferred to reserve his concurrence in the expression by the committee of its prejudgment of the conclusions which would be reached by the judicial examination proposed to be made. The report discussed very fully the questions of law relating to the reexamination of the claims, and expressed the opinion that the claim of Weil had "no actual foundation in fact; that it was originated in fraud and was established by false swearing."[1] The report said:

"The failure of the required constitutional majority of two-thirds of the Senate to ratify the convention with Mexico dated July 13. 1882, causes that method of providing for the further investigation of these cases to disappear from further consideration and leaves to Congress the duty, reserved in the fifth section of the act of June 1878, 'to otherwise direct' what shall be done with the money received or to be paid to the United States under the award made on the claim of Benjamin Weil against Mexico. * * *

"The claim of Benjamin Weil was never presented to the United States or to Mexico before it was submitted to the joint commission for adjudication. In this respect the proceedings before the commission were very loose and unguarded. If any material fact among the many that Mexico now presents to prove Weil's fraud had been made known to the State Department before this claim was submitted to the commission, it is most probable that he would never have had the consent of the government to present it in the name of the United States; or, if Weil's claim, as it was presented with the affidavits in its support, had been examined by the State Department, it is scarcely possible that the United States would have brought into such serious question its own laws and regulations in respect of the shipment of cotton from Texas and other States in rebellion in 1864 as to have permitted its enforcement or even its presentation against Mexico by a man then engaged in rebellion. Weil was then in the active service of Louisiana, engaged in sending out cotton and bringing in goods and arms and munitions of war under a general contract with that State in violation of the laws of the United States.

[1] S. Report 1316, 49 Cong. 1 sess.

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"The cotton he alleges he was shipping was contraband, and its capture by any person in the service of the United States would have passed the title to the government. Weil's right to it was forfeited by his offense against the laws of the United States, and its capture was all that was necessary to be done to have secured a complete title to the cotton in the United States. * * *

"This question was mooted on the hearing of the case before the commission, but it was evident that the claim of the United States was stronger than that of Weil to the cotton, if there was any cotton captured by Mexican troops, and that Mexico could not plead, as against the United States, that Weil had forfeited his right to the cotton. If that was true, it only established more clearly the right of the United States to indemnity. That commission could not settle any question, and did not attempt to settle any, between the United States and Weil as to his violation of our laws. That subject is still open.

"The money due under this award represents that cotton, and the question is, in this view of the matter, whether it can be lawfully paid by the Secretary of State to Weil or his assigns, in the face of his crime against the United States by which the cotton was forfeited, without the express consent of Congress. * * *

"It can make no difference by whose neglect or stupidity the falsity of this claim was permitted to escape detection and exposure in the court of arbitration. Being in law and in fact an award to the United States against Mexico of a sum of money due for the capture of a train alleged to have been loaded with cotton that never existed, the honor of the country forbids us to claim it.

"When it is made manifest that the United States have been fraudulently deceived by their own citizen in demanding this sum of money for his benefit, every sentiment of duty, honor, and justice requires that this government should refuse to become the medium through which such crimes are to be perpetrated.[1] * * *

"Indeed, the United States, both in its dealings with other governments and its own citizens, has never regarded the awards of commissions or final adjudications as irrevocable

[1] Mr. Morgan at this point entered into an examination of the evidence in the case. Referring to the fact that Weil had agreed to pay a half of what might be recovered to his original attorneys, and that the attorney of his widow and curatrix claimed a half of Weil's remaining share of the award, the report said: "If this was a just claim it would be the duty of Congress, or the President, or the courts—whoever directs the distribution of the money—to protect the estate of Weil against such heavy charges for services in its prosecution. Such engagements are contrary to justice and public policy and the spirit of the laws against champertous agreements, such as these obviously are."

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where the honor of the nation was involved, and in many cases they have been set aside on behalf of claimants. The case of Venezuela is fresh in legislative annals, and requires no more than a citation. The awards under the Mexican treaty of 1848 were twice set aside—once by the courts in the Gardiner claim, and once by direct act of Congress in the Atocha claim. (13 Stat. 595; 16 Stat. 633.) In the interest of rejected claimants Congress reopened two of the awards of the commission under the Chinese claims treaty of 1858. (15 Stat. 440; 20 Stat. 171.) In the case of the *Caroline* the Secretary of State returned to Brazil money which had been paid after a diplomatic settlement, against the protest of the claimant; and Congress appropriated a large sum to reimburse Brazil for moneys paid the United States representative, but which never reached the Treasury. (18 Stat. 70.)[1]

"The committee understand that the Secretary of State, in this letter, warns Congress that the money in his hands, paid by Mexico on account of the award to the United States on the Weil claim, will be distributed to the claimants if Congress should adjourn its present session without otherwise directing the President, or the custodian of the money, as to what disposition he shall make of it. * * *

"If the action to be taken by Congress is in the direction of vindicating the conduct of the Presidents who have declared that the honor of the United States requires that the claim of Weil should be further investigated by enacting a law to provide for such a trial, and if that action must be final, in order to prevent the payment of the money to the claimants, it is unfortunate that so grave a matter should be forced to depend on a contingency that is so uncertain and so unsatisfactory.

"If the President has the power under the treaty, or under the law, to order the payment of this money to the claimants, and if he believes they are honestly entitled to it, it is his plain duty to order its immediate payment, without reference to the opinion of former Presidents or to the adjournment of Congress. If he believes that 'the honor of the United States, or the principles of public law, or considerations of justice and

[1] In this case a claim was made against Brazil on account of the alleged fraudulent condemnation by a judge at St. Catherine's of the Peruvian bark *Caroline*, to the damage of the American underwriters. In 1867 Brazil, being then engaged in the Paraguayan war, was induced to settle by the American minister, Gen. J. Watson Webb, who, besides rejecting an offer of arbitration, threatened a rupture unless the claim, which had at that time been at least in part transferred to Brazilians, should immediately be paid. When drafts were sent to the Department of State for $25,000, to pay the share retained by the American claimant, the Department of State withheld them; and Congress appropriated $57,500 to repay the whole amount to Brazil. (S. Ex. Doc. 52, 43 Cong. 1 sess.; 18 Stats. at L. 70.) The Attorney-General of the United States advised that Brazil was not internationally liable for the misconduct of the judge.

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equity' constrain him to refuse or to delay the payment, and that he has the power to delay it while Congress is in session, the same discretion, it is submitted, could be justly and lawfully extended so as to afford Congress time to give this subject the attention it deserves."

Other Committee Reports.

The question of providing for a judicial investigation of the awards continued to be the subject of discussion in Congress. July 7, 1886, Mr. Edmunds submitted for Mr. Morgan a report from the Committee on Foreign Relations dealing particularly with La Abra claim. Mr. Brown submitted a minority report.[1] August 5, 1886, Mr. Daniel, from the Committee on Foreign Affairs, presented to the House of Representatives a report adverse to reopening that claim. The report, while recognizing "the power of Congress to intervene," expressed the opinion that the facts proved by the company before Sir Edward Thornton were not disproved by the after-discovered evidence, and that "the weight of the decision, as an agreed finality, is not overborne by any suggestion of doubt or by any argument based on the newly discovered testimony." Messrs. Singleton, Hitt, and Worthington submitted a minority report.[2]

Mr. Bayard's Report.

Thus the matter stood when, on December 21, 1887, the Senate adopted a resolution requesting the production of any correspondence with the Mexican Government in relation to the claims since January 1886, together with a statement of what sums had been paid on them by Mexico and what sums had been distributed. In response to this resolution the President communicated to the Senate March 5, 1888, a report of Mr. Bayard, as Secretary of State, to which were annexed various documents.[3] Mr. Bayard, after answering the inquiry of the Senate in regard to the moneys which had been received from Mexico, proceeded to discuss the legal aspects of the subject. He said that the claimants had insisted that the Secretary of State should distribute the moneys paid on the awards, on the ground (1) that the Mexican Government had had full opportunity for defense before the commission, and (2) that under the convention the action of the commission was final. Both these arguments were, he said, urged before Mr. Evarts when,

[1] S. Report 1454, 49 Cong. 1 sess.
[2] H. Report 3474, 49 Cong. 1 sess.
[3] S. Ex. Doc. 109, 50 Cong. 1 sess.

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in August 1879, he made his report in which, though he conceded the finality of the awards from an international point of view, he declared that the honor of the United States required that the two cases should be further investigated. Proceeding, then, Mr. Bayard said:

"It is fair to assume that the rejection by the Senate of the treaty signed by Mr. Frelinghuysen, for an international rehearing of the awards, was in no sense an expression of opinion adverse to their investigation, which Mr. Evarts had recommended. It is rather to be regarded as an approval of the opinion which he also expressed, that the investigation should, under the circumstances, be made by this government for itself, as a matter affecting solely its own honor.

"It is a remarkable fact that whenever, since the distribution of the Mexican fund was commenced, the deliberate judgment of the official authorized by Congress to make such distribution has been recorded upon the two awards in question, it has uniformly been to the effect that the evidences that the United States, in presenting the claims, had been made the victim of fraudulent imposition were of such a character as to require investigation by a competent tribunal, possessing appropriate powers for that purpose.

"The payment of the fifth installment of the Weil award by Mr. Secretary Blaine is no exception to this statement; for, having been made on the 8th of March 1881, the third day after his entrance upon the discharge of the duties of his office, it can scarcely be supposed to have been an expression of his deliberate judgment upon the charges of fraud, arrived at after his personal investigation and consideration. Nor can the payment by Mr. Evarts of certain installments of La Abra award be regarded as inconsistent with his recommendation of investigation in that case, since the allegations of fraud in relation thereto affect only the measure of damages,[1] and not, as in the Weil case, the question whether any ground of claim ever existed.

"The sole question now presented for the decision of this government is whether the United States will enforce an award upon which the gravest doubts have been cast by its own officers in opinions rendered under express legislative direction, until some competent investigation shall have shown such doubts to be unfounded, or until that branch of the government competent to provide for such investigation shall have decided that there is no ground therefor."

Mr. Bayard also argued, on the strength of the cases of Atocha and Gardiner, the two awards under the convention with China of 1858, the case of the *Caroline*, and the opinion of the Supreme Court in the case of Frelinghuysen *v.* Key, that

[1] See, *supra*, 1335

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"the duty of the government to refuse to enforce an inequitable and unconscionable award," had been "repeatedly maintained in the most authoritative manner." He also disclosed the fact that he had sought to obtain a judicial investigation of the Weil and La Abra awards without awaiting further Congressional action. By section 12 of the act of March 3, 1887, in relation to suits against the Government of the United States, it is provided that when any claim or matter pending in any of the executive departments involves controverted questions of fact or of law, the head of such department may, with the consent of the claimant, submit it to the Court of Claims for decision. Mr. Bayard stated that, being desirous to avoid delay, he had sought the consent of the claimants to such a submission, but that the attorneys had, in behalf of their clients, declined the proffered investigation. In conclusion, he suggested that a recommendation be made to Congress to provide expressly for the reference of the claims to the Court of Claims, or such other court as might be deemed proper, in order that a competent investigation of the charges of fraud might be made.

Second Refusal of a Mandamus.

When Mr. Blaine again became Secretary of State, in March 1889, he adhered to the course of his two immediate predecessors in refusing to distribute the moneys on hand applicable to the two awards in question. In consequence, Sylvanus C. Boynton, as assignee of a part of the Weil claim, on November 23, 1889, filed a petition in the supreme court of the District of Columbia against Mr. Blaine as Secretary of State to compel him to make a distribution. In due course the case came before the Supreme Court of the United States, and on March 23, 1891, the decree of the court below dismissing the petition was affirmed. In the course of his opinion, Chief Justice Fuller, speaking for the court, said:

"The principal propositions urged by counsel are that 'the award made against Mexico in favor of Benjamin Weil remains a final and conclusive adjudication in favor of a citizen of the United States against a foreign government;' that 'the United States have not now and never have had any property, right, or interest in the original claim or the award, or in the money paid in by Mexico to meet and satisfy it;' that 'the money so paid is, by the terms of the statute, in the official custody of the Secretary of State; the President of the United States has no lawful control over it, and never had any lawful control over it, except for a temporary purpose during the pendency of

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a new treaty in the Senate; that control ended when the Senate rejected the new treaty.'

"These propositions have already been substantially disposed of by the decision of this court in Frelinghuysen *v.* Key, 110 U. S. 63, from the principles announced in which we have no disposition to recede. * * *

"The new convention was then pending in the Senate, and it was clear that the discretion of the executive department of the government to withhold all further payments to the relators until the diplomatic negotiations between the two governments on the subject were finally concluded could not be controlled by the judiciary.

"This is conceded by the relator, and such a concession is inconsistent with the contention that the award was a final and conclusive adjudication in Weil's favor, as an individual, against Mexico. As between nations, the proprietary right in respect of those things belonging to private individuals or bodies corporate within a nation's territorial limits is absolute, and the rights of Weil can not be regarded as distinct from those of his government. The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it. * * *

"In United States ex rel. Angarica *v.* Bayard, 127 U. S. 251, 259, where a sum of money had been received by the Secretary of State as part of an award made by the Spanish-American Claims Commission, which sum of money had been eventually paid to the petitioner, but had in the meantime been invested and earned interest, it was held that the Secretary was not liable to pay such interest to the petitioner, because the sum in question was withheld by the United States and the petitioner's claim based on the withholding was a claim against the United States, and the case fell within the settled principle that interest is not allowed on claims against the United States unless the government has stipulated to pay interest or it is given by express statutory provision. * * *

"Congress, in furnishing the auxiliary legislation needed to carry the results of the convention under consideration into effect, requested the President to so far investigate certain charges of fraud as to determine whether a retrial ought to be had. This inquiry might have resulted in reopening the awards as between the two nations, or in such reexamination in a domestic forum as would demonstrate whether the honor of the United States required a different disposition of the particular amounts in question. * * * And while it is true that for the disposition of the case of Frelinghuysen *v.* Key it was sufficient that it appeared that diplomatic negotiations were pending which, as the court demonstrated, the act of 1878 in no manner circumscribed, it does not follow that the political department of the government lost its control because those negotiations failed.

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"On the contrary, that control was expressly reserved, for it was made the duty of the President, if of opinion that the cases named should be retried, to withhold payment until such retrial could be had in an international tribunal, if the two governments so agreed, or in a domestic tribunal if Congress so directed, and, at all events, until Congress should otherwise direct. The fact that a difference of view as to whether the retrial should be international or domestic may have arisen and led to delay, or that such difference may have existed on the merits, does not affect the conclusion. The inaction of Congress is not equivalent to a direction by Congress. The political department has not parted with its power over the matter, and the intervention of the judicial department can not be invoked."[1]

Report on La Abra Claim.

August 30, 1888, the Senate adopted resolutions authorizing the Committee on Foreign Relations, or a subcommittee thereof, to conduct a special investigation of La Abra claim. The investigation was begun September 24, 1888, and was continued at intervals till February 27, 1889. On March 1 Mr. Dolph presented the committee's report, together with a bill to authorize the Attorney-General, in the name of the United States, to proceed against the company in the Court of Claims for the purpose of determining whether the award was obtained in whole or in part by fraud. The report expressed the opinion that "the whole claim of the company" was fraudulent, and the testimony before the commission, so far as it tended to fix responsibility for the company's loss upon the Mexican Government, "rank perjury." The report declared that the power of Congress to reopen the award was unquestionable.[2]

Acts of 1892.

In December 1892 acts were at length passed by Congress conferring jurisdiction on the Court of Claims to investigate both the Weil and La Abra cases, and to determine whether the charges of fraud were well founded. Proceedings were duly begun, but they are not yet terminated. The claimants demurred to the actions on grounds affecting the power of Congress to authorize them to be maintained. These demurrers were overruled on the authority of the decisions of the Supreme Court.[3] Another and distinct ground of objection was that the acts of Congress were unconstitutional and void because they were not approved

[1] United States ex rel. Boynton *v.* Blaine, 139 U. S. 306.

[2] S. Report 2705, 50 Cong. 2 sess.

[3] United States *v.* La Abra Silver Mining Co., 29 Court of Claims, 432.

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by the President when Congress was in session. The acts were signed by the President of the Senate and the Speaker of the House December 15, 1892, and on the 20th they were laid before the President. On December 22 the Senate and the House, pursuant to a joint resolution, adjourned for the the usual holiday recess till January 4, 1893. The bills were approved on the 28th of December. Davis, J., did not sit in the case. Nott, J., delivering the opinion of the court, held that the bills were constitutionally approved. Richardson, C. J., concurred in this result, but on the ground that Congress had merely taken a recess. He reserved the question "whether or not the President has a right to approve a bill after the Congress in which it was passed has expired."[1] The merits of the cases yet remain to be judicially determined, and an appeal from the judgment of the Court of Claims to the Supreme Court is provided for.[2]

The "Pious Fund."

In the written statements which the Mexican agent presented at the meeting of the agents and secretaries November 20, 1876, the only award (other than those in the Weil and La Abra

[1] United States *v.* Weil, 29 Court of Claims, 523.

[2] Since the foregoing passage was written the Court of Claims has entered a decree in La Abra case, and an appeal has been taken. The decree was as follows:

"In the Court of Claims, term 1896–97.

"THE UNITED STATES *v.* LA ABRA SILVER MINING COMPANY ET AL. } In equity. No. 17917.

"At a Court of Claims held in the city of Washington on the 24th day of June, A. D. 1897, the court directed the entry of the following decree:

"The court finding from the evidence that the award made by the United States and Mexican Mixed Commission in respect to the claim of said company was obtained as to the whole sum included therein by fraud, effectuated by means of false swearing and other false and fraudulent practices on the part of said company and its agents, it is therefore hereby ordered, adjudged, and decreed that all claims in law and equity on the part of said company, its legal representatives and assigns, be forever barred and foreclosed of all claim to the money received from the Republic of Mexico for or on account of such award.

"BY THE COURT.

"Filed June 24, 1897.

"A true copy of record.

"In testimony whereof I have hereunto set my hand and affixed the seal of said court this 19th day of August, A. D. 1897.

[SEAL.] "JOHN RANDOLPH,
"Assistant Clerk, Court of Claims.

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cases) expressly mentioned was that in respect of what was called the "pious fund."[1]

This was a fund donated by private persons to Jesuit fathers in the Californias for the conversion of the heathen in those provinces. It was managed by the Jesuits and its income applied in conformity to the will of the donors until 1768, in which year the Jesuits were expelled from Mexico in pursuance of the order of the Crown, or "pragmatic sanction," of February 27, 1767. The administration of the fund was then undertaken by the Spanish Government, which divided the proceeds between the Franciscan and Dominican orders. The Mexican Government on establishing its independence of Spain succeeded to this trust. By a law of September 19, 1836, the Mexican Government confided the administration of the fund to the Catholic bishop of the two Californias, which were erected by Pope Gregory XVI. into an episcopal diocese. By a decree of President Santa Anna of February 8, 1842, so much of the law of September 19, 1836, as confided the management of the fund to the bishop of the two Californias was abrogated and the administration of the trust again devolved on the State. By a further decree of the 24th of October of the same year President Santa Anna directed that the property belonging to the fund should be sold for the sum represented by its income capitalized on the basis of 6 per cent per annum, and that the proceeds of the sale, as well as the cash investment, should be paid into the public treasury; and he at the same time recognized an obligation on the part of the government to pay 6 per cent per annum on the capital thereafter. The greater part of the property was sold in pursuance of this last decree for about $2,000,000. The bishop of the two Californias protested against these proceedings, and on the 3d of April 1845 the Mexican Congress passed an act restoring to him and his successors for the purposes of the trust the properties of the fund yet remaining unsold. The interest on

[1] All the statements of the Mexican agent were contained in three paragraphs, the first of which related to the Weil and La Abra awards, and the second to the "pious fund." The third and last was as follows: "That the umpire having allowed compensation in several cases, with the proviso that the interested parties should prove their American citizenship and that they were legitimately entitled to be the recipients of such compensations, the Mexican Government expects that the amounts corresponding to such cases will be deducted from the sum total of the awards, if within a prudent term said conditions are not fulfilled."

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that part of the fund realized by the sale of the property not having been paid by the Mexican Government, a claim for $1,700,000 was brought by Thadeus Amat, bishop of Monterey, and Joseph S. Allemany, archbishop of San Francisco, against the Mexican Government before the commission. The American commissioner took the view that the Mexican Government held the funds as trustee for the Catholic Church in the two Californias, and that after the cession of Upper California to the United States Mexico was bound to pay a proper proportion of the annual interest to the Catholic Church in the ceded province. Without reference to the respective populations of the two countries, he adopted an equal division as the proper rule of distribution, and on this basis held that the Government of Mexico should pay to that of the United States in the gold coin of the latter, with interest at the rate of 6 per cent per annum from the 24th of October 1868 to the close of the labors of the commission, the sum of $904,700.79 and $100 for preparing and printing proofs. The Mexican commissioner took the ground that no award should be made, holding that the endowment was essentially national in its character and that the Catholic Church in Upper California lost its claims to any of the funds when the territory passed into the possession of the United States. On this difference of opinion the case was referred to the umpire, Sir Edward Thornton. He held:

First. That on the 30th of May 1848, the day of the exchange of ratifications of the Treaty of Guadalupe Hidalgo, the Roman Catholic Church of Upper California became a corporation of citizens of the United States, and, not having declared any intention of retaining Mexican citizenship, must be held to have elected to assume the citizenship of the United States under Article VIII. of that treaty.

Second. That neither the Spanish nor the Mexican Government ever pretended that the proceeds of the fund were not to find their way into the hands of the ecclesiastical authorities in the Californias, or that they were to be applied to any other objects than those pointed out by the donors. The decree of October 24, 1842, was an admission of obligation to remit the proceeds of the fund to the bishop of the Californias, and the Mexican Government subsequently admitted this obligation by issuing orders for its payment on the custom-house at Guaymas. This obligation was still further acknowledged by the act of the Mexican Congress of April 3, 1845, which restored

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to the bishop of the Californias and to his successors all credits and other properties belonging to the "pious fund" which were still unsold for the objects mentioned in the law of September 29, 1836, without prejudice to what the Congress might decide with reference to the properties which had already been alienated. The umpire held that those credits must include the indebtedness of the Mexican Government for unpaid interest on the property sold, the proceeds of which had been incorporated into the national treasury.

Third. The umpire also held that the claimants were the direct successors of the bishop of the Californias, whose diocese before the Treaty of Guadalupe Hidalgo comprised both Upper and Lower California, and that they ought therefore to receive a fair share of the interest upon the proceeds of the "pious fund" in order to devote it to the purposes for which it was founded.

Fourth. The umpire held that the fairest division that could be made of the whole interest for twenty-one years was to divide it into two equal parts, one of which should be paid to the claimants. With regard to the whole amount of interest due, the umpire found from the papers before him that the share of the Roman Catholic Church of Upper California was, on the basis adopted, $43,080.99 a year, or in the aggregate for twenty-one years the sum of $904,070.79. This the umpire allowed without interest.[1]

In regard to this award, the statement which the Mexican agent desired to record was as follows:

"2d. In the case No. 493, of Thadeus Amat and others *v.* Mexico, the claim presented to the United States Government on the 20th of July 1859, and to this commission during the term fixed for the presentation of claims in the convention of July 4, 1868, was to the effect that the 'pious fund' and the interest accrued thereon should be delivered to claimants; and though the final award in the case only refers to interest accrued in a fixed period, said claim should be considered as finally settled *in toto*, and any other fresh claim in regard to the capital of said fund or its interest, accrued or to accrue, as forever inadmissible."

The general response of Mr. Fish to the statements of the Mexican agent, when they were communicated to him by Mr. Mariscal, has already been quoted. In an instruction to Mr. Mariscal of May 1, 1877, which was communicated to the

[1] Thadeus Amat et al. *v.* Mexico, No. 493, Am. Docket.

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United States, Mr. Vallarta, Mexican minister of foreign affairs, said:

"In regard to the case of the archbishop and bishops of California, the Mexican Government, far from putting in doubt the final effect of the awards, has declared in the second of said statements that, in conformity to article 5 of the convention, the whole claim presented to the commission must be considered and dealt with as finally arranged and as dismissed and forever inadmissible anything solicited by claimants, but not allowed by the commission. In other words, the Mexican Government recognizes itself bound to pay the awards allowed by the umpire to the claimants in behalf of the Catholic Church of Upper California, but this settles finally the claim in regard to everything belonging to the 'pious fund' of the missions of California, and none other can ever be presented, and much less sustained, by the United States Government, or admitted at any future time by Mexico, in conformity with the spirit and letter of the convention of 4th July 1868."

No further correspondence on the subject appears then to have taken place.

Jurisdictional Questions.

We have seen that the jurisdiction of the commission did not extend to any claim presented to either government for its interposition with the other prior to February 2, 1848. By Article V. of the convention it was provided that the result of the proceedings of the commission should be considered "as a full, perfect, and final settlement of every claim upon either government arising out of any transaction of a date prior to the exchange of the ratifications." The ratifications of the convention were exchanged at Washington February 1, 1869. Many claims were therefore rejected by the commission on the ground that they arose out of transactions subsequent to that date. A claim was made for the value of certain provisions taken from the claimant's store by General Ortega in 1863. It appeared that the claimant afterward presented an account of the provisions to the proper officer in Mexico, in accordance with the law on the subject, and that the account was returned June 2, 1869, for further proof. The proof was furnished, but on November 12, 1869, the account was again returned on the ground that it had been presented after the term prescribed by law had expired. "If this result," said the umpire, "was brought about by the negligence of the claimant, he has but himself to blame and can not be entitled to any consideration from the commission. But if he was wronged by the return

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of the paper, it was an injury committed after the term within which the commission can take cognizance of such matters."[1]

While in some of the earlier cases the decisions as to what constituted citizenship within the meaning of the convention were exceptional, it was uniformly held that such citizenship was necessary when the claim was presented as well as when it arose. Numerous claims were dismissed on the ground that the claimant was not a citizen when the claim arose.[2] The assignment of a claim to an American citizen was held not to give the commission jurisdiction.[3] An American woman who was married in July 1861 to a British subject in Mexico was held not to be competent to appear before the commission as a claimant in respect of damage done by the Mexican authorities in November 1861 to the estate of her former husband, though her second husband had in 1866 become a citizen of the United States by naturalization.[4] On the other hand, where the nationality of the owner of a claim, originally American or Mexican, had for any cause changed, it was held that the claim could not be entertained. Thus, where the ancestor, who was the original owner, had died, it was held that the heir could not appear as a claimant unless his nationality was the same as that of his ancestor.[5] The person who had the "right to the award" must, it was further held, be considered as the "real claimant" by the commission, and whoever he might be, must "prove himself to be a citizen" of the government by which the claim was presented.[6]

[1] Adolph Blumenkron *v.* Mexico, Nos. 329 and 795, MS. Op. VII. 408, Thornton, umpire.

[2] E. g., Joseph Philip Becker *v.* Mexico, No. 736, MS. Op. II. 408; Charles E. Wesche *v.* Mexico, No. 848, MS. Op. I. 346; Jean, Jean Marie, Alfred, and Auguste Fleury *v.* Mexico, No. 312, MS. Op. II. 525; Otto Henning *v.* Mexico, No. 225, MS. Op. II. 525; Victor Nandé *v.* Mexico, No. 313, MS. Op. II. 525; Jean B. Couturon *v.* Mexico, No. 370, MS. Op. II. 525.

[3] G. W. Barnes *v.* Mexico, No. 788, MS. Op. III. 131.

[4] Heirs of John Young *v.* Mexico, No. 591, MS. Op. IV. 618, decision of Thornton, umpire.

[5] M. J. Lizardi *v.* Mexico, No. 146, MS. Op. VII. 380, Thornton, umpire.

[6] Julius Alvarez *v.* Mexico, No. 915, MS. Op. VI. 538, Thornton, umpire, October 30, 1876. October 23, 1876, Sir Edward Thornton delivered (MS. Op. VI. 536) the following opinion: "In the case of Herman F. Wulff *v.* Mexico, No. 232, with regard to which the umpire is asked to amend his award of June 18, 1875, by making it absolute in favor of the administrator instead of conditional upon proof that the recipient shall be a citizen of the United States, the umpire can not acquiesce in the arguments put forward by the counsel for the claimant, whoever that claimant may

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Near the close of the commission the agent of Mexico requested the umpire to annul his awards in certain cases on the ground that the persons who presented the claims as assignees had not been recognized as the claimants, while those who suffered the injuries complained of, having been so recognized, had not appeared before the commission. October 27, 1876, the umpire announced the following decision:

"The umpire is of opinion that he would not be justified in annulling the awards in the above cases. There can be no doubt that the claims were just, as far as the original claimants were concerned, and very little doubt that they were citizens of the United States. If, then, they should present themselves hereafter at the time of the payment of the awards, and should prove their right to them, it would be a great hardship if the awards were not forthcoming. Some discretion must be left with the government which takes charge of the distribution and payment of the awards."[1]

At the same time the agent of Mexico requested the umpire to annul the awards in certain other cases because, while it appeared that the original claimants, in favor of whom the awards were made, were dead, it did not appear that they had left heirs, or that the latter, if there were any, were citizens of the United States. October 27, 1876, the following decision was made:

"The umpire considers that to comply with the request would be an unjustifiable proceeding on his part, because it may well be that there exist heirs of the above-mentioned persons who are citizens of the United States, and who, knowing that the claims have been presented and decided upon, are merely waiting for the time when the payment of the awards shall commence."

be. He is of opinion that not only must it be proved that the person to whom the injury was done was a citizen of the United States, but also that the direct recipients of the award are citizens of the United States, whether these beneficiaries be heirs or, in failure of them, creditors. The heirs are certainly benefited by being able to pay the debts of their deceased relative, even though the whole of the award may be swallowed up by the creditors. If there be no heirs and only creditors, the umpire is of opinion that even those creditors who are the immediate recipients of the award must prove that they are citizens of the United States. The umpire thinks that the commission can make no award except to corporations, companies, or private individuals who are citizens either of the United States or of the Mexican republic, respectively."

[1] Robert M. Couch *v.* Mexico, No. 234; Peter Wilson *v.* Mexico, No. 235; D. H. Whitfield *v.* Mexico, No. 237; J. Turpin *v.* Mexico, No. 238.

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Procedure and Practice.

A motion was made by the agent of Mexico for leave to file defensive proofs after the four months from the date of the filing of the memorial, as limited by the rules of the commission. The commissioners differing, the question was referred to the umpire, who held that the proof ought not to be admitted, no reason in fact being shown for the desired departure from the rules.[1] On the other hand, a claimant was allowed further time within which to file a certain draft which had been pledged for a debt in Mexico.[2] It was held by the umpire that either of the commissioners was "justified in calling for documents which may tend to throw light upon any particular case, provided that the time allowed for producing these documents does not endanger the final decision of the case before the expiration of the term allowed by the convention."[3] The umpire, however, refused to receive evidence which had not been before the commissioners, holding that he had no power to do so. In a certain case the agent of Mexico, referring to some evidence which had been received too late to be laid before the commissioners, asked the umpire to receive it or else to return the case to the commissioners in order that they might decide whether it should be admitted. The umpire refused to take either course. "On the contrary," said the umpire, "he considers that it was the duty of the agent to ask for the admission by the commission of these documents, and if the commissioners had disagreed and had referred the matter to the umpire he would have decided the question. As it is, no mention has been made of this testimony by the commission, but the umpire has been requested to give a final decision on the whole case. He has therefore examined the papers which have been presented to him, and will give his final decision thereupon."[4]

In many cases[5] Sir Edward Thornton refused to make

[1] Charles E. Norton *v.* Mexico, No. 895, MS. Op. III. 155, Thornton, umpire.

[2] G. L. Hammeken *v.* Mexico, No. 158, MS. Op. VII. 391.

[3] J. D. Pradel *v.* Mexico, No. 812, MS. Op. VII. 478, Thornton, umpire.

[4] Bark *Emily Banning* *v.* Mexico, No. 136, MS. Op. III. 334, Thornton, umpire, June 24, 1874. This ruling was affirmed by Sir Edward Thornton March 6, 1875, in the case of Jacob J. Wenkler *v.* Mexico, No. 356, MSS. Op. IV. 33. In the latter case certain evidence explanatory of the original evidence was ultimately admitted by the commissioners and sent to the umpire.

[5] E. g., Manuel J. de la Vega *v.* Mexico, No. 746, MS. Op. VI. 621.

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awards in favor of claimants where the only evidence of the injury complained of was the claimant's own statement. "This case," said Mr. Wadsworth, delivering the opinion of the commission, "exhibits a failure of proof and vicious preparation Nearly all the proofs in the case were taken before one of the claimants as consul of the United States. These can not be esteemed of any value. The case is now dismissed."[1]

By the rules of the commission "all persons having claims" were required to "file memorials of the same with the respective secretaries," and every memorial was required to be "signed and verified by the claimant." Referring to these rules, Sir Edward Thornton, in the case of Jabez M. Tipton *v.* Mexico, No. 242, said:

"The umpire can not consider that the memorial and protest dated September 24, 1856, and presented to the United States minister, can be held to be Tipton's memorial to the commission. It is not impossible that Tipton may already have made some arrangement with the Mexican Government with which he has been satisfied, or that he has become convinced that he has no claim against the Mexican Government; but the umpire can in no case admit that the above-mentioned memorial and protest constitute a claim before the commission."

A surviving partner was permitted to prosecute the firm's claim before the commission.[2]

The Mexican corporation of Reynosa presented a claim for itself and for certain of its citizens for damages suffered in an alleged raid on the town from the United States. The umpire said that it was very doubtful whether the corporation had a right to do so when the citizens in question had full power to claim for themselves, it not being even proved that the citizens in question were really Mexican citizens. The case of the master and seamen of the bark *Emily Banning*,[3] cited by the Mexican commissioner, was, said the umpire, very different from the case in question, since "the owners of a ship are the natural representatives of the master and seamen, and to a certain extent bound to see that they are compensated for injuries done them when in their service."[4]

[1] Welsh & Allen *v.* Mexico, No. 155, MS. Op. III. 69.

[2] Cornelius H. Garrison, surviving partner of Garrison & Fretz, *v.* Mexico, No. 8, Lieber, umpire, November 7, 1871.

[3] Bark *Emily Banning*, Nautilus Submarine Pearl Fishing Company, claimants, *v.* Mexico, No. 136.

[4] The Corporation of Reynosa *v.* the United States, No. 831, MS. Op. VI. 323, Thornton, umpire, February 28, 1876.

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In the case of George Moore *v.* Mexico, No. 701, the commissioners, July 26, 1871, allowed a rehearing and made an award in favor of the claimant. They had previously dismissed the case for want of proof of citizenship. The reasons for the reversal of this action were stated by Mr. Wadsworth, who delivered for the commission the following opinion:

"Claimant produced his petition for a rehearing, accompanied by a certified copy of his naturalization papers, establishing conclusively his American citizenship. Whenever the evidence produced on a motion for a rehearing before the commission is of a certain and conclusive character, such as ought undoubtedly to produce a change in the minds of the commissioners and convince them of petitioner's right to an award, we are disposed to grant the motion and award according to public law, equity, and justice. If there be an exception to this practice, it must be where there has been some gross laches of the claimant, or where, to allow the motion, at the time and under the circumstances, injustice would probably be done to the government defending."

July 18, 1872, Dr. Lieber refused a motion for the rehearing of one of his awards, on the ground that, after a reexamination of the whole case, in the light of the argument for a rehearing, no reason appeared for reconsidering his decision.[1]

We have seen that Sir Edward Thornton refused a rehearing in the Weil and La Abra cases on grounds which have already been disclosed. At the same time and on the same grounds he refused to rehear various other cases.[2] "In the single case of Shreck, No. 768," said Sir Edward Thornton, "the umpire listened to the request of the agent of the United States to reconsider, because it appeared that there was a law of Mexico which concerned the citizenship of the claimant to which the commissioners, of course, had access, but no new evidence was offered or taken into consideration in that case." In the case thus referred to Sir Edward Thornton had decided that the claimant, who appeared before the commission as a citizen of the United States, was, in fact, a citizen of Mexico, by reason of his birth in the latter country, assuming that the Mexican law so regarded him. The agent of the United States produced the appropriate law of Mexico, by which it appeared

[1] Josefa Thoré de Lespés *v.* Mexico, No. 596, MS. Op. II. 627.

[2] Joseph W. Hale *v.* Mexico, No. 58; F. W. Latham, assignee, *v.* Mexico, No. 73; George W. Hammeken *v.* Mexico, No. 158; J. M. Burnap *v.* Mexico, No. 302; Thadeus Amat et al. *v.* Mexico, No. 493; R. M. Miller *v.* Mexico, No. 518; George White *v.* Mexico, No. 244; M. del Barco & Roque de Garate *v.* Mexico, No. 748; Augustus E. St. John *v.* Mexico, No. 295.

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that the assumption was clearly erroneous, and Sir Edward Thornton made an award in favor of the claimant.

In the case of Alfred A. Green *v.* Mexico, No. 776, it was shown that certain evidence which was before the commissioners was not transmitted to the umpire, so that he had made his decision on only a part of the record in the case. He therefore decided to reconsider the case so far as the omitted evidence was concerned, but declined to consider fresh arguments submitted from the claimant's counsel.

In the course of his argument for a rehearing in the case of Thadeus Amat et al. *v.* Mexico, No. 493, the agent of Mexico alleged that there was an arithmetical error in the umpire's award. Sir Edward Thornton reexamined his award in that regard, and finding the error corrected it and awarded the proper amount.[1]

Arbitral Provisions as to Boundaries.

As this chapter was begun with the citation of a general provision in the Treaty of Guadalupe Hidalgo for the arbitration of differences, it may fitly be closed with a reference to certain late stipulations in which that principle has been applied by the United States and Mexico to the adjustment of their common boundaries.

By the treaty of limits of January 12, 1828, the United States and Mexico engaged each to appoint a commissioner and a surveyor to run the line, and they also agreed to accept the result reached by them. There was no provision for the decision of questions of difference, if any, between the persons so appointed. A similar engagement was incorporated in the fifth article of the Treaty of Guadalupe Hidalgo, and in the first article of the treaty of December 30, 1853.

By the convention of July 29, 1882, the two countries agreed to create an International Boundary Commission, consisting of a chief engineer and associates appointed by each party, to relocate the boundary in places where the monuments of prior surveys had been destroyed or displaced. This convention having lapsed by reason of delays in the appointment of commissioners, it was revived by a convention of February 18, 1889, by which the time for the execution of the work was fixed at five years from the date of the exchange of the ratifications of the new convention. By another convention of August 24, 1889, this period was extended for two years from October 11, 1894.

[1] MS. Op. VI. 544.

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There is another series of conventions specially relating to the water boundary between the two countries. The first of these was concluded November 12, 1884. It provided that in order to avoid difficulties which might arise through changes to which the channels of the Rio Grande and Rio Colorado, in places where they form the boundary, were subject, through the operation of natural causes, the dividing line should forever follow the center of the normal channels, notwithstanding any alterations in the banks or in the courses of the rivers, provided that such alterations were effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one. But, as questions might arise as to the proper application of this provision and as to whether changes in the courses of the rivers might not have been produced by artificial causes, such as jetties, piers, or other obstructions, or by dredging, a convention was concluded on the 1st of March 1889 for the establishment of an International Boundary Commission, which should have jurisdiction of all such questions. The commission thus provided for is composed of two commissioners, one appointed by each government, two consulting engineers appointed in the same manner, and such secretaries or interpreters as either government may see fit to appoint. If the two commissioners agree, their decision is final, unless either government shall within a month from its rendition disapprove it. In such case both governments engage to take cognizance of the matter and to decide it amicably, bearing constantly in mind the stipulations of Article XXI. of the Treaty of Guadalupe Hidalgo of February 2, 1848. The two governments also engage to proceed in the same manner in case the two commissioners disagree. It was provided that this convention should remain in force for a period of five years from the date of the exchange of the ratifications. The ratifications were exchanged at Washington December 24, 1890. By another convention, signed October 1, 1895, and duly ratified and proclaimed, the duration of the convention of March 1, 1889, was extended for a period of one year from December 24, 1895. The object of the new convention was declared to be to enable the International Boundary Commission to "conclude the examination and decision of the cases submitted to it."

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CHAPTER XXVIII.

THE PANAMA RIOT AND OTHER CLAIMS: CONVENTIONS BETWEEN THE UNITED STATES AND NEW GRANADA OF SEPTEMBER 10, 1857, AND THE UNITED STATES AND COLOMBIA OF FEBRUARY 10, 1864.

I. CONVENTION OF 1857.

Terms of the Convention.

By a convention between the United States and New Granada (afterward the United States, and now the Republic, of Colombia), concluded at Washington September 10, 1857, it was agreed that "all claims on the part of corporations, companies, or individuals, citizens of the United States, upon the government of New Granada, which shall have been presented prior to the 1st day of September 1859, either to the Department of State at Washington, or to the minister of the United States at Bogotá, and especially those for damages which were caused by the riot at Panama on the 15th of April 1856, for which the said government of New Granada acknowledges its liability, arising out of its privilege and obligation to preserve peace and good order along the transit route, shall be referred to a board of commissioners consisting of two members, one of whom shall be appointed by the Government of the United States and one by the Government of New Granada." The commissioners so named were to meet in the city of Washington within ninety days from the exchange of the ratifications of the convention, and, before proceeding to business, to make and subscribe a solemn oath that they would "carefully examine and impartially decide, according to justice and equity, upon all the claims laid before them, under the provisions of this convention, by the Government of the United States." They were then to proceed to name an umpire, and, in case they could not agree, the selection was to be made by the minister of Prussia in the United States.

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In cases in which the commissioners should agree to award an indemnity they were authorized "to determine the amount to be paid, having due regard, in claims which have grown out of the riot of Panama of April 15, 1856, to damages suffered through death, wounds, robberies, or destruction of property." In cases in which they could not agree the subjects of difference were to be referred to the umpire.

The commission was required to "terminate its labors in nine months from and including the day of its organization."

The Panama Riot.

The facts in regard to the Panama riot are detailed in a report to the Department of State by Mr. Amos B. Corwine, who was sent to the Isthmus as a special commissioner on the part of the United States to investigate the circumstances of the incident.[1] Mr. Corwine states that on the morning of the 15th of April the steamer *Illinois* arrived at Aspinwall (Colon), having on board about 950 passengers, including many women and children, en route for California, and a large amount of baggage and other freight. Three trains containing all these passengers, the United States mails, and a portion of the freight had arrived at Panama, and a fourth, with a quantity of baggage and about 500 express packages, was expected later, when, about 6 o'clock in the evening, a quarrel occurred between a drunken passenger and a Panama negro who kept a provision stand near the railway station over the refusal of the former to pay for a slice of watermelon which he had purchased from the negro, and of which the price was a dime. A companion of the passenger paid the negro, but the disturbance did not cease. Before or after the payment of the dime—Mr. Corwine accepts the latter conclusion—a pistol shot was fired. The pistol belonged to the passenger, but there was some controversy as to who fired the shot. Mr. Corwine said that the evidence was "conclusive" that the shot was fired by a companion of the watermelon vender, a "light-colored native" named Habrahan, who took the pistol from the passenger (who had drawn it) and fired it at him. The negro and his "light-colored native" companion then ran away to the *cienaga*, a marshy negro settlement near the railway station, and presently returned with a large crowd of negroes armed with stones,

[1] Mr. Corwine's report is bound in vol. 5 of the MS. consular letters from Panama.

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machetes, and other weapons, and commenced an attack on McFarland's Hotel (the Pacific House) and the Ocean House.

The best account of the progress of the riot is given in a deposition of Capt. Allen McLane, agent of the Pacific Mail Steamship Company at Panama, made before the United States consul at that place and embodied in Mr. Corwine's report.

Captain McLane gives a graphic description of the scene in and about the railway station just before the riot, showing that the passengers were orderly and not anticipating any trouble. About 6 o'clock in the evening he heard the report of a firearm, which seemed to come from a spot outside of but near the gate of the railway station. This, as he was afterward informed, was the report of the shot fired during the altercation between the passenger and the watermelon vender. This report was followed almost instantly by shouting and hallooing from the same direction.

A moment after he heard the report of the firearm Captain McLane saw a native man come to the beach and run along it toward the city for about 400 yards, when he lost sight of him. A few minutes later he heard a bell in the city ring an alarm, and immediately thereafter saw large crowds coming toward the railway station. From the time he heard the report of the firearm until he saw the crowds collecting about the station he thought that not more than ten minutes elapsed. From the time he heard the report until he heard the noise, which proved to be an attack on the hotels, he thought that not more than five minutes elapsed.

At the time of the breaking out of the riot there were on the pier, where Captain McLane was standing, some thirty or forty natives who had been employed by the steamship company in discharging freight and baggage from the cars into the scows. Some of these men, seeing the excited crowds rushing toward the station shouting and waving their arms, jumped from the pier and started to join them; they returned, however, at Captain McLane's order, he explaining to them that they would only increase the excitement and become parties to the riot which had already begun. Some of these natives subsequently joined the rioters; others did not.

When Captain McLane observed the rioters coming toward the railway station, which was about 100 yards distant, he proceeded thither in company with two gentlemen named Center and Nelson. On his way to the ticket office he saw a party of

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men loading an old iron cannon, substituting for balls and bullets, of which none could be obtained, iron boiler rivets. This cannon, when loaded, was carried and placed outside of the gate of the railway station, commanding the street leading from the gate to the cienaga, and was put in charge of a trustworthy man, with orders not to fire it unless the natives should advance on the station and could not otherwise be restrained.

Before he reached the station the appearance of a riot seemed so great that Captain McLane dispatched a message to the chief of police to bring his force at once. The messenger was a burly native who had for some time been in Captain McLane's employ. While bearing the latter's message he was wounded by a ball in the neck, but he performed his mission.

Arriving at the railway station, Captain McLane found the clerks engaged in registering tickets, the windows through which the passengers handed them being crowded; for, while the tumult was going on outside, the passengers had no conception of its seriousness, and Captain McLane himself did not expect that the station would be regularly assaulted.

By this time many shots had been fired, principally by the natives, at the adjacent hotels, and a few by the inmates of the hotels in self-defense. Captain McLane expected the police soon to be on the ground, when it would only be necessary for them to draw up in the clear space between the station and the cienaga in order to restore quiet. With a view, however, to remove the passengers as speedily as possible from the reach of the excited natives, he directed the ticket clerks to put away their books and papers and to send the passengers on board the California steamer. Evidences of excitement and confusion began to appear among the persons assembled in the station. Captain McLane saw some old rusty muskets taken from the side of the room, where they had been hanging for months, and attempts made to load them; he saw pistols in the hands of several persons; many persons were asking for ammunition, though no one to his knowledge could find any; he heard afterward, however, that some was obtained and that the muskets, or a portion of them, were loaded. Perceiving the condition of affairs, he proposed to Mr. Nelson that they should endeavor to organize a few of the men around them and prepare to defend the station, should the police not arrive soon enough to prevent an attack upon it. This was found to be utterly impossible;

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hardly anyone was armed, and there was a general feeling of helplessness and panic. About twenty men were collected at the gate of the station looking toward the cienaga. They were endeavoring to preserve order, and exerted themselves to restrain three or four men who would rush out in front of the gate and fire at random among the huts of the cienaga. Captain McLane while at the gate saw the iron cannon before referred to; it was planted so as to command the street leading from the cienaga to the station, and was in charge of an American named Willis, who, as has been stated, had orders not to fire it unless the natives attacked the station.

During these scenes at the gate and early in the riot some of the passengers came on the ground in great excitement, saying that their families were in the upper stories of the hotels attacked by the natives. Some men were advanced to one of the hotels, and breaking in the side door, which was out of the range of fire, allowed the passengers to escape; at the same time a ladder was placed at one of the back windows, down which others escaped. During these occurrences many shots were fired from the cienaga at the hotels and toward the station. The fire of the natives on the station now increased considerably, and for the first time Captain McLane thought that an assault would be made.

Some time before this he had invited on board the California steamer two native ladies who had come from the city to witness the embarkation and who were in an exposed position on the balcony of the railway company's mess house. He stated that their presence subsequently saved a heavily charged cannon from being fired into a crowd of some six hundred defenseless men, women, and children, who had been placed on board the steamer for safety.

What afterward occurred may be given in Captain McLane's own language:

"Not a sound went from the station; doubtless each person there felt that dreadful scenes of massacre, rapine, and plunder were inevitable, unless the authorities of the country could be brought and interposed between the reckless and maddened rioters and their innocent, unarmed, and defenseless victims. At this moment the long listened-for sound of the bugle note was heard, bringing relief to many an aching heart. We congratulated each other, and in a moment more would have been outside the inclosure to welcome our deliverers, when there was poured into the station a volley of musketry, accompanied

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by savage shouts for blood. This volley was quickly followed by others; the dreadful realty came upon us that the police had joined the mob. In a moment the police, headed by Colonel Garrido, had crossed the clear space between the cienaga and the station houses, and from under the windows of the ticket office and freight room commenced firing into them. At the same time the outside mob, with some of the police in company, entered the station from the west end along the track, firing through it to clear the way, and broke into the various rooms, machetes in hand, and began their work of murder and plunder."

When the police took possession of the station, Captain McLane, accompanied by another person, went to look for the governor, and, having found him after some delay, prevailed upon him to accompany them to the station and stop the massacre. But the order which it was said that the governor had previously given to the police to fire upon and occupy the station was carried out by them in such a manner that nearly every person in the station was massacred by them and the mob. It was also alleged that the governor was remiss in efforts to prevent the plunder and bloodshed which took place in his presence.

These are the main facts in relation to the riot of the 15th of April 1856, for which the Government of New Granada made the acknowledgment of liability recorded in the convention of 1857, though it steadily denied the responsibility of its officials either for the occurrence or for not preventing it. Before the work of murder and destruction was stayed, about twenty persons were killed, only two of whom belonged to the assailants, and twenty-nine were wounded, thirteen of whom were natives. The loss of the foreigners in property was large—claims on that score to the amount of half a million dollars being preferred.

The Treaty of 1846.

The acknowledgment of liability by New Granada was, as the convention declared, based on that government's "privilege and obligation to preserve peace and good order along the transit route." This declaration seems impliedly to have referred to the provisions of the thirty-fifth article of the treaty between the United States and New Granada of December 12, 1846. By that article New Granada "guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open

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and free to the Government and citizens of the United States," while the United States, on the other hand, in consideration of this and certain other advantages, "guarantees, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the beforementioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

Referring to these stipulations, Mr. Marcy, as Secretary of State, discussing, in instructions to Mr. Bowlin, United States minister at Bogotá, of June 4, 1856, the occurrence at Panama, said:

"This state of insecurity is very prejudicial to both countries, and it is not to be doubted that when properly urged upon the consideration of New Granada that government will take prompt and effectual measures to insure to the citizens of the United States the most ample protection for their persons and property on the Isthmus within its territory. This is not only a duty of national obligation, but it is expressly provided for in the treaty of 12th of December 1846, between the United States and New Granada. The United States must have the free, safe, and uninterrupted transit for their citizens and for public and private property across the Isthmus of Panama to the full extent contemplated by that treaty, and this government looks with confidence for the security of this right, and does not expect that any necessity will arise for the use of any other means for the secure enjoyment of it but an appeal to the state of New Granada to fulfill its treaty stipulations upon that subject. The United States may reasonably expect, after what has happened, that New Granada will station such a force along the route of the railroad and at Aspinwall [Colon] and Panama as will secure adequate protection to the persons and property of the citizens of the United States."

The Acknowledgment of Liability.

On the actual negotiation of September 10, 1857, the records of the Department of State throw little light. Negotiations were at first conducted through Mr. Bowlin, at Bogotá, but they proved fruitless. The Government of New Granada then sent an envoy to the United States, Gen. P. A. Herran, who took up the negotiations at Washington in July 1857. On the 21st of that month Mr. Cass, who was then Secretary of State, having acknowledged the receipt of a note from General Herran,

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in which the latter had stated that he was instructed to negotiate an arrangement of the questions pending between the two republics, appointed July 23 as the day for a conference. The principal questions at issue were those of the Panama riot and certain tonnage and customs duties affecting the transit of the Isthmus.

The next thing found in the records is a note of the 27th of August from Mr. Cass to General Herran, inclosing a "draft of a convention for the adjudication of claims of citizens of the United States upon New Granada;" and on the 9th of September Mr. Cass informed General Herran that at 12 o'clock of the next day copies of the convention would be ready for signature. At the appointed time it was duly signed; and on the same day General Herran communicated to Mr. Cass a note, expressing gratification at the conclusion of the claims convention, but regret at the failure to arrange other matters.

Nothing further on the subject appears until June 4, 1858, when Mr. Cass addressed a note to General Herran, which was as follows:

"When the negotiations for the settlement of the difficulties between our respective countries were brought to a close by the conclusion of a treaty on the 10th of September last, it was the confident expectation of this government that the treaty would be ratified by New Granada without delay or objection. The arrangement was not entirely satisfactory to the United States, for it left unadjusted several subjects of difference, some of them of much importance, arising out of the transit route and out of the measures in relation to it proposed to be adopted by your government.

"You will recollect that till the treaty was upon the point of being signed it was mutually intended that its stipulations should extend to and embrace all the questions that had arisen, and which had threatened, at any time, to disturb the peaceful relations of the two countries. This intention was defeated by a misunderstanding as to one of these stipulations, which could not be reconciled, and the effort to make a definitive arrangement of all the unadjusted subjects was therefore abandoned. But the treaty was valuable because it made reasonable provisions for the adjudication and payment of the claims of citizens of the United States against the Government of New Granada, and especially because it assured satisfaction for the deplorable riots of Panama in April 1856, by which grevious outrages had been committed against the persons and property of the United States. * * * I informed you at the commencement of the discussion between us that the recognition by your government of its responsibility for those aggressions at Panama and an arrangement for their satisfaction

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were considered by the United States indispensable to the success of our negotiations. * * * Reports reached here some time since that the treaty would not be ratified by the constitutional authority of New Granada, and these have been confirmed by the last arrival. There is good reason to believe either that ratification will be wholly withheld or that it will be accompanied with such conditions as will render it impossible for the United States to assent to them."

August 16, 1858, General Herran informed Mr. Cass that the convention was ratified by the Government of New Granada on the 8th of July, with certain explanations and modifications. The only one of these necessary now to be noticed was an explanation of the effect of the acknowledgment by New Granada of her liability for the riot at Panama. This explanation was as follows:

"It is understood that the obligation of New Granada to maintain peace and good order on the interoceanic route of the Isthmus of Panama, of which Article I. of the convention speaks, is the same by which all nations are held to preserve peace and order within their territories, in conformity with general principles of the law of nations and of the public treaties which they may have concluded."

The purpose of the New Granadian Government in making this explanation General Herran stated in his note of August 16, as follows:

"The object of the first explanation [the explanation in question] is to prevent the future possibility on the part of any foreign government of construing the original phrasing of Article I. of the convention into a new obligation, imposed on itself by the republic, of indemnifying all such damages and prejudices as may be suffered by persons traveling over the Panama railroad, whatever may be the circumstances of the cases which might occur. Now, as there is no country on earth in which torts are not committed and injuries suffered, in spite of all the securities which may be intended to be afforded and of all precautions which may be taken, there can be no government that could be willing, thus indefinitely, to assume their responsibility upon itself. Were there a state that could bind itself to indemnification for all losses that might be caused by misdoers within its limits, it would, by the very fact, hold out an inducement for misdemeanors and require an inexhaustible treasury to meet such obligations.

"It was not in this sense that the negotiators of the convention mentioned the responsibility of New Granada to which the explanation alludes. It was in a rational sense—on the part of the United States for the purpose of justifying their demand, and on the part of New Granada to show the reason why it acceded to it. Yet, a proposition written down in an

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international instrument, in solemn forms, might, in the future, be taken in a sense much wider than that which the negotiators might have intended to give to it.

"Touching the riot of the 15th of April, which is the ground of the claim intended to be adjusted, the Granadian Confederacy satisfies the United States, binding itself to indemnify the damages and prejudices caused by it, which, in itself, is an explicit, practical, and complete acknowledgment of responsibility, so that the proposed explanation in no way diminishes or alters the satisfaction given to the United States and in nothing militates against the arrangement which has been made. The convention was framed for a determinate object. This being attained, the instrument will, *ipso facto*, stand annulled, as is the case with treaties, from the moment that the period of their duration has terminated. It could not, therefore, contain a stipulation, granted in general terms, applicable to all such cases as might occur and the duration of which would have to be unlimited.

"As for the settlement of the question which has arisen out of the riot of the 15th of April we are guided by international laws and by the treaty now in vigor between the two republics; so will it have to be in the future. It is not by virtue of a new obligation that New Granada this time has bound itself to grant the indemnifications claimed by the United States, nor will it be claimed that the obligation could work its effect before it had been contracted. It follows, hence, that if the responsibility mentioned in the first article of the convention can be construed as a new obligation—that is to say, as a responsibility to which no nation is held by its public treaties or by international laws—it required to be explained in order that it should bear no sense other than that which the contracting parties intended that it should have. Everything that conduces to clearness and accuracy of sense in an agreement obviates difficulties in its execution and influences the contracting parties in maintaining harmony between themselves. This has been the aim of the Granadian Congress."

The explanation of General Herran, while not entirely free from ambiguity, admits two things, viz:

1. That by Article I. of the convention of 1857 New Granada acknowledged and assumed liability for the injuries and losses of citizens of the United States by the riot of April 15, 1856.

2. That this was an extraordinary or unusual liability, assumed in accordance with the rules of international law and the treaties between the two countries.

The claims convention, together with the explanation of the New Granadian Congress, was approved by the Senate of the United States, with several amendments by that body, which were immediately submitted to the New Granadian

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Government. On the 14th of March 1859, two days after the treaty, as amended by the Senate, was sent to General Herran, he proposed the consideration of certain grievances which, it was said, the New Granadian confederation had against the United States, among which was the nonpayment of tonnage and mail taxes. Mr. Cass, on the 31st of March, replied:

"I have simply to repeat the substance of what has been stated to you in our personal conferences, that, until the convention of September 1857 has been ratified by New Granada, this government is not prepared to enter upon any further discussion in reference to the various points mentioned in your note."

June 17, 1859, General Herran informed the Department of State of the acceptance by his government of the Senate's amendments. The ratifications of the convention were exchanged at Washington November 5, 1860.

Organization of the Commission.

The commissioners met in Washington June 10, 1861. On the part of the United States the commissioner was Elias W. Leavenworth, of New York; on the part of New Grenada, José Marcelino Hurtado. After filing their commissions they each subscribed the oath prescribed by the convention. The commission of Charles W. Davis, as secretary, was also filed. Mr. Davis was ordered to notify Mr. Seward of the organization of the board, and to request him to transmit to it all papers in the Department of State relating to the claims against New Granada. On the following day rules were adopted.

Mr. Leavenworth's Commission.

When Mr. Leavenworth filed his commission, Mr. Hurtado objected to it on the ground that it authorized him to act only "during the pleasure of the President of the United States for the time being," while the convention contemplated that each government should name one commissioner, and not several in succession, or as many as they might please. Mr. Leavenworth stated that the words were only a matter of form and ought not to be understood as implying that the powers granted would be revoked. Mr. Hurtado, however, addressed Mr. Seward on the subject; and on August 29, 1861, Mr. F. W. Seward, acting Secretary of State, replied:

"The allegation of Mr. Leavenworth that the condition referred to was one of mere form was perfectly correct, the expression quoted being inserted in every commission issued

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by the Executive, with the exception of those for which the Constitution of the United States makes distinct provision.

"Apart from this view, it is evident from the text of the convention under which the board is organized that no capricious substitution of one person for another previously appointed, and engaged in the duties devolved upon him, could have been contemplated. The convention says that, 'in case of the death, absence, or incapacity of either commissioner, or in the event of either commissioner omitting or ceasing to act,' the government so affected 'shall forthwith proceed to fill the vacancy thus occasioned.'

"It is not understood by this department that the stipulation quoted will tolerate any extrinsic interference with the board when once organized, except in the specified cases of 'death, absence, or incapacity,' such incapacity being intrinsic and arising solely from physical or moral, and not from personal or political causes. Any other interpretation of the terms of the convention would only expose the commission to the most unfortunate influences and might at any moment seriously embarrass, if not ultimately defeat, the whole purpose of the convention."

Appointment of Umpire.

October 1, 1861, the commissioners concurred in tendering the post of umpire to Mr. N. G. Upham, of New Hampshire, who had served as commissioner on the part of the United States under the convention with Great Britain of February 8, 1853. On the 6th of October Mr. Upham replied, accepting the appointment, and inclosing the requisite oath, which he had taken before the judge of the district court of the United States in New Hampshire. It seems that Mr. Upham did not go immediately to Washington, as the commissioners telegraphed him on the 4th of December, requesting him to repair to that city at once.

Question as to the Ratification of the Convention.

October 2 Mr. Carlisle, the agent of New Granada, suggested to the commissioners that the printed copy of the convention presented by the Department of State differed from that which the Government of New Granada had placed in his hands, in the omission of the special ratification by the latter government. This ratification, he said, in the view which he was inclined to take of a certain class of the cases with which he was charged, seemed to him to be important to be considered in the deliberations of the commission. He therefore requested the commission to ask the Secretary of State to make such official recognition of the special ratification as would avoid all question as to its authenticity. With this request

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the commissioners on the same day complied. The board then adjourned till the 4th of November, when the commissioners received from Mr. Seward a communication of the 5th of the preceding month, in which he stated that, upon an examination of the original instrument on file in the Department of State, as ratified by the President of the United States, in connection with the ratification of New Granada, it appeared that certain amendments had been accidentally overlooked by the clerk who prepared the pamphlet copy for the use of the Department. The question raised as to the ratification of the convention was thus disposed of without controversy.

List of Claims.

In notifying Mr. Seward of the appointment of an umpire, the commissioners requested him to "cause a statement of the claims provided for in the convention to be submitted to the commission." This request was based upon the second article of the convention, by which it was provided that the commissioners should, after the appointment of the umpire, proceed "to examine and determine the claims which may be presented to them * * * by the Government of the United States." In reply Mr. Seward stated that all the papers relating to the claims in question having, pursuant to the act of Congress on the subject, been transferred to the board, it was not within the power of the department to present a detailed statement of them. Moreover, such a step seemed to be unnecessary, in view of the fact that the claims of which the commission had jurisdiction were defined in the first article of the convention.[1]

With this reply the commissioners were not content. They therefore addressed to Mr. Seward on the 5th of November the following communication:

"The commissioners concur in considering it necessary that the claims coming before the board should, agreeably to the provisions of the second article of the convention, be presented by the Government of the United States; and as the Hon. Mr. Seward states that it is not in the power of the department to present a detailed statement of them, the papers relating to the matter having been transferred to the board, the commissioners have ordered that a correct statement of the entire number of such claims as the papers received from the Department of State have reference to, and of such claims besides as have to this date been filed before the commission, should be carefully prepared and is herewith inclosed. By the aid of

[1] Mr. Seward to the commissioners, October 5, 1861, MS.

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this document it is hoped that the department will be in a position to carry out the provision of the convention above referred to."

As the commissioners concurred in thinking it necessary that the claims should be presented by the Government of the United States, Mr. Seward, "desiring to facilitate as much as possible the wishes of the board," yielded to the request of the commissioners, and inclosed to them "a mere list of the claims" which had been filed in the Department of State, made up from such data as had been accessible. The list embraced 262 individual cases. Mr. Seward said that he communicated it with the explanation that, in the judgment of the United States, the provisions of the convention had been fully complied with by the transfer to the commission of all documents on file either in the Department of State, or in the United States legation at Bogotá, in relation to the claims.

January 9, 1862, Mr. S. S. Cox, as attorney for certain claimants, in respect of whom a question of citizenship under the convention had been raised, asked the commission to inquire of the Department of State whether or not, previously to the completion of the convention and during its negotiations, any list of the claimants was furnished to the minister from New Granada, and if there was, to request that a copy of such list be furnished the commission. Mr. Cox stated that his object was to show the fact, if it were so, that New Granada had notice of the claims in which the question of citizenship was raised, as claims of citizens of the United States, and that the convention was negotiated with a view to their adjustment, without any dissent from the New Granadian negotiator. The board granted the motion, and directed the secretary to transmit a copy of it to the Department of State.

On the 11th of January Mr. Seward replied that it was believed that no specific list of individual claims was furnished by the Department of State to General Herran prior to the signature of the convention; that an informal and merely approximate list was prepared and placed in his hands; but that it was not made the subject of official record because it was not contemplated or expected that such a memorandum would be regarded as of official force. It was distinctly remembered in the department, however, that the list handed to General Herran embraced the claims growing out of the Panama riot, as an aggregate amount, without any attempt at a detailed statement. Mr. Seward, in further response to the

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motion, inclosed to the commission a copy of a note addressed to General Herran by the Secretary of State on November 2, 1859, showing the individual claims filed in the Department of State between the signing of the convention and the date of the note.

The Presentation of Riot Claims.

The reluctance of the Department of State in the first instance to furnish the commission with a list of claims was in part due to the fact that a question had arisen as to the requirements of the convention touching the riot claims. We have seen that by the convention the commission was invested with jurisdiction of "all claims on the part of * * * citizens of the United States, upon the Government of New Granada, which shall have been presented prior to the 1st day of September 1859, either to the Department of State at Washington, or to the minister of the United States at Bogotá, and especially those for damages which were caused by the riot at Panama on the 15th of April 1856." In his reply to the commissioners' first request for a list of claims, Mr. Seward, after declining to comply with it, said it was "presumed that the limitation as to the time of presentation," expressed in the convention, was not intended to apply to the riot claims, in view of "their probably small amount," the "comparatively humble social position" of the claimants, and the notorious fact that after the event which gave rise to the claims, the claimants "were dispersed over this vast country, from California to Maine, thereby depriving them of opportunities for knowing the measures which were in progress for their relief."[1] In his subsequent letter to the commissioners, inclosing the "mere list" of the claims which had "been filed in the Department of State," Mr. Seward recurred to the subject of the riot claims, and, after making a "distinct reservation" in regard to them, said:

"This government maintains the principle that those claims have been presented by the United States and recognized by New Granada *en masse*, and that where, from any of the causes alluded to in my communication of the 5th ultimo, individuals have failed to file their claims arising out of the Panama riot, within the period limited in the convention, they are entitled to investigation and decision upon their own merits and proofs, and the department holds to its right to amend and add to the list in respect to claims of this character, should any be presented to it."

[1] Mr. Seward to the commissioners, October 5, 1861, MS.

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The question thus raised was discussed before the commission and was decided in the case of Peter Frank, whose claim was presented to the Department of State after September 1, 1859. The commissioners differing in opinion, the question was referred to the umpire. Mr. Upham said that the sole question upon the face of the convention was whether the word "especially" could be construed as excepting the riot claims from the phrase "all claims." The word "especially" was an intensifying term, synonymous with "particularly" and other words of similar import. If "all the citizens" of a government were held bound to render service in behalf of their country in a given emergency, and "especially" native-born citizens, the idea could not be entertained that native-born citizens were thus excluded from the obligation of service. On the contrary, their inclusion would appear only the more clearly. If, said Mr. Upham, it had been the intention of the negotiators of the convention to except the riot claims from the limitation in regard to the presentation of "all claims," it might readily have been accomplished by using words of exception. The words "especially those" could not, in his opinion, be construed, as the United States commissioner had suggested, as equivalent to "and also," or "in addition thereto." Indeed, the meaning of the language was so plain that little reliance seemed to be placed upon any supposed ambiguity in the words themselves; but it was argued that, if construed in the ordinary sense, they were inconsistent with the manifest purpose of the convention. "What an absurdity," argued counsel, "to require the presentation of claims to the United States under the convention while the convention was in secret preparation. What a monstrous hardship would such a provision be in a convention not ratified till more than a year after the time alleged to be fixed for the presentation of claims of such a nature." According to Vattel,[1] every interpretation of a treaty that led to an absurdity should be rejected.

This argument, said Mr. Upham, was based solely on the want of suitable notice to the claimants; but this was a question on which the negotiators and the advisory powers of the two governments were as competent to pass as the commissioners, and their action could not be overruled by the latter. It appeared that, immediately after the riot, measures were taken by the United States to investigate the subject fully.

[1] Book 2, chap. 17.

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In December 1856 the President, in his message to Congress, stated that he had caused a full investigation to be made, and that it fully sustained the claims of the government against New Granada on account of the riot. Early in 1859 elaborate propositions were presented to New Granada for the settlement of this and other subjects. In these propositions it was stated that "the United States had fully investigated the matter of the riot at Panama and fixed the amount due." In a subsequent communication it was stated that the United States had "taken the testimony not only of American gentlemen, officers of the government, and officers of the railroad, but the evidence of persons of almost every nation" in reference to the claim made on account of the riot; that it had "caused an examination to be made by a special crmmissioner and the resident minister near the republic of New Granada," and that its position was "founded on direct, positive, unequivocal, and legal testimony taken in reference to these claims." On the 27th of February 1857 the minister of the United States, acting under instructions, demanded the sum of $400,000 on account of the riot claims, though he declared that "the sum claimed and proved to have been taken and destroyed amounted to much more."

On this evidence, said Mr. Upham, it was to be presumed that the Government of the United States and the negotiators of the treaty believed that they had sufficient knowledge in regard to the claims to enable them to act upon their adjustment, and that they might, with perfect propriety, consider the case as closed so far as concerned applications for redress. Hence, in the convention as signed, the jurisdiction of the commission was limited to claims which had been presented prior to the day of signature, September 10, 1857; and no exception was made in terms, and none, so far as he could see, by implication, as to any class of claims. When the treaty was ratified by the Senate of the United States, March 18, 1859, the limitation was extended two years, to September 1, 1859. Both the negotiators of the convention and the Senate must have understood the effect of the limitation fixed upon by them, as they had before them the diplomatic correspondence and the evidence obtained by the special investigations. Any omission further to protect the rights of claimants could not, under the circumstances, be considered a matter of inadvertence, still less of absurdity, or of conflict with the scope and object of the treaty, which would justify a

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departure from its plain language. It appeared that, since the promulgation of the convention, very few new claims had been presented; and if claimants had been improvidently barred by the action of their own government, their remedy rested with that government, and not with the commission. Questions might, indeed, arise as to what constituted the presentment of a claim. "The rule in such cases is," said Mr. Upham, "usually a most liberal one. This question is not directly raised here. Any evidence of application by letter, or personally to the department or minister at Bogotá, within the time specified, or any list of claimants, or evidence seasonably appearing in the papers of the government as to damages sustained by anyone, it is presumed would be held as a satisfactory presentment for the subsequent specification of a claim; but such questions can only be settled as they arise. If there is no evidence in this case of any presentment or notice of the claim being brought to the knowledge of the government authorities within the time specified, or seasonable recognition of it in the evidence taken by the government, I consider the commissioners as having no jurisdiction over it, and that it can not be adjudicated upon by them."

Liability for Riot Claims.

A question was also raised before the commission as to the extent of New Granada's acknowledgment of liability for the riot claims. The agent of that government, Mr. James M. Carlisle, offered to submit evidence to show that damages were inadmissible, as the riot was a sudden outbreak, caused by the violent and unjustifiable conduct of American citizens at Panama, and that the Government of New Granada had acted in good faith and had exerted all its available power to quell the outbreak and restore order, and had failed in no respect to discharge all the duties incumbent on it by the laws of nations, to which alone the government was amenable. Mr. Carlisle contended that the liability of New Granada was not fixed by the first article of the convention, arguing (1) that if the language used might be regarded as having such tendency, it was so ambiguous as to be wholly overruled by the explanation made by New Granada at the time of the exchange of ratifications and admitted by both sides to be a part of the treaty; (2) that the language of the first article was a mere confession on the part of New Granada of liability to have the claims made against her, and not of liability for their payment; (3) that the imputation of a

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greater liability did not comport with another provision of the first article, viz, that the commissioners should "carefully examine and impartially decide, according to justice and equity, upon all claims laid before them."

The umpire decided that the liability of New Granada was clearly and fully admitted by Article I., and was not varied by the New Granadian explanation. The evidence offered by Mr. Carlisle was therefore rejected.

The "explanation" referred to was, as we have seen, to the effect that the obligation of New Granada to maintain peace and order on the transit route was "the same by which all nations are held to preserve peace and order within their territories, in conformity with general principles of the law of nations, and of the public treaties which they may have concluded." Referring to this "explanation," Mr. Upham said that it could operate only in one of two modes. It was either an explanation of the meaning of *words* employed, which were supposed to be used in an ambiguous or doubtful manner, or it was an explanation of the *grounds or principles of action on which the parties proceeded.* In the case of the explanation in question, which was the more natural and apparent mode? If it applied to ambiguity in words, two principles must be considered: (1) That the ambiguity should be fully and clearly removed, as one ambiguity can never remove another; and (2) that New Granada, as the stipulating party, designing to remove an objectionable provision or to make plain what was not fully apparent, was bound to show *affirmatively* that this was done. These considerations certainly bore against applying the "explanation" to an ambiguity in words, especially as it might well be held to be a mere statement of the ground or principle on which New Granada assumed the obligation to liquidate the claims. There were various reasons why an explanation to this extent might be desired by the New Granadian Government. If there were any individuals who supposed that the claims had been unduly pressed as a matter of force or arbitrary exaction, here was a full and explicit refutation of the charge. It might also be desirable for the future, long after the circumstances of the case had passed from public memory, to show that the claims were controlled by the settled principles of the law of nations, and by public treaties. Moreover, on a close examination of the "explanation," it would be perceived that it did not purport to touch, in any

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manner, the question of liability. The original convention acknowledged the liability of New Granada for claims caused by the Panama riot, because of her "obligation to preserve peace and good order along the transit route." The "explanation" did not purport to overrule this acknowledgment, but merely adverted to the reason on which it was founded. These considerations, said Mr. Upham, taken in connection with the fact that there was no ambiguity in the original convention, rendered imperative the conclusion that the "explanation" was merely declaratory of the *animus* of the contracting parties, and of the grounds on which the convention was entered into, and could not be construed as changing or overriding it. His opinion must therefore be entered upon the record to the effect that, in respect of the class of claims in question, the liability of New Granada was fixed by the action of the two governments; and that the consideration of the commissioners in regard to them was limited to matters of damage.

Matters of Procedure.

November 5, 1861, the commissioners ordered that all claims presented to the commission be heard in the order in which the memorials were filed, unless, for cause shown, the board should in special cases otherwise direct. On the 14th of November they ordered that on the first Monday in December the calling of the calendar be begun, and that cases in which counsel for the claimants were not prepared be placed at the foot of the calendar, unless, for good and satisfactory reasons, the board should otherwise determine. December 19, 1861, they resolved that on the following Monday the first eight cases on the calendar would be called, and on each successive day thereafter three cases, and that if in any case either of the parties was not ready to submit it, it would be examined and decided without further hearing, unless for good cause the board should otherwise order. It was further resolved that the calendar would be called at 11 o'clock a. m. of each day.

In numerous cases the period prescribed by the rules for the filing of memorials was extended for cause shown.[1] In one case the commissioners accepted a power of attorney given to counsel, with sworn accounts and statements, as a sufficient memorial.[2]

[1] Orders of the commissioners, November 29, 1861, December 4, 1861, December 21, 1861.

[2] MS. Journal, December 4, 1861.

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February 3, 1862, Mr. Gilbert Dean, who was appointed by the United States as counsel to present the claims of persons who had no individual representatives before the commission,[1] submitted a motion in which he stated that he had on that day presented for the consideration of the commission the claims of several citizens who had not filed memorials in accordance with the rules of the board; that he believed that "the situation of the United States (communication between several of the States and Territories and the capital having been obstructed or cut off since June last), or the residence of claimants in distant parts," where they were "not aware of the rules or of the existence of the commission," was the cause of the omission; and that, if the claims in question were not presented, they would by the terms of the convention be extinguished and one of its objects would be thereby defeated. He therefore requested that, as to those claims, the rules should be suspended and the filing of memorials dispensed with, and that he might be permitted to present the claims in question, together with such testimony as could be obtained without an adherence to the forms prescribed in the rules.

The commissioners granted the motion.

From time to time the Department of State sent volumes of diplomatic and miscellaneous correspondence to the commission, in order that original papers might be read; but in each case this was done with a request for the return of the volume when the documents should have been perused.

Interest.

On March 4, 1862, the commissioners ordered that all awards should date from the 10th of that month, and that in all cases in which interest was allowed it should be computed at the rate of 6 per cent per annum. On the 9th of March they modified this order so as to make it apply only to damages arising from the Panama riot, and ordered that in all other cases in which interest was allowed it should be computed at the rate of 5 per cent per annum.[2]

[1] Mr. Dean also represented a number of the claimants as attorney. (Mr. Marcy, Sec. of State, to Mr. Dean, Oct. 29, 1856, MS. Dom. Let. XLVI. 81. See, as to Mr. Dean's appointment, Mr. Seward, Sec. of State, to Mr. Dean, Jan. 23, 1862, and Jan. 31, 1862.)

[2] MS. Journal.

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Adjournment.

February 26, 1862, Mr. Leavenworth addressed to Mr. Seward a letter in which he stated that about one hundred and twenty-five cases remained to be decided. Seventy-five of these were, he said, small in amount and involved no questions of difficulty; but the remainder were "generally important," and it was "certainly most desirable" that the commissioners "should have further time to hear counsel and to examine both the facts and the law involved in them." "If it [an extension of time] can not be had," continued Mr. Leavenworth, "I shall endeavor on my part to be prepared to make a decision in all the cases. Many of them, the most important, which counsel have delayed till this time to submit, must be decided in great haste, and with little examination of the testimony and less still of the law."

The President communicated a copy of Mr. Leavenworth's letter, and of certain other papers relating to the same subject, to the Senate, with a recommendation that the time of the commission be extended; and on the 5th of March 1862 the Senate, with the concurrence of two-thirds of the Senators present, adopted a resolution advising and consenting to an extension of six months beyond the time set by the convention, with the proviso that the government of New Granada should "duly assent to such extension," and that it should not in the mean time "be discharged from liability for claims before the commission, and undecided by reason of the inability of the commission to pass upon them within the time prescribed by the convention."[1]

The effect of this resolution was merely to give an anticipatory sanction to any measures which the President might adopt, in conformity with the Senate's expressed opinion, for the prolongation of the commission's existence. The Colombian minister was not invested with power to bind his government in the matter; and there was no way of preventing the legal expiration of the commission on the 9th of March 1862. On the morning of the 8th of March, therefore, Mr. Leavenworth addressed a note to Mr. Hurtado, stating that he was prepared at once "to decide every case growing out of the Panama riot, or to disagree on the same, except the cases of

[1] MSS. Dept. of State.

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the Panama Railroad Company and the two steamship companies." "And unless it shall this day be decided," continued Mr. Leavenworth, "that the commission is to be continued, I am ready this evening to dispose of all the residue of the cases on the calendar. In all the cases in which we shall disagree I shall be ready at once to go before the umpire and orally present our views in brief and submit them to his decision."

It was past noon on the 8th of March when Mr. Hurtado received this letter. He declined the proposition contained in it, saying:

"As some principles bearing on many of the cases growing out of the Panama riot are before the umpire and have not been finally disposed of, I do not see how we could proceed to pass upon the cases involving those principles except by leaving that part of each claim subject to future consideration. I am free to admit, besides, that I have not been able fully to examine all the cases growing out of the riot; but I am willing to continue their examination as rapidly as possible; the number, however, to which none of the principles before the umpire apply must be comparatively small.

"With reference to the other cases on the calendar, I do not think, and you must concur with me, that either you or I would do justice to the parties interested by submitting the controverted points in all the cases to the umpire for his immediate decision, with such oral arguments only as we should be able to make upon them in the course of an evening."

On the 9th of March 1862 the commission adjourned *sine die*.

While the commission was in session a revolution took place in New Granada, and the government by which Mr. Hurtado was appointed fell. This fact, however, was held not to terminate his commission. His was, as Mr. Seward said, "an appointment of a judicial nature in execution of a convention between the United States and the republic of New Granada. This government having entered upon the execution of the special convention and proceeded therein in concert with that of New Granada, it would necessarily hold Mr. Hurtado's appointment to be irrevocable by that power if such a question should arise."[1]

[1] Mr. Seward, Sec. of State, to Mr. Burton, March 19, 1862, MS. Inst. to Colombia.

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Mr. Leavenworth's Report.

The state of the business before the commission at the time of its adjournment is disclosed in a report by Mr. Leavenworth, the American commissioner. This report is as follows:

"OFFICE OF THE JOINT COMMISSION
"OF THE UNITED STATES AND NEW GRANADA,
"*Washington, March 11, 1862.*

"To the Hon. WM. H. SEWARD,
"*Secretary of State.*

"SIR: The joint commission provided for by the convention of September 10, 1857, between the United States of America and the republic of New Granada, was duly organized on the 10th day of June 1861, and expired in pursuance of the fourth article of said convention on the 9th day of March, instant.

"Señor Don José Marcellino Hurtado appeared as the commissioner on the part of New Granada, and the undersigned on the part of the United States; and after having mutually presented our credentials and taken the oath of office, we took our seats.

"The commission was organized in the city of Washington, and all its sessions have been held at this place.

"The board appointed Dr. Charles W. Davis, of Washington, to the place of secretary of the board, and John Robb, esq., to that of clerk.

"The commissioners mutually agreed upon the Hon. Nathaniel G. Upham, of Concord, in the State of New Hampshire, as the umpire authorized by the first article of said convention, who assumed and discharged the duties of that position.

"The board remained in session but two days at its first meeting, viz, on the 10th and 11th days of June, and then adjourned till the first Monday of September then next.

"Agreeably to their adjournment, the commissioners met on the first Monday of September last and remained in session till the 2d day of October last and adjourned till the first Monday of November then next.

"They again convened on the first Monday of November last, and have remained in session until the expiration of the commission on the 9th instant.

"The claimants under the said convention reside in all parts of the Union, and large numbers of them especially in the States of California and Oregon. It was therefore deemed proper to extend to them the time in which to file their memorials and proofs till the first Monday of September last. Practically even this time was found to be much too brief, as only about one-third of all the memorials before the board were filed within the time allowed.

"The government of New Granada, by her counsel, J. Mandeville Carlisle, esq., asked for her the same length of time in which to file her counter proofs as was allowed to the claimants in which to file their memorials and proofs. This was

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granted, and the time allowed to her was fixed for December 1, 1861; but all cases which were ready were to be heard at any earlier day.

"When the commission convened on the first Monday of November, its time was occupied for a season in settling some preliminary questions growing out of the construction of the terms of the convention, but it has continued to devote itself, without adjournment or delay, to its appropriate duties.

Claims and Awards.

"The number of cases placed upon the calendar was two hundred and eighteen. The nine months limited by the convention for the duration of the commission were found to be insufficient for the perfect examination of all the cases.

"One hundred and nine cases have been settled by awards, and in two cases partial awards have been made. Two more cases were disposed of by the awards made in other cases, the claims being the same in each.

"One hundred and seven cases, including the two in which partial awards were made, still remain unsettled.

"Of the one hundred and eleven awards made, eighty-nine were by the commissioners and twenty-two by the umpire.

"In fifty-one of the cases decided by the commissioners the claims were allowed in whole or in part, as will more fully appear by schedule (A), hereto attached.

"In the other thirty-eight cases nothing was allowed by the commissioners. These cases will appear by schedule (B), also hereto attached.

"Each of the awards made by the umpire was in favor of the claimant. This will more fully appear in schedule (C), hereto attached.

The total amount of the fifty-one awards made by the commissioners is		$99,757.21
Of this sum there was awarded in six cases for seven deaths	$33,500.00	
For injuries to persons in eight cases	18,550.00	
For the seizure of a portion of the cargo of the schooner *Mechanic*	27,337.21	
For property in the remaining thirty-six cases, including the property also awarded in cases of personal injuries	20,370.00	
		99,757.21

All of which will more fully appear by said schedule (A).

The total amount of the twenty-two awards made by the umpire is		$396,878.26
Of this sum there was awarded for eight deaths the sum of	$40,000.00	
For personal injuries in four cases	12,250.00	
For personal property in thirteen cases, including eight of the cases in which awards were made for deaths	10,740.22	
To R. W. Gibbes on a Colombian bond or instrument	6,952.60	
For the seizure and confiscation of vessels and their cargoes in four cases	326,935.44	
		396,878.26

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All of which will also appear by said schedule (C).

The total amount, therefore, which was awarded for seven deaths by the commissioners is	$33,500.00	
Do. for eight deaths, by the umpire.....	40,000.00	
		$73,500.00
The total amount which was awarded by the commissioners for personal injuries to eight persons is	18,550.00	
Do. by the umpire to four persons.....	12,250.00	
		30,800.00
The total amount which was awarded by the commissioners for property in thirty-six cases is....	20,370.00	
Do. by the umpire in eight cases is.....	10,740.22	
		31,110.22
Making the total amount awarded as above for deaths, personal injuries, and property caused by the Panama riot.....		135,410.22
There was awarded to R. W. Gibbes.....		6,952.60
And there was awarded both by the commissioners and umpire, inclusive, for the seizure and confiscation of vessels and their cargoes, the sum of.....		354,272.65
Making the grand total of all the awards made by the commissioners and umpire		496,235.47

"All of which will more fully appear by schedules (A) and (C) hereto annexed.

"There are now remaining upon the calendar of the board, undisposed of, one hundred and seven cases. In one hundred and five of them no awards were made, and in two of them, viz, the Panama Railroad Company and the Pacific Steamship Company, partial awards were made without prejudice to the residue of their respective claims. The names and calendar numbers of these cases will be found in schedule (D), hereto attached.

"Of the one hundred and eleven cases in which awards have been made, ninety-eight arose out of the Panama riot and thirteen from other causes.

"Of the one hundred and seven cases remaining undecided, eighty-nine arose from the Panama riot and eighteen from other causes. Some of these cases, especially some of the more difficult and intricate ones, have been fully argued before the board by counsel, and all have been fully submitted for our final award.

Interest.

"In all cases of claims growing out of the Panama riot, and arising from the loss of property there, interest was allowed at the rate of 6 per cent from the 15th day of April 1856, the day of the riot, to the 10th day of March 1862, on which day the certificates bear date; the amount of such interest in each case was included in the award.

"In cases of deaths and personal injuries arising from said riot a gross sum was allowed in full, as of said 10th day of March.

"In all other cases, the claims being mostly of long standing,

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and for large amounts, 5 per cent interest was allowed, computed in all cases up to the 10th day of March aforesaid.

Opinions.

"The opinions which have been given by the respective commissioners and by his honor the umpire are filed with the papers in the cases in which they were given. The constant pressure upon our time, however, has rendered it impossible for the commissioners to write out elaborate opinions, except perhaps in a very few cases at the commencement of our labors.

Contested Awards.

"The certificates required by the third article of the convention have been executed by the commissioners and deposited with the Secretary of State, except in the following cases, viz:

"No. 9. John D. Danels.

"No. 12. R. W. Gibbes.

"No. 25. Ship *Good Return*, Seth Driggs, claimant.

"No. 26. Brig *Medea*, Seth Driggs, claimant.

"No. 80. *La Constancia*, Pond & Mason, administrators.

"In these five cases the honorable commissioner from New Granada declined to sign the certificates, for reasons set forth in his protest, entered in the journal of the board after the proceedings of the last day of its session.

"A counter protest from the commissioner on the part of the United States will be found to follow it.

"Notwithstanding the protest, the commissioner on the part of the United States thought it his duty to sign the certificates in said five cases, and has done so accordingly, and they have been filed as above.

"The first sentence of the seventh section of the 'Act to carry into effect conventions between the United States and the republics of New Granada and Costa Rica' was not understood by this board, and therefore no attempt has been made to comply with its terms.[1]

"A copy of the rules and regulations adopted by the board in pursuance of the fourth section of the act aforesaid will be found recorded in the journal of the board.

Insufficiency of Time.

"It is greatly to be regretted that the business before the board and ready for its action could not have been disposed of within the nine months allowed by the convention. It is but just, however, to say that after allowing to the claimants and also to New Granada the length of time which seemed necessary for each, the time which remained was not sufficient to enable the commissioners to give to all the cases submitted to them that thorough and perfect examination which was desirable, and

[1] The sentence in question provided that "all acknowledgments of indebtedness on the part of the Government of New Granada to claimants, being established by the award of the board of commissioners, shall be delivered to the Government of the United States, and made payable thereto." This phrase seems merely to have meant that all certificates of award issued by the commission should be delivered, etc. (12 Stats. at L. 145.)

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which seemed due to the claimants, to New Granada, and to the characters of the commissioners themselves.

"The board early apprehended that such might be the final result. Acting under that apprehension, the commissioner on the part of the United States, as early in November as the middle of the month, urged that the preliminary questions arising under the convention, first in regard to the question whether the liability of New Granada was acknowledged to be absolute by the terms of the convention, and second in regard to the necessity of the presentment of claims growing out of the Panama riot, prior to the 1st day of September 1859, might be finally disposed of in that month, and the calling of the calendar commenced on the 1st of December; and the commissioner on the part of the United States drew up and the board adopted a resolution to commence the calling of the calendar at the time above mentioned. But the preliminary questions were not yet decided on the 1st day of December, owing mainly to the fact that the counsel for New Granada so long postponed the argument; the final decision was further delayed because the opinion of the honorable commissioner on the part of New Granada was not ready for the umpire, on the appeal, on the question of liability, at the time agreed upon, viz, December 7, nor until five days thereafter. The opinion of the commissioner on the part of the United States was in the hands of the secretary for the umpire on the day specified.

"The question of liability was settled by the umpire on or about the 14th day of December. On the 19th day of December the commissioner on the part of the United States drew up and offered the first resolution, in schedule (E) hereto annexed, which was adopted by the board, and under which the board proceeded till some time in January, when the commissioner on the part of the United States offered another resolution that the board should call six cases each day thereafter. This resolution also was adopted, and under its operation the board went through the calendar the first time prior to the 1st day of February.

"On the 28th day of January and the 14th day of February the commissioner on the part of the United States offered the second and third resolutions in said schedule (E), which were adopted and acted upon by the board.

"The resolutions above referred to were all adopted by the commissioner on the part of the United States, with a view to accelerating the progress of the business on the calendar of the board, and as he recollects were the only resolutions offered for that purpose.

"On Monday, the 16th day of December, the commissioner on the part of the United States informed his honorable colleague that he had examined the first twenty-two cases on the calendar, and was prepared to discuss them with him. On the

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following Thursday the honorable the commissioner on the part of New Granada remarked that he had examined five cases, but unfortunately he had left all the papers at his house, and therefore they could not be then examined further.

"As early as the 1st day of February the commissioner on the part of the United States had examined all the cases then on the calendar, growing out of the Panama riot, except the three cases of the Panama Railroad and the Atlantic and Pacific Steamship companies (which had not then been fully argued), and was prepared to agree or disagree upon them, and so informed the honorable commissioner from New Granada. Within two days from that day more than sixty new cases were added to the calendar, and by the 15th day of February the commissioner on the part of the United States had examined all of them, and so advised his honorable colleague, and that he was prepared to decide them.

"From the middle of December till the close of the commission, the commissioner on the part of the United States was always far in advance of the commissioner on the part of New Granada in the examination of the cases on the calendar, and during all the time this was well understood by the honorable the commissioner from New Granada, and as a general rule the cases growing out of the Panama riot were each day discussed as far and as fast as the last-mentioned commissioner had examined them.

"On the morning of the 8th instant, the commissioner on the part of the United States caused a note to be delivered to the honorable commissioner from New Granada, advising him that the commissioner on the part of the United States was then prepared to decide all the Panama cases, except the three above mentioned, and in case the commission should not be extended that day, that he would be ready in the evening to agree or disagree in all the cases on the calendar.

"A copy of this note, with the reply to it, will be found in the journal of the proceedings of this board.

"The commissioner on the part of the United States has examined all the cases on the calendar with a considerable degree of care (unless it be the last two cases entered on the 1st day of March, Nos. 214 and 215), and was prepared some days before the close of the session of the board to make his decisions in them. He ought, however, to add that, had the existence of the commission been continued he should have examined more thoroughly than he has yet been able to do all the more important cases not yet decided, and should have given some further attention to each of the cases now left on the calendar.

"Brief as was the time allowed to the board, the commissioner on the part of the United States has, as far as was in his power, endeavored to dispose of all the cases on the calendar within the nine months allowed by the terms of the convention.

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"The undersigned regrets the necessity which seems to require him to allude so fully to this subject, but he thinks that justice to himself and the duty which he owes to his government demand that he should say thus much.

Records of the Commission.

"Agreeably to the provisions of the fifth section of the act aforesaid, I transmit herewith, to be deposited in the Department of State:

"First. The journal of all the proceedings of the board.

"Second. The docket of the claims which have been presented to the board under the said convention, and also of the awards which have been made by the commissioners and of those made by the umpire.

"Third. The two calendars of cases which were made for the use of the board and of the counsel.

"Fourth. All the various records, documents, and papers which have been transmitted to the board from the Department of State, and such memorials and other papers and proofs as have been filed by the respective claimants with this board and also those filed on the part of New Granada.

"In closing this report, permit me, sir, to express to you my high appreciation of the eminent ability, patience, and impartiality with which the honorable umpire has discharged his important, difficult, and delicate duties, and also of the fidelity and constant and careful attention both of the secretary and clerk of the board.

"I have the honor of presenting to Mr. Seward the assurance of my highest personal regards, and remain,

"His obedient servant,

"E. W. LEAVENWORTH,

"*Commissioner on the part of the United States.*"[1]

[1] The act of February 20, 1861 (12 Stats. at L. 145), passed to carry the convention into effect, allowed compensation to the American commissioner at the rate of $2,500 a year, and authorized the President of the United States to provide for contingent expenses. Mr. Leavenworth presented a bill for the expenses of traveling to and from Washington, hack and carriage hire, washing, boarding at hotels, rent of rooms, postage, and stationery. The Attorney-General held that such things were personal expenses, to be paid out of the commissioner's salary, and not in any sense "contingent" expenses. A public officer might, so the Attorney-General held, incur similar expenses of a contingent nature, because they were extraordinary, unforseen, and therefore strictly contingent and incurred, not for personal benefit, but in the public service. But mere living expenses of a person in the public service did not come within this category. (Bates, At.-Gen. 10 Op. 216.)

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(A)

Awards for claimants by the commissioners.

Calendar No.			
No.	1.	Joseph B. Myers	$609.22
No.	2.	Ralph Granger	1,353.83
No.	3.	Elias G. Granger	1,624.60
No.	5.	Alonzo E. Horton	203.07
No.	7.	Paul W. Sherman	338.46
No.	10.	Charles G. Ernest	473.84
No.	11.	Wm. Van Vlear	270.77
No.	13.	Frederick Nottemeyer	304.61
No.	14.	Mrs. P. E. Rogers	203.07
No.	16.	James R. W. Sellwood	697.22
No.	17.	John Selwood for injuries $5,000.00	
		John Selwood for property 3,708.15	
			8,708.15
No.	20.	Lazarus Dinkelspiel	476.22
No.	21.	Calvin R. Ralph	400 00
No.	22.	Mary Ann Tilley, death of two sons	8,560.00
No.	23.	Laurentine H. Burlison	86.65
No.	24.	Lescrite J. Allen	94.77
No.	31.	Joseph A. Linscott, administrator, etc., for the death of Wm. L. Dickey	5,000.00
No.	40.	George Powell, injuries 2,000.00	
		George Powell for property 108.31	
			2,108.31
No.	43A.	Milton W. Bean for injuries 2,500.00	
		Milton W. Bean for property 135.38	
			2,635.38
No.	49.	Panama Railroad Company	2,351.80
No.	55.	Fessenden N. Otis	270.77
No.	56.	Jacob G. Frey, as administrator of Jacob J. Frey, for his death	5,000.00
No.	57.	Richard W. Warrington	203.07
No.	58.	Abner Peirson	135.38
No.	59.	Joseph M. Parker, for injuries	2,500.00
No.	65.	Edwin Children	189.54
No.	68.	Daniel H. Budd	303.94
No.	69.	Curtiss N. Coe	67.69
No.	72.	George S. Dana	1,353.83
No.	73.	Daniel White	123.88
No.	74.	The Pacific Mail Steamship Company	679.50
No.	76.	Jonathan Freeman	54.15
No.	82.	Mary L. Pexton, for injuries	1,000.00
No.	83.	Alexander J. McDonald	406.15
No.	84.	William Pierce	90.70
No.	86.	John Hill, for injuries	500.00
No.	96.	Samuel A. Harvey	80.56
No.	99.	Dr. John P. Riley	609.22
No.	105.	Edward M. Dietz	101.54
No.	108.	Isaac N. Thompson, injury	2,000.00
No.	111.	Eliza S. Orr	406.15
No.	112.	Harriet Vance	169.23
No.	113.	Sarah Hunter	135.38
No.	114.	Robert Marks, by James Marks, his administrator, for his death	5,000.00
No.	120.	James O'Conner	203.07
No.	126.	John Turner, for injuries	3,050.00
No.	129.	Mrs. Anna Aikin	270.77
No.	133.	John Lewis, death of his son, Moses	5,000 00
		John Lewis, for property	406.15

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Calendar No.		
No. 135.	Bridget Williams, administratrix of Patrick S. O'Neil, for his death	$5,000.00
No. 142.	Dr. Thomas C. Barker	609.22
No. 212.	The schooner *Mechanic*, Amos B. Corwine, assignee	27,337.34
		99,757.21

Amount awarded for the death of seven persons in six of the above cases, Nos. 22, 31, 56, 114, 133, and 135	$33,500.00	
Amount awarded for injuries in eight of the above cases, being Nos. 17, 40, 43A, 59, 82, 86, 108, and 126.	18,550.00	
Amount awarded for the seizure and confiscation of a portion of the cargo of the schooner *Mechanic*	27,337.21	
Amount awarded for property in the remaining thirty-six cases, all arising from the Panama riot, and in cases Nos. 17, 40, and 43, in which amounts were also allowed for personal injuries	20,370.00	
		99,757.21

(B.)

Claims disallowed by the board.

Calendar No.	
No. 4.	Erastus Horton.
No. 8.	Cornelius Fitzgerald.
No. 15.	Wm. O'Donnell.
No. 19.	Susan Hilton.
No. 28.	Thomas Brix.
No. 30.	James Cox.
No. 35.	Brig *Native*, Seth Driggs, claimant.
No. 36.	Mary L. McFarland, administratrix.
No. 37.	M. A. Dougherty, administrator of Wm. H. Hunter.
No. 38.	Edward Allen.
No. 39.	Lorenzo F. Furqinson.
No. 41.	John McAlister.
No. 42.	Joseph Lestracle.
No. 43.	B. Thomas Hudson.
No. 47.	B. C. Verdernon.
No. 48.	Isaac Kempher.
No. 51.	John Kempher.
No. 60.	Clement Oatman.
No. 62.	Hugh Miller.
No. 67.	Thomas O'Rourke.
No. 70.	Benjamin Collins.
No. 77.	Ira E. Oatman.
No. 79.	Frederick W. Atwater.
No. 85.	Lewis Ressell.
No. 88.	Erving Edson.
No. 91.	Fanny Bastel.
No. 92.	Flora King.
No. 93.	John Hawthorne.
No. 95.	Fanny Bossiere, administratrix of P. S. Bossiere.
No. 98.	Schooner *Economy*, Peter Bosquet, claimant.
No. 100.	Mary L. Willis, administratrix of L. M. Willis.
No. 101.	David J. Fisher.
No. 102.	James McAlear.
No. 106.	Dennis M. Shannon.
No. 107.	Patrick H. Hogan.
No. 130.	John L. Oiler.
No. 131.	H. B. Laranay.
No. 132.	Samuel Carpenter.

In all, thirty-eight cases.

Nos. 4, 8, 15, 19, 30, 62, 67, 70, 85, 88, 93, 95, 98, 130, 131, and 132 were rejected because the proofs were unsatisfactory.

Nos. 28, 36, 37, 38, 39, 41, 42, and 47 were rejected because they were not American claims.

Nos. 43B, 48, 51, 79, 91, 92, 100, 101, 102, 106, and 107 were rejected because not presented prior to September 1, 1859, and the last five—100, 101, 102, 106, and 107—were not regarded as *bona fide*.

Nos. 60 and 77 were rejected because the facts sworn to did not constitute a claim, and there was want of proof. No. 35 was not within the treaty.

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(C.)

Awards made by the umpire, the Hon. Nathaniel G. Upham.

No. 6.	Neils Nelson		$663.22
No. 9.	John D. Daniels		92,787.67
No. 12.	R. W. Gibbes		6,952.60
No. 18.	James O'Donnell		250.00
No. 25.	Ship *Good Return*		44,291.78
No. 26.	Brig *Medea*		43,347.49
No. 29.	Catherine J. Phillips, for injuries		3,000.00
No. 33.	A. W. Fenner, for injuries		5,000.00
No. 44.	Deborah B. Wasgatt, administratrix, for the death of her husband Aaron Wasgatt.	$5,000.00	
	And for property	500.00	
			5,500.00
No. 45.	Timothy Sweet, administrator, etc., for death of Alanson Sweet	5,000.00	
	And for property	300.00	
			5,300.00
No. 50.	Peter Franks, John Brand, administrator, for death of Franks	5,000.00	
	And for property	250.00	
			5,250.00
No. 52.	James J. Erving, injuries	2,000.00	
	For property	800.00	
			2,800.00
No. 53.	Burley B. Barney, administrator, for death of Nathan G. Prebbles	5,000.00	
	For property	262.00	
			5,262.00
No. 54.	James O. Stokes, administrator, etc., for the death of Joseph Stokes		5,000.00
No. 78.	Peter W. Putnam, injuries and property		4,500.00
No. 80.	*La Constancia*, Pond & Mason administrators		146,508.50
No. 87.	Sarah Ann Beatty, administratrix for death of George Beatty		5,000.00
No. 94.	August Douglass		1,580.00
No. 103.	George W. Chamberlain		1,500.00
No. 109.	Alexander Reiter		635.00
No. 137.	Victor Denver, Michael Rennur, administrator, for death of Victor	$5,000.00	
	And for property	900.00	
			5,900.00
No. 138.	For death of Bernard Denner	5,000.00	
	And for his property	850.00	
			5,850.00
			396,878.26

Amount awarded for the death of eight persons in cases Nos. 44, 45, 50, 53, 54, 87, 137, and 138	40,000.00
Amount awarded for injuries in cases Nos. 29, 33, 52, and 78, calling No. 78 one-half for injury and one-half to property	12,250.00
Amount awarded for property in cases Nos. 6, 18, 94, 103, and 109, and in six of the cases where awards were made for deaths and in two of the cases where awards were made for injuries, Nos. 52 and 75, all inclusive	10,740.22
Amount awarded R. W. Gibbes in No. 12 on a Colombian bond.	6,952.60
Total	69,942.82
leaving the sum of	326,935.44

awarded for the seizure and confiscation of vessels and their cargoes in cases Nos. 9, 25, 26, and 80.

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Amount awarded by commissioners for deaths caused at the Panama riot	$33,500.00	
Do. by the umpire, in all fifteen persons	40,000.00	
Total awarded for deaths		$73,500.00
Amount awarded by commissioners for injuries to persons at the Panama riot, eight cases	$18,550.00	
Do. by umpire, four cases	12,250.00	
Total awarded for injuries		30,800.00
Amount awarded by the commissioners in thirty-six cases for property, tort, at the Panama riot	$19,970.00	
Do. by umpire	10,740.22	
Total awarded for property		30,710.22
Amount awarded as above by the umpire to R. W. Gibbes		6,952.60
Awarded by the commissioners in case No. 212, for part of cargo, etc	$27,337.21	
Amount awarded in Nos. 9, 25, 26, and 80	326,935.44	
Total amount awarded for the seizure and confiscation of vessels and their cargoes		354,272.65
Total amount awarded for fifteen deaths at the Panama riot, embraced in fourteen memorials		73,500.00
Total amount awarded for injuries in twelve cases		30,800.00
Total amount awarded for the property lost in forty cases, including also the property lost by those who were killed and by those who were wounded		30,710.22
Total amount awarded for damages growing out of the Panama riot		135,010.22
Total amount awarded for the seizure and confiscation of vessels or cargoes, or both		354,272.65
Amount of award to R. W. Gibbes		6,952.60
Total of all the awards by commissioners and umpire in seventy-three cases		496,235.47

(D.)

Cases not decided by the board, nor by the umpire.

No. 27. The brig *Frederick*.
No. 32. Henry Eckford, J. H. De Kay, administrator.
No. 34. Brig *Fanny*, Seth Driggs, claimant.
No. 46. Theodore J. De Sabla.
No. 49. The Panama Railroad Company.
No. 61. Wallace W. Williams.
No. 61B. James Peterson, steamer *Quickstep*.
No. 63. Bradford W. Johnson.
No. 64. Samuel M. Waggoner.
No. 71. Joseph Tillison.
No. 74. Pacific Mail Steamship Company.
No. 75. United States Mail Steamship Company.
No. 81. Schooner *Ben Alam*, W. & D. Cotheal.
No. 89. Ziba P. Eastman.
No. 90. Mrs. T. G. Lambert.
No. 97. Mary L. Boyle.
No. 104. P. M. Scooffey.
No. 110. Palmer Orton.
No. 115. Charles E. Perry.
No. 116. Isaac B. Purdy.
No. 117. George W. Riggs and Joseph K. Riggs, administrators, etc.
No. 118. Hartley Gove.
No. 119. George E. Hoar.
No. 121. Thomas Lee.
No. 122. James Craig Colt.
No. 123. Mrs. Emily Gibbes, Robert M. Gibbes, trustee.
No. 124. Estate of Robert Oliver, Robert M. Gibbes, executor.
No. 125. Isaac Snow.
No. 127. John Harding.
No. 128. Daniel M. Perine.
No. 134. Robt. and Thos. H. Oliver. James Craig Colt, attorney.
No. 136. Augustus C. Fretz.

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Cases not decided by the board, nor by the umpire—Continued.

No. 139. L. H. Sherman, P. Heald, administrator.
No. 140. Margaret O. Shiff.
No. 141. Robert O. Colt.
No. 143. John A. Moore.
No. 144. Harvey T. Lee.
No. 145. James Chapman.
No. 146. C. D. Holdsclaw.
No. 147. J. E. Stevens.
No. 148A. H. Winchester.
No. 148B. Brig *America*.
No. 149. E. M. Day.
No. 150. Benjamin Green.
No. 151. P. H. Winfield.
No. 152. Alfred Freeman.
No. 153. Wm. H. Stone.
No. 154. E. P. Willis.
No. 155. Joseph Brindley.
No. 156. Michael Scott.
No. 157. Elizabeth Gray.
No. 158. Bridget Kellery.
No. 159. Sarah F. and J. L. Clark.
No. 160. Mrs. Mary M. Neeve.
No. 161. Jemima L. Willson.
No. 162. E. F. Blaisdell.
No. 163. George Myer.
No. 164. James McLaughlin.
No. 165. Robert Smith.
No. 166. Mary C. Condon.
No. 167. Joseph Munson.
No. 168. Wm. L. Patterson.
No. 169. John Colton.
No. 170. John Smith.
No. 171. A. T. Tysee.
No. 172. Ridgley Greathouse.
No. 173. Wm. C. Beston.
No. 174. Stephen Hill, jr.
No. 175. Philo Olmstead.
No. 176. C. and George Gross.
No. 177. James McCreary.
No. 178. R. E. B. Wilcox.
No. 179. E. D. Bronson.
No. 180. R. G. Lane.
No. 181. Nathan B. Kendall.
No. 182. Thomas H. Foss.
No. 183. Wm. T. Davis.
No. 184. George M. Rowe.
No. 185. Joseph Mosher.
No. 186. Lafayette Hachett.
No. 187. N. W. Hall.
No. 188. Wm. Coppens.
No. 189. Wm. Jocelyn.
No. 190. Conrad Luckett.
No. 191. Mrs. L. C. Baker.
No. 192. C. H. Hardy.
No. 193. Joseph Maloon.
No. 194. Samuel J. Goodrich.
No. 195. John D. Harvey.
No. 196. Catherine Fay.
No. 197. Thomas B. Stanley.
No. 198. C. F. Williams.
No. 199. Jacob L. Peebles.
No. 200. Richard Ireland.
No. 201. Robert McLeese.
No. 202. Wm. Patterson.
No. 203. C. F. Lee.
No. 204. Sarah Fay.
No. 205. George W. Lowery.
No. 206. Mrs. A. M. Barrow.
No. 207. Wm. P. Wilkins.
No. 208. Catherine Kelley.
No. 209. James J. Fisher.
No. 210. Seth Lore.
No. 211. Charles A. Walker.
No. 214. Brig *Marcelino*, Amos B. Corwine, attorney for Townsend Scudder, assignee.
No. 215. Brig *New Granada*, A. B. Corwine, attorney for Townsend Scudder, assignee.

(E.)

OFFICE OF JOINT COMMISSION OF UNITED STATES AND NEW GRANADA,
Washington.

Resolved, That on Monday next the first eight cases on the calendar will be called, and on each succeeding day thereafter three cases will be called and, if, in any case, either of the parties is not ready to submit the same, it will be examined and decided without further hearing, unless for good cause the board shall otherwise order.

The calendar to be called at 11 o'clock of each day

By order of the board,

CHAS. W. DAVIS, *Secretary, etc.*

DECEMBER 19, 1861.

OFFICE OF JOINT COMMISSION OF UNITED STATES AND NEW GRANADA,
Washington, January 28, 1862.

Resolved, That on Monday morning February 3, at 11 a. m., the board will commence to call the calendar again and for the last time; that all cases

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not ready will go to the foot of the calendar, and if not ready when there reached will be examined and decided without being heard.

The board will proceed with the hearing of cases each morning at 11 a. m.

By order of the board,

CHAS. W. DAVIS, *Secretary.*

Resolved, That cases not argued nor submitted on written briefs on the 1st day of March next, shall be decided by the board on examination.

CHAS. W. DAVIS, *Secretary.*

FEBRUARY 14, 1862.

NOVEMBER 14, 1861.

Ordered, That on the first Monday in December next, the calling of the calendar will be commenced in its order, and cases in which the counsel for the claimants are not prepared will be placed at the foot of the calendar, unless for good and satisfactory reasons the board may otherwise order.

II. CONVENTION OF 1864.

New Commission.

In a note to General Herran of March 10, 1862, Mr. Seward proposed that the commission under the convention of 1857 should provisionally continue its sessions, on condition that, if the Government of New Granada should accept the resolution of the Senate "literally," its proceedings should be valid, but otherwise "null and of no effect."[1] General Herran seemed to be apprehensive lest under the resolution of the Senate new claims might be presented. He also discovered other difficulties in the way of accepting the resolution; and a correspondence ensued between him and Mr. Seward. This correspondence General Herran transmitted to his government, but its reception was delayed by reason of its capture by insurgents.[2] The condition of affairs thus evidenced in Colombia resulted in the postponement of the negotiations, though Mr. Seward strongly urged the injustice suffered by those whose claims were not examined.[3] It was not till February 10, 1864, almost two years after the expiration of the former commission, that a new convention was concluded for the adjustment of the undecided cases. This convention was signed by Mr. Seward, on the part of the United States of America, and by Señor Manuel Murrillo, on the part of the United States of Colombia, the successor of New Granada under a new federal constitution. The ratifications were exchanged August 19, 1865. Reciting that the commission organized under the convention of 1857, "did fail, by reason of uncontrollable circumstances," to decide

[1] MSS. Dept. of State.

[2] General Herran to Mr. Seward, October 6, 1862, MSS. Dept. of State.

[3] Mr. Seward to General Herran, December 16, 1862, MSS. Dept. of State.

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all the claims before it, it provided for the revival of the stipulations of that convention except that the time for the examination of claims was extended for a period not to exceed nine months from the exchange of the ratifications of the new convention, and that new commissioners and a new umpire were required to be appointed.

Meeting of the New Commission.

The commission under the new convention met in Washington August 24, 1865. On the part of the United States the commissioner was Mr. Thomas Biddle; on the part of Colombia, Gen. Eustorjio Salgar. Mr. Charles W. Davis was, on motion of General Salgar, made secretary of the commission. The commissioners caused their commissions and oaths to be entered in the journal, and directed the secretary to inform Mr. Seward, as Secretary of State, of the organization of the commission, and to request him to order all such books and papers, then on file in the Department of State, as might be necessary to the discharge of the duties of the commission, to be sent to it.

The rules and regulations of the commission under the treaty of 1857 were adopted, subject to such modifications as the commissioners might subsequently make. The secretary was authorized to appoint a clerk to assist him in the discharge of his duties, and a messenger for the service of the commission. The commissioners also directed the secretary to publish the fact of the organization of the board in the newspapers.

Mr. James Mandeville Carlisle appeared as counsel for Colombia; and it was ordered that the secretary facilitate him in the performance of his duties by giving him access to all books and papers which he might require to examine.

Selection of an Umpire.

November 20, 1865, the commissioners wrote to the Commander Joseph Bertinatti, envoy extraordinary and minister plenipotentiary of His Majesty the King of Italy, requesting him to act as umpire; but on the 22d of November he appeared before the commissioners and declined the appointment.

On the 23d of November the commissioners selected as umpire Sir Frederick W. A. Bruce, then British minister at Washington, and on the following day he accepted.

The "Umpire Cases."

It has been seen that there were five awards rendered by Mr. Upham as umpire under the convention of 1857, the regularity of which Colombia contested, and which the Colombian commissioner,

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Mr. Hurtado, refused to sign. The cases in which these awards were rendered were commonly known as the "Umpire cases," and the controversy in regard to them forms an important incident in the history of the two commissions. The list of the disputed awards was as follows:

No. 80. *La Constancia*	$146,508.50
No. 25. Ship *Good Return*	44,291.78
No. 26. Brig *Medea*	43,347.49
No. 9. John D. Danels, deceased; B. D. Danels, administrator	92,787.67
No. 12. R. W. Gibbes	6,952.60
Total	333,888.04

The first four cases grew out of the war of the Spanish colonies in America for independence, and were associated both in origin and in principle, the chief question at issue being the right of the claimants to the protection of the United States in respect of losses and injuries incurred in the course of unneutral transactions. The case of Gibbes was different, being a claim for the value of a Colombian bond.

Of the five cases in question, that of Gibbes was the first to be submitted to the umpire. It was taken up by the commissioners for consideration February 3, 1862. On the 5th of the same month it was submitted to the umpire, the secretary making in the journal the following entry:

"The case of Robert W. Gibbes, No. 12, was called, having been submitted by Mr. Causten, counsel for claimant, some time since on the papers. Mr. Carlisle, after making some remarks in opposition to the claim, submitted the case. Mr. Hurtado presented his opinion verbally in relation to the claim, and was replied to by Mr. Leavenworth. The case was then submitted to the umpire for his decision, he being present at the trial."

The cases of the *Medea* and *Good Return* and that of John D. Danels were transmitted by the secretary to the umpire February 18, 1862.[1]

[1] The journal contained the following entries in these cases: November 14, 1861, "Mr. W. S. Cox, as counsel in the case of J. D. Danels, filed his argument in reference to the said claim." December 24, 1861, "The following cases were called by the board: No. 9, J. D. Danels, etc.; No. 12, R. W. Gibbes, etc. Mr. Carlisle submitted his argument in each of the above-named cases except R. W. Gibbes, which was postponed by consent of counsel." January 27, 1862, "Mr. Carlisle read an argument against the claims arising out of the cases known as the *Good Return* and *Medea*, Nos. 25 and 26, and which, by consent of counsel, had been appointed for

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They were communicated with the following letter:

"OFFICE OF JOINT COMMISSION OF
"UNITED STATES AND NEW GRANADA,
"*Washington, February 18, 1862.*

"SIR: At a meeting of the board held this day it was ordered that the secretary inform you that the commissioners had disagreed in the cases of the *Good Return*, *Medea*, and J. D. Danels, and to send papers for your examination, and to ask your decision in said cases. The following is a list of papers sent you this day, for which you will please acknowledge receipt:

"Memorial of J. D. Danels.

"Three arguments of counsel for claimant in Danels case.

"Two printed arguments of J. M. Carlisle.

"Opinion of J. M. Hurtado in Danels case.

"Printed argument of J. M. Carlisle in the *Good Return* and *Medea* cases.

"The opinion of Mr. Leavenworth in the above cases and the papers in the *Good Return* and *Medea* were delivered to you in Washington.

"I am, sir, your obedient servant,

"CHAS. W. DAVIS, *Secretary.*"

In the case of the *Constancia* there appears on Sunday, March 2, 1862, the last day of the commission, the following entry:

"The commissioners disagreed in the case of the *La Constancia*. Mr. Leavenworth presented his written brief in this case to the umpire."

On March 7, 1862, two days before the close of the commission, Mr. Upham filed in the cases of the *Medea* and *Good Return* an opinion in which he held that the claimants might appear before the board and recover damages as citizens of the United States. He gave no opinion as to the amount that should be allowed. But at some time on the 9th of March he communicated to the secretary the following paper, which was subsequently entered in the journal:[1]

discussion on Saturday last, the 25th. After the conclusion of Mr. Carlisle's argument, Messrs. Eames and Walter S. Cox replied orally, the former gentleman reserving to himself the privilege of filing a brief within a few days, if upon reflection he should deem it necessary." February 18, 1862, "The commissioners having disagreed in their opinions in reference to the claims of Seth Driggs (*Good Return* and *Medea*), and also the Danels case, it was ordered that the secretary forward to the umpire, for his examination and decision, the arguments of counsel for both parties in the said cases, and also the opinions of the commissioners."

[1] The journal contains the following entry: "March 10, 1862. The board met and, the proceedings of the last preceding meeting not being entered upon the journal, adjourned."

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"To CHARLES W. DAVIS, esq., secretary of the Joint Commission of Claims between the United States and New Granada:

"The umpire reports awards made in cases submitted to him as follows:

"No. 26. *Medea*, thirteen thousand six hundred and ninety-five dollars, with interest thereon from November 19, 1818.

"No 25. *Good Return*, fourteen thousand dollars, with interest thereon from November 30, 1818.

"No. 9. John D. Danels, fifty thousand dollars, with interest thereon from January 27, 1845.

"No. 80. *Constancia*, forty-six thousand three hundred and seventy-three dollars and fifty cents, with interest from January 1, 1819.

"No. 12. R. W. Gibbes, twenty-five hundred dollars, with interest from July 26, 1826.

"In the above cases interest to be taxed at 5 per cent agreeably to the order of the commissioners.

"March 9, 1862.

"N. G. UPHAM."

March 11, 1862, the board, so the journal reads, "met at the usual hour to hear the proceedings of the last meeting read and to approve or correct them on the journal." The journal as then extended contained, under date of March 9, the following entry:

"To CHARLES W. DAVIS, esq., secretary of the Joint Commission of Claims between the United States and New Granada:

"The umpire reports awards made in cases submitted to him as follows:

"No. 26.	Brig *Medea*	$13,695.00
	Interest from November 19, 1818	29,652.49
		43,347.49
"No. 25.	Ship *Good Return*	14,000.00
	Interest from November 30, 1818	30,291.78
		44,291.78
"No. 9.	John D. Danels	50,000.00
	Interest from January 27, 1845	42,787.67
		92,787.67
"No. 80.	*La Constancia*	46,373.50
	Interest from January 1, 1819	100,135.00
		146,508.50
"No. 12.	R. W. Gibbes	2,500.00
	Interest from July 26, 1826	4,452.60
		6,952.60

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"In the above cases interest to be taxed at 5 per cent, agreeably to the order of the commissioners.

"March 9, 1862.

"N. G. UPHAM."

Protest of Mr. Hurtado.

After the reading of the journal Mr. Hurtado presented the following protest:

"Upon the awards of the umpire in cases Nos. 9, 12, 25, 26, and 80 being read by the secretary, Mr. Hurtado, the commissioner from New Granada, observed that he for the first time learned that these cases had been finally decided upon by the umpire; and first with respect to the case of Gibbes, No. 12, that it had only been submitted to the umpire on the question of the nationality of Weyman, the original claimant, and as to whether the document on which the claim was preferred established any indebtedness on the part of Colombia. But the question as to what that amount should be, if the liability of Colombia was established, was never submitted to the umpire, notwithstanding that he has decided it. This objection, Mr. Hurtado observed, was not immaterial; if he had had an opportunity to state his views as to the amount of indebtedness, established by the document, after the liability had been determined, he would have shown that the amount stated in the document was in Colombian dollars, which were only worth about eighty cents of a dollar, United States currency, each, and he would besides have shown that the document, if construed with an obligation to pay, did not bear interest.

"That with respect to the awards made by Mr. Upham, the umpire, on the other claims mentioned, viz, Nos. 9, 25, 26, and 80, Mr. Hurtado hereby protests in the name of the Government of New Granada, as having been made in disregard of the express stipulations of Article II. of the convention which requires that the subject of difference between the commissioners shall be referred to the umpire and the commissioners heard; and Mr. Hurtado declares that he has never referred to the umpire other questions bearing on the claims above last mentioned, except such as were stated in his brief of the ——— in the case of John D. Danels, which bore on points of jurisdiction and the standing before this board of that claimant and of those represented in the *Medea* and *Good Return*, etc., cases. That the New Granadian commissioner reserved to himself the right to enter upon and expose the merits of each case, should the positions taken by him be decided in an adverse manner; and for what he now states he refers to the final part of his opinion above quoted. That therefore, inasmuch as the awards in cases Nos. 9, 25, 26, and 80, and also in No. 12, have been given without the New Granadian commissioner having been heard on the merits of these questions, but only in points of jurisdiction, said decisions or awards are, in the

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opinion of Mr. Hurtado, null and void according to the stipulations of the treaty and to the universal principle of justice that no party can be condemned before having been heard in defense.

"The commissioner from New Granada therefore protests against the said awards or any responsibility accruing therefrom against the Government of New Granada.

"Mr. Hurtado after having made the above statement said he would respectfully propose to the honorable the umpire to withdraw the awards entered in Nos. 12, 9, 25, 26, and 80 for reconsideration of the respective cases at some future time, and also he reserved to himself the right further to protest against such awards if need be.

"J. M. HURTADO."

Mr. Leavenworth's Counter Protest.

On a subsequent day Mr. Leavenworth communicated to the secretary a counter protest, dated the 11th of March, which was as follows:

"Mr. Leavenworth, the commissioner on the part of the United States, in answer to the foregoing protest from the honorable commissioner on the part of New Granada, desires to state: That in regard to the case of R. W. Gibbes, No. 12 on the calendar, it was *fully* argued by the counsel of New Granada, Mr. Carlisle, before the commissioners and in the presence of the umpire on the 5th day of February last, the case having been previously submitted on the part of the claimant by his counsel, Mr. Causten. After the close of the argument of Mr. Carlisle it was agreed by and between the respective commissioners to submit the cases to the umpire at that time upon oral arguments. The case was then *fully* argued by the respective commissioners, at very considerable length, and on all the points which they chose to raise, and was then and there *fully* submitted to the umpire for his decision. There was no intimation given, either by the counsel or by the honorable commissioner on the part of New Granada, or by anyone, that the argument or submission was limited to a question of jurisdiction or to any preliminary question whatever. * * * Not only is this the recollection of the umpire, the secretary, and the commissioner on the part of the United States, but the same is most amply shown by the records of the commission, which under date of February 5, 1862, contain the following: [*Supra*, 1398.] These records have, each morning, invariably been carefully read by the secretary to the commissioners, who have, I think, never failed to listen to them, and they have been recorded as approved. It is true that no question was raised in the argument as to the amount of damages, or the payment of interest, but the amount was specified in dollars in the bond or instrument upon which the claim was founded, and left no question on that point, and till *now* there was never any question in regard to interest. * * *

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"In regard to the following cases, No. 9, John D. Danels; No. 25, the ship *Good Return;* No. 26, the brig *Medea*, and No. 80, the *La Constancia*, in relation to which the honorable commissioner from New Grenada protests that 'he has never referred to the umpire other questions bearing on the claims above last mentioned except such as were stated in his brief on the case of John D. Danels, which bore on points of jurisdiction,' I reply, First. That the commissioner on the part of the United States never so understood the reference of them to the umpire, nor did he ever understand that there was any limitation whatever in such reference of the above cases. Secondly. Such also is the understanding of the secretary of of the board, and of the honorable the umpire himself. Thirdly. The cases were severally *fully* argued on *all* points by the counsel on the part of the claimants, and also by the counsel for New Granada, and were finally submitted to the board of commissioners. Fourthly. That the commissioner on the part of the United States understood that these cases were fully submitted to the umpire is evident from the fact that in his argument presented in writing to the honorable the umpire he has examined the cases fully on their merits, and submitted them to the final arbitrament of the umpire, and specified the amounts which he claimed should be awarded. But, fifthly, were there room for any serious question on this point, it seems to be fully and satisfactorily settled by the records of the commission.

"Under the date of January 27, 1862, will be found the following entry: [*Supra*, 1398, note 1.] These arguments were not confined to any preliminary questions, but were very long and elaborate, and covered all the points of law and fact growing out of the cases. Under date of February 18, 1862, will be found the following entry: [*Supra*, 1898, note 1.] The arguments of the counsel on each side, covering the whole ground, and also the argument of the commissioner on the part of the United States, touching all the questions argued by the respective parties, were forwarded without delay, and soon after the argument of the honorable commissioner on the part of New Granada. The commissioner on the part of the United States insists that up to this time no intimation had been made from any quarter that the arguments on the reference to the honorable the umpire were confined to any preliminary questions.

"In relation to the *La Constancia*, the commissioner on the part of the United States remarks that this case was submitted to this board on the 25th day of February last, and that it involved the same questions, substantially, which arose in the cases of *Medea* and *Good Return*. The commissioners had already disagreed in those cases, and as early as from the first to the third of this month they formally disagreed in this case also, and the commissioner on the part of the United States on the 6th instant drew his brief in the same, which being

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mislaid was not handed to the umpire until the 9th instant, when the following entry was made in the minutes of the commission: 'The commissioners disagreeing in the case of *La Constancia*, Mr. Leavenworth presented his written brief in this case to the umpire.' This was done in the presence and hearing of the commissioner on the part of New Granada and without objection on his part, though his attention was called to the subject. This brief would have been handed to the honorable the umpire at an earlier day but that no new questions were raised in it and the umpire was constantly engaged during the week previous to the 9th instant with earlier cases, which had been previously referred to him. * * *

"The commissioner on the part of the United States further remarks that the honorable commissioner on the part of New Granada had been in no manner debarred from presenting his views in full in each of these cases. The honorable the umpire has been at all times ready to receive them and to give to them all needful attention. No particular form has been observed in the mode of presenting cases to the umpire. In a few cases a reference to the umpire has been entered upon the journal; the opinions of the commissioners have been handed to the secretary, and the fact of their delivery to the umpire also noted upon the journal. Sometimes an entry has been made that the commissioners had disagreed in one or more cases, and that the opinion of one or both the commissioners had been handed to the umpire. Sometimes the commissioners have disagreed and handed their opinions to the umpire at their convenience and no entry whatever has been made upon the journal. Cases which have gone up to the umpire in all these various ways have been decided by him and the awards entered up without objection from any quarter. No particular form of proceedings was required by the terms of the convention, by the law to carry it into effect, or by the rules and regulations of the board, and none were observed or asked for.

"It is not claimed on the part of the commissioner from New Granada that he disagreed from his colleague simply on the preliminary questions, or on a question of jurisdiction, in any one of the said cases; on the contrary, the commissioners discussed the cases fully on their merits, and without any such or any other limitations, and when they finally disagreed no intimation was made by the commissioner on the part of New Granada that any one of the five cases referred to was to go up to the umpire in any other manner than on the merits.

"It should also be observed in passing that the decisions in these cases by the honorable the umpire were delayed till the last day of the session of this board; that it was his imperative duty to decide the cases which were before him by the disagreement of the commissioners, and that had they been submitted to him on any preliminary questions it would have been a gross neglect of his duty to delay his decisions till the last day of the session and thereby render a final award impossible.

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"Mr. Leavenworth, as commissioner on the part of the United States, therefore insists on the entire validity of the awards made in the said five cases by the honorable the umpire on the perfect good faith which has characterized all the proceedings, and that the obligation of New Granada to perform and fulfill the said awards and each of them is in all respects perfect and undoubted.

"Washington, March 11, 1862.

"E. W. LEAVENWORTH,
"*Commissioner on the Part of the United States.*"

Statement of Mr. Upham.

With reference to the foregoing protest and counter protest, Mr. Upham filed the following paper:

STATEMENT OF THE UMPIRE.

"The attention of the umpire having been called to documents placed on record by the commissioners relative to the decisions of the umpire in certain cases therein specified, he herewith represents that the statement of the American commissioner with the records of the secretary conforms to his understanding of the facts. The New Granadian commissioner, in his views of the cases sent me, spoke of a question reserved, and that was that when the original capture was made Venezuela was an independent state and subsequently became a part of Colombia. I sent immediately for the facts on that question and received them. Arguments also, written and oral, were made on this subject, and I considered the cases fully submitted. Some remarks were made as to a hearing on the merits, but on the delivery of my opinion on the several points raised and submitted to me, the decision necessarily fixed the liability to the extent of money conceded to be received, and as no further measures were taken for a hearing, at the last moment, as the commission was expiring, I filed the awards. On the subsequent protest, as the commission had expired, it did not seem to me the cases could be opened again, except on an extension of the commission, when, perhaps for cause shown, it might be done.

"The design certainly was to give a full hearing as far as might be.

"March 11, 1862.

"N. G. UPHAM."

Diplomatic Discussion.

By Article III. of the convention of 1857 it was provided that the commissioners should issue to the claimants certificates of award which should bear interest at the rate of 6 per cent per annum, and that the aggregate amount of the sums awarded should be paid by New Granada to the United States at Washington,

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in equal semiannual installments, within eight years from the date of the first payment, which was to be made six months from the termination of the commission. But, in order to insure to claimants the prompt payment of what was due them, there was embodied in section 7 of the act of February 20, 1861,[1] passed by the Congress of the United States to give the convention effect, the following provision:

"That all acknowledgments of indebtedness on the part of the Government of New Granada to claimants, citizens of the United States, being established by the award of the board of commissioners, shall be delivered to the Government of the United States and made payable thereto, and the United States shall thereupon assume and pay to such claimants, at the Treasury, upon the certificate of the board of commissioners, whatsoever sums of money shall have been severally awarded them, the Government of the United States becoming thereby the creditor of the Government of New Granada for the aggregate of all sums so assumed and paid, and entitled to receive to that extent the payment stipulated and guaranteed under the third article of the convention."

On March 16, 1862, General Herran, with a view to determine the obligations of his own government, communicated to Mr. Seward a list of the awards made by the commissioners, and also a list of those made by the umpire and acquiesced in by the New Granadian commissioner. In acknowledging, on the 20th of March, the receipt of these lists, Mr. Seward remarked that he had not found in the list of the umpire's awards those made by him in the cases of Gibbes and Danels, and *La Constancia*, *Good Return*, and *Medea*, which "the journal of the commission" showed to have been "duly and regularly submitted to him by the commissioners of both governments," and added: "These awards, I have the honor to inform you, have been transmitted to the Treasury, with those bearing the certificates of both commissioners, and will be fully protected by the Government of the United States."[2] To this declaration General Herran replied that the cases in question were not included in his list, "because the umpire presumed to decide them, without authority, upon points which had not been submitted to him;" and he protested that if the United States should pay the claims, New Granada could not be held responsible for them.[3]

[1] 12 Stats. at L. 145.

[2] MSS. Dept. of State.

[3] General Herran to Mr. Seward, March 20, 1862, MSS. Dept. of State.

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Reservation of Payment.

Under these circumstances the Government of the United States reserved payment of the five awards,[1] and the payments of Colombia toward the extinguishment of its obligations were received "as a general credit upon the indebtedness" of that government, "without specific application to any installments which may have become due, and without fixing the precise amount of those installments until the aggregate of indemnity due to citizens of the United States under the convention [should] be definitely settled."[2] Owing to the prevalence of revolutionary disorders, the payments of Colombia were not always "entirely punctual."[3] At the same time the United States steadily maintained the validity of the awards.[4]

Submission to New Commission.

November 18, 1865, Attorney-General Speed advised Mr. Seward that it was evidently intended that the commission under the convention of 1864 should be a continuation of the commission under the convention of 1857; that the new commission had power "only to determine such claims as were presented to, and left undetermined by, the former joint commission;" and that in order to do this it "must of necessity determine what cases had been decided by the old commission."[5] With this opinion Mr. Seward duly acquainted the commission, saying that its consideration of the subject would not in the first instance "invoke the merits of the claims," but that if it should decide "that they were not lawfully allowed by the commissioners and arbiter under the convention of September 10, 1857," it would "then be the duty of the parties interested to have them again heard and decided by the present commission and arbiter."[6]

Cases of "La Constancia," "Good Return," "Medea," and John D. Danels.

February 17, 1865, Mr. Walter S. Cox, as counsel for the claimants in the cases of *La Constancia*, *Good Return*, *Medea*, and J. D. Danels—all the "umpire cases" except that of Gibbes—asked the commissioners to advise him as to when the question referred to them by the Secretary

[1] Mr. Seward to General Herran, December 16, 1862, MSS. Dept. of State.

[2] Mr. Seward to Mr. Parraga, March 19, 1864, MS. Notes to Colombia. See, also, Mr. Seward, Sec. of State, to Mr. Causten, Nov. 3, 1864; same to Mr. Corwin, July 20, 1865.

[3] Mr. Seward to Mr. Murillo, September 5, 1863, MS. Notes to Colombia.

[4] Mr. Seward to Mr. Murillo, February 1, 1864, MS. Notes to Colombia.

[5] 11 Op. 402.

[6] Mr. Seward to Mr. Davis, November 21, 1865, MS.

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of State would be heard, in order that he might present an argument upon it. A time having been set, the question was duly argued; and on March 22, 1866, it was submitted to the umpire, Sir Frederick Bruce, who on the 25th of the next month rendered the following decision:[1]

"In examining the allegations of the claimants presented by their counsel, and the statements offered in reply by the counsel for Colombia, serious doubts arise as to the sufficiency and regularity of the proceedings which resulted in the decision of the umpire, Mr. Upham, and as '*in rebus dubiis tutior pars est eligenda*,' it appears to me that the reconsideration of these cases is the most reasonable course to adopt.

"It is evident that the Secretary of State, the most natural and competent judge in international questions, has himself entertained doubts on this point. For he has taken the unusual step of suspending payment of these claims, and of consulting the Attorney-General on the manner in which they are to be dealt with. That learned officer has replied in the following terms: 'The government did properly withhold payment pending the negotiations for a new convention, and under that new convention the government can not rightly pay the five suspended claims till the new commissioners shall say whether they were or not decided by their predecessors.'

"In seeking to ascertain with whom originated the first idea of a fresh convention before which these questions might be brought, it is to be found in the language used by the umpire, Mr. Upham, himself. He says, with references to the protest of Mr. Hurtado, 'as the commission had expired, it did not seem to me the cases could be opened again, except on an extension of the commission, when perhaps for cause shown it might be done. The design certainly was to give a full hearing as far as might be.'

"It can not be presumed that the umpire, whose decision ought to have been final and conclusive on the points submitted to him, would have spontaneously and without necessity suggested a possible mode of revision had he not been shaken by Mr. Hurtado's protest, or had he felt convinced that neither on the merits nor on the point of form was there ground for appeal. In civil courts an appeal lies to a superior tribunal; in international courts, which recognize no superior judge, fresh negotiations are opened, and a fresh commission appointed, to which the disputed cases are referred. The Government of the United States has in a spirit of enlightened justice taken this course, in support of which, if necessary, it could allege the suggestion of the umpire himself. It may moreover be fairly supposed that the claimants, as well as the persons who have had official cognizance of the doubts raised as to the validity of the decision, have been impressed by

[1] MS. Journal, 159.

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them, otherwise they would have sued the Government of the United States before the Court of Claims for the amount awarded to them by Mr. Upham had their title been perfected.

"For the above reasons, and, considering that by the terms of the second and the following articles of the convention, the attributions of the umpire are limited to pronouncing interlocutory decisions on disputed points (*puntos de discordanza*) submitted to him by the commissioners; and that to the commissioners belongs the duty of issuing the certificates required to justify the payment by the Government of the United States;

"Considering that no such certificate was issued by the commission which has expired, and that the cases in question, having been presented but not settled, must be looked upon as not having been decided;

"I am of opinion that these claims must be submitted *de novo* to the actual commission with a view to a fresh reexamination and decision on their merits.

"FREDERICK W. A. BRUCE.

"BRITISH LEGATION,
"*Washington, D. C., April 25, 1866.*"

On the 27th of April 1862 Sir Frederick Bruce rendered a further decision on the four cases in question, to the following effect:

"I consider that the responsibility of making awards in these cases rests on the present commission. The opinions pronounced by the commissioners and umpire under the first commission will have the weight due to the learning and ability of the eminent persons who pronounced them. But they do not relieve the present commissioners from the obligation of hearing these cases as *de novo* upon all points, whether of jurisdiction, of law, or of fact, which the parties or their counsel may wish to submit to them. The award is their act, and the terms of the certificate can not be satisfied without a full hearing of the points in dispute."

Subsequently to this decision the cases to which it relates were fully argued on the merits by counsel for the claimants, as well as by counsel for New Granada, and, the commissioners differing in opinion, were referred to the umpire, who disallowed them.[1]

[1] MS. Journal, 172. Before this decision was rendered the four cases in question were brought before the commission under the convention between the United States and Ecuador of November 25, 1862, with a view to obtain from the latter country that part of the indemnity for which it was liable as one of the successors of the old republic of Colombia. The Ecuadorian commission, Mr. Hassaurek, the United States commissioner, delivering the opinion, rejected the claims. Mr. Seward at first declined to give the present commission a copy of Mr. Hassaurek's opinion; but,

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Case of Gibbes.

Counsel for Gibbes refused to prosecute his case before the present commission, and protested against its acting upon the claim. Under these circumstances the case was submitted to the board by Mr. Carlisle, as counsel for Colombia; and on May 18, 1866, the case being called, the commissioners made the following order: "Stricken from the calendar and docket, protest being made against the action of the board, and case not prosecuted." After the adjournment of the commission the claimant demanded payment from the Treasury. His demand was referred to the Attorney-General, by whom an opinion was ultimately given to the effect that the award of the old commission constituted a subsisting obligation in his favor, though a doubt was expressed as to whether he was entitled to payment from the Treasury, since he did not possess a certificate from the commissioners.[1] The claimant obtained payment from the Treasury of the full amount of his claim with interest, and the amount so paid him was included in the account of the United States against Colombia. October 26, 1872, Mr. Fish inclosed to Mr. Martin, the Colombian minister at Washington, a letter of the Secretary of the Treasury of the preceding day purporting to show that the amount of Colombia's indebtedness to the United States at that time under the conventions was $56,158.60.[2] Mr. Martin objected to the account on the ground (1) that it contained a claim for compound interest, and (2) that it embraced the Gibbes award.[3] In reply Mr. Fish, while declaring the objections to the award to be unfounded, stated that the claimant had been paid by the Treasury on due consideration; and he offered to waive the claim for compound interest and to give Colombia a receipt in full if she would pay the Gibbes award with simple interest.[4]

in view of the stipulations of Article II. of the convention of 1857, by which each government was required to "furnish," "upon the request of either of the commissioners, such papers in its possession as the commissioners may deem important to the just determination of any claims presented to them," he afterward sent them a copy. (Mr. Seward to Mr. Davis, February 8, 1866, MS.) As to some of the proceedings of Commodore Danels, see Mr. John Quincy Adams, Secretary of State, to Mr. Thompson, Secretary of the Navy, June 5, 1819, MS. Dom. Let. XVIII. 326.

[1] Hoar, At. Gen., 13 Op. 19. Compare 7 Op. 600; 4 Id. 177; Rustomjee v. The Queen, L. R. 1 Q. B. D. (1876), 279; L. R. 2 Q. B. D. (1876-77), 69.

[2] MS. Notes to Colombia.

[3] Mr. Martin to Mr. Fish, November 9, 1872, MS. Notes from Colombia.

[4] Mr. Fish to Mr. Martin, January 8, 1873, MS. Notes to Colombia.

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This proposition Mr. Martin ultimately accepted, saying:[1]

"Since it is necessary to pay the Gibbes claim, although it was not duly recognized by the commission appointed in pursuance of those conventions [of 1857 and 1864], in order to obtain the acknowledgment that their stipulations were fulfilled by Colombia, and a receipt in full in favor of the Colombian Government, which desires to have this matter settled as soon as possible, that the impression may not prevail that for a few dollars more or less it failed to fulfill its obligations to the American Government, the undersigned incloses * * * a check * * * for the amount of the Gibbes claim, with simple interest up to the 30th instant, as follows:

Principal	$6,952.00
Interest from May 18, 1866, the day of the termination of the commission in virtue of the extension of its time, and according to article 3 of the international convention of 1857	3,421.54
Total	10,373.54

"This sum * * * is not paid because the Government of Colombia thinks itself under obligations to pay it. The documents which it has in its possession show that the Gibbes claim was not awarded by the international commission, and that it ought not to have been paid by the American Government; but, since the latter deemed it to be its duty to pay it and did pay it, * * * the undersigned hereby reimburses it therefor, in the exercise of the authority conferred upon him by his government, accepting, as a compromise, the proposal of the Honorable Mr. Fish for the settlement of the matter."

On receiving this note and the accompanying remittance, Mr. Fish transmitted to Mr. Martin a receipt in full, and the account between the two governments was closed.[2]

Proceedings and Adjournment of Commission.

The commissioners under the convention of 1864 held numerous sessions, some of which were public and some private. Judge Dean appeared before the new board as he had done before the old one, as counsel for the United States. All claims

[1] Mr. Martin to Mr. Fish, July 28, 1874, MS. Notes from Colombia.

[2] Mr. Fish to Mr. Martin, July 29, 1874, MS. Notes to Colombia. See For. Rel. 1871, 229; 1875, I. 429. As to the settlement of the Gibbes case, see Mr. Fish to Mr. Boutwell, December 10, 1869; same, to Mr. Causten, December 16, 1869; Mr. Hunter to Mr. Causten, January 30, 1871; Mr. Fish to Mr. Causten, October 4, 1872; Mr. Evarts to Mr. Hackett, January 24, 1878, MSS. An award for Venezuela's share of the Gibbes claim was made by the commission under the convention between the United States and Venezuela of December 5, 1885. (Robt. W. Gibbes *v.* Venezuela, No. 17.) As to certain old Colombian bonds, see Mr. Evarts, Secretary of State, to Mr. Helper, December 6, 1880, MS. Dom. Let. vol. 135, p. 308.

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and items of claim not presented prior to September 1, 1859, were excluded from consideration.[1]

February 14, 1866, the board, on motion of the United States commissioner, ordered (1) that cases already decided by the commission should be entered on the docket as of that date; (2) that all cases thereafter decided should be entered on the day of decision; and (3) that interest, when allowed, should be calculated up to the day on which the decision should be ordered to be entered on the journal, and to be reported to the Secretary of State.

May 19, 1866, the commission adjourned *sine die*.[2]

Capitation Tax Case.

Among the cases before the commission there was a claim of the Pacific Mail Steamship Company for the refund of a tax which it had paid on passengers carried by it between Panama and San Francisco. This tax was collected under a law of the provincial chamber of Panama of November 6, 1849, which took effect January 1, 1850, and which required the captains of all vessels embarking or disembarking passengers at Panama to pay $2 on each passenger. It was contended by the claimant (1) that the law was unconstitutional, and (2) that, as the tax was paid only by foreigners, none but foreign vessels carrying passengers to and from Panama, the imposition constituted a discrimination against foreigners, and as such was violative of the treaty between the United States and New Granada of 1846.[3]

The umpire rendered the following decision:

"This claim is presented on behalf of the Pacific Mail Steamship Company for a refund of a tax on passengers carried by them between the ports of Panama and San Francisco, which they paid in obedience to a law passed by the provincial chamber of Panama requiring the captains of all vessels embarking

[1] MS. Journal, 69.

[2] The secretary was ordered to continue his occupation of the office of the commission for such time as might be necessary for preparing its records for transmission to the Secretary of State, and to retain the services of the clerk and messenger. On motion of General Salgar, the secretary was authorized to receive from the contingent fund of the commission $1,000, as Colombia's share of his compensation. An allowance was made to the clerk, William C. Zantzinger, of $1,500 in full for his services, and to the messenger of $500.

[3] The provisions of the treaty particularly referred to were Articles II., III. and XXXV.

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or disembarking passengers in Panama to pay two dollars for each one of said passengers. The total sum thus paid is stated to amount to $121,000 during the years 1850-1-2-3. But of this amount a large portion was recovered by the company from the passengers.

"It is to be observed that the law complained of was not passed by the national legislature, but by the provincial chamber of Panama. Whether the chamber exceeded its powers according to the constitution in passing that law or not is a purely municipal question, which could only be decided by the tribunals of sovereign authority of New Granada.

"No steps, however, appear to have been taken to test the validity of the law. If it be assumed that the supreme court had power under the former constitution of New Granada to annul the law as unconstitutional, the absence of any proceeding before that court would constitute a serious objection to this claim. For it is an admitted principle of international law, that parties who are aggrieved by the unlawful acts of a public authority are bound to exhaust every legal means given by the constitution of the country to have the illegality declared and the acts overruled. But if they, being foreigners and entitled under treaty to appeal to the courts of law, neglect to do so, they are not entitled to invoke the intervention of their government to obtain for them indemnity. A protest, whether made by the parties themselves or by a consul, can not be held to supply the place of an appeal to a legal tribunal competent to deal with the subject-matter, nor does it render the right to intervention perfect and complete.

"Omitting, however, this objection to the claim upon which, in the absence of data not supplied by the documents before me, I am unable to pronounce a positive opinion, I proceed to consider the principle on which the claimants rest their demand for indemnity against the United States of Colombia. They allege that the tax was a violation of the thirty-fifth article of the treaty of 1846 between the United States of America and New Granada, and that they, as sufferers from that breach of treaty, are entitled to redress. The article, so far as is material to the question at issue, declares 'that no other tolls or charges shall be levied or collected upon the citizens of the United States or their said merchandise passing over any road or canal that may be made by the Government of New Granada or by the authority of the same than is under like circumstances levied upon and collected from the Granadian citizens,' 'nor shall the citizens of the United States be held liable for any duties, tolls, or charges of any kind to which native citizens are not subject for passing the said isthmus.'

"It is evident from the language of the article that this tax, if a violation of the treaty at all, is a violation of the spirit and not of the letter of that instrument. The supreme court of New Granada, in deciding against the legality of a similar

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tax, subsequently imposed, annuls it on the ground that under the new constitution of New Granada the chamber had exceeded its powers in dealing with a matter affecting foreign commerce and expressly reserved to the national legislature, but the court does not base its decision on the ground that the tax was contrary to the treaty entered into with the United States, and the supreme council of the government in rejecting the demand for indemnity presented by the company after the decision of the supreme court annulling the posterior law had been made known, expressly denies that the tax was a violation of any article of the treaty of 1846.

"Mr. Corwine, the consul of the United States, was directed to protest against the levy of the original tax, which, however, the authorities of Panama continued to exact in spite of his protest. It does not appear, however, from the documents furnished to the commission, that the Government of the United States, on finding that the protest of the consul had been disregarded, addressed any representations to the supreme government at Bogotá denouncing the proceeding as a violation of treaty. The protest made by a consul under such circumstances is merely an act which reserves the right of the protesting party for future discussion, and which is intended to deprive the opposing party of the argument he might derive from presumed acquiescence, were the question of right not saved by some formal act.

"Under these circumstances I am of opinion that there is a preliminary question to be settled, viz, the construction that is to be put on the treaty, and that until it is decided that a breach of treaty has taken place, the claim of the company does not arise, nor can it be taken into consideration. As the case stands at present, the commission is in fact called upon to determine the meaning and import of an international compact entered into by the high contracting parties with due solemnity and consideration. It is asked to decide in favor of a construction which the Government of the United States of America, one of the parties, has not formally adopted and urged in its correspondence with the Government of Colombia, while the latter government, the other contracting party, has expressly rejected it, as appears from the 'Resolucion del Poder ejecutivo.'

"This point, involving considerations of much difficulty and delicacy, which has undergone no discussion and on which the two governments have arrived at no understanding, must be decided before the claim advanced by the company can be investigated.

"If I entertained any doubts as to the proper functions of the commission, and as to its incompetency to assume jurisdiction in a case in which the principle out of which the alleged liability arises is still a legitimate matter of debate between the two governments, they would be set at rest by the manner

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in which the Panama riot cases have been presented to this commission. The question of the liability of the Government of the United States of Colombia for the losses thereby incurred by the parties was made the subject of correspondence between the two governments, and that liability was recognized by the Government of Colombia previously to the constitution of the commission. The assent of that government was incorporated in the convention appointing the commission, and to the latter was left the duty which properly belongs to a tribunal of this kind, namely, that of deciding upon general principles of law and equity what claims are entitled to compensation under the general responsibility which the Government of the United States of Colombia had consented to assume. If further argument were required as to the scope of the commission, it would be found in the terms of the convention, which submits for its decision claims of American citizens against the Government of the United States of Colombia, but which do not confer jurisdiction over what in fact is a demand that the commission shall decide that the Government of the United States of Colombia has been guilty of a breach of treaty.

"Being of opinion therefore that the construction to be put on the treaty has not been settled by the proper authorities, that the commission is not empowered to settle a question of such a nature, and that upon the decision of that question the right of the company to indemnity, if otherwise unobjectionable, must depend, I reject this claim, with the declaration that this award does not prejudice the rights of the claimant, should the Government of the United States decide at any time hereafter that under the treaty of 1846 the imposition of the passenger tax constituted such a violation of its letter or spirit as to authorize a demand for redress.

"FREDERICK W. A. BRUCE.[1]

"BRITISH LEGATION,
"*Washington, May 9, 1866.*"

Results of the Commission.

The awards of the commissioners and of the umpire amounted, prior to May 18, 1866, to $82,808.19. On that day the commissioners made, in accordance with the advice of the umpire, yet another award of $5,559.50, with interest at 5 per cent from September

[1] The foregoing opinion was incorrect in saying that the United States had not objected to the tax in question. (Mr. Seward, Sec. of State, to Mr. Stanbery, November 14, 1866, Dom. Let. vol. 74, p. 382.) The claim, however, was not presented to Colombia after its rejection by the umpire. (Mr. Fish, Sec. of State, to Mr. Cox, January 10, 1870, Id. vol. 83, p. 41, and March 14, 1872, Id. vol. 93, p. 139.)

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10, 1857. The following entries, showing the final disposition of claims, were made in the journal:

May 12, 1866, the board made the following awards and decisions:

ADJUDGED VALID.

No. 4.	Brig *America*	$15,000.00
	Without interest.	
No. 16.	John Harding	164.00
	Interest	99.33
		263.33
No. 22.	B. H. Johnson	800.00
	Interest	484.53
		1,284.53
No. 25.	Catherine Kelly	700.00
	Interest	423.96
		1,123.96
No. 28.	Seth Love	1,900.00
	Without interest.	
No. 40.	Isaac B. Purdy	800.00
	Interest	484.53
		1,284.53
No. 48.	D. J. Smith	150.00
	Interest	90.85
		240.85
No. 50.	P. M. and M. J. Scoffy	1,400.00
	Without interest.	
No. 55.	Samuel M. Waggner	4,600.00
	Interest	2,786.02
		7,386.02
No. 56.	H. Winchester	135.00
	Interest	81.76
		216.76
No. 68.	C. D. Holdsclaw	398.00
	Interest	241.05
		639.05
No. 69.	Joseph Tillison	316.25
	Interest	191.49
		507.74

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No. 74.	Noah C. Efford	151.00
	Interest	91.45
		242.45
No. 77.	Hartley Gove, Henry W. Field, administrator	5,000.00
	Without interest.	
No. 82.	Benjamin Green	300.00
	Interest	181.70
		481.70
No. 87.	Charles E. Perry	1,000.00
	Without interest.	
No. 107.	R. E. B. Wilcox	51.50
	Interest	31.18
		82.68
No. 108.	E. D. Bronson	117.50
	Interest	71.16
		188.66
No. 113.	L. H. Sherwin	66.50
	Interest	40.27
		106.77
No. 114.	John D. Harvey	1,865.50
	Interest	1,129.83
		2,995.33
No. 125.	George E. Hoar	300.00
	Interest	181.70
		481.70
No. 128.	Mrs. L. C. Baker	200.03
	Interest	121.10
		321.13
No. 129.	Richard Ireland	85.00
	Interest	51.46
		136.46
No. 145.	E. M. Day	97.00
	Interest	58.74
		155.74
No. 172.	Charles A. Walker	200.00
	Interest	121.13
		321.13
No. 180.	Charles L. Loveday	125.00
	Interest	75.70
		200.70

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ADJUDGED NOT VALID.

No. 1. James Pedersen (steamer *Quickstep*).
No. 2. Brig *Albion*.
No. 3. Schooner *Angelica*.
No. 5. Adolph Buhle.
No. 6. W. S. Bache.
No. 10. Brig *Eight Sons*.
No. 11. Francisco H. de Ealo.
No. 13. George H. Fletcher.
No. 14. Schooner *Grampus*.
No. 15. W. L. and G. Griswold.
No. 17. George W. Harrington.
No. 19. Betsey Hawley.
No. 20. Samuel Hirsch.
No. 21. Schooner *Henrietta*.
No. 23. Brig *Josephine*.
No. 24. T. Morton Jones.
No. 26. James H. Keating.
No. 27. Sidney Kelly.
No. 29. John B. LeMaitre.
No. 30. E. G. Lioni.
No. 31. James A. Morris.
No. 32. R. B. McMillin.
No. 33. S. C. Akin.
No. 34. Mary L. Beylle.
No. 35. Schooner *Minerva*.
No. 36. J. M. McPherson and Captain Paoli.
No. 37. Brig *Morris*.
No. 38. Brig *Cygnett*.
No. 41. Allen M. Price.
No. 42. A. A. Lechler.
No. 43. Brig *Patriota*.
No. 44. C. B. Patterson and W. T. Kendall.
No. 45. Schooner *Ranger*.
No. 46. F. W. Robeson.
No. 47. Alexander Rudin (Schooner *By-Chance*).
No. 49. Theresa Schmidt.
No. 52. E. P. Willis.
No. 54. Brig *Sarah Willson*.
No. 57. A. Woodward.
No. 58. Brig *Albert*.
No. 59. Ship *San Yago*.
No. 60. James Bartlett.
No. 61. Schooner *Andrew Jackson*.
No. 62. Schooner *Junius*.
No. 63. Sloop *General Vires*.
No. 64. Moses Meyers & Son.
No. 66. Nehemiah Foster.
No. 67. P. A. Karthaus.
No. 70. Thomas Roe.
No. 71. R. H. Weyman.
No. 72. Schooner *United States*.
No. 75. John O'Connor.
No. 76. Felix McCloskey.
No. 78. James Chapman.
No. 79. W. P. Williams.
No. 81. Edward R. Brandon.
No. 84. Steamship *Young America*.
No. 85. P. H. Winfield.
No. 86. William H. Stone.
No. 88. Alfred Freeman.
No. 89. Sarah F. and Jane L. Clark.
No. 90. Jennie L. Willson.
No. 91. John Cotter.
No. 92. John Smith.
No. 93. Elizabeth F. Blaisdell.
No. 94. George Meyer.
No. 95. James McLaughlin.
No. 96. Robert Smith.
No. 97. Mary C. Condon.
No. 98. Joseph Munson.
No. 99. William L. Patterson.
No. 100. A. T. Tyree.
No. 101. Ridgely Greathouse.
No. 102. William C. Bexton.
No. 103. Stephen Hill, jr.
No. 104. Philo Olmstead.
No. 105. Christian and George Gros.
No. 106. James McCreary.
No. 109. Nathan B. Kendall.
No. 110. Joseph Maloon.
No. 112. R. G. Lane.
No. 115. Thomas B. Stanley.
No. 116. Samuel S. Goodrich.
No. 117. N. W. Hall.
No. 119. Lafayette Hackett.
No. 120. Thomas H. Foss.
No. 121. William Coppens.
No. 122. William J. Davis.
No. 123. William Garcelon.
No. 124. Joseph Mosher.
No. 127. Conrad Lückell.
No. 130. Jacob L. Peables.
No. 131. George M. Rowe.
No. 132. O. F. Williams.
No. 133. Mrs. T. G. Lambert.
No. 134. C. H. Hardy.
No. 135. Catherine Fay.
No. 136. Sarah Fay.
No. 137. William Patterson.
No. 138. Robert McLeese.
No. 139. Mrs. A. M. Barrow.
No. 140. Odavid Dubois.
No. 141. George W. Lowery.
No. 142. Harvey T. Lee.
No. 143. Elizabeth Gray.
No. 144. Charles Francis Lee.
No. 146. Mrs. Mary McNeeve.
No. 147. Bridget Kellerry.
No. 148. Thomas Bland.
No. 149. Lewis Reford.
No. 150. Thomas Lee.
No. 157. Isaac Snow.
No. 162. Theodore Stevens.
No. 165. Peter Stout.
No. 166. H. C. Belden.
No. 167. John A. Moore.
No. 168. J. E. Stevens.
No. 169. Michael Scott.

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ADJUDGED NOT VALID—Continued.

No. 170. Joseph Brindley.
No. 174. Brig *New Granada.*
No. 181. Charles Wolfsheimer.
No. 182. Nathan Clark and Sarah Clark.
No. 183. James Cameron.
No. 184. Elizabeth C. Cameron.
No. 185. John Leary.
No. 187. Edward Develin.
No. 188. James E. Ryan.
No. 189. Sarah Rogers.
No. 197. Michael and Sarah Ann Curley.
No. 198. Francis and Rose A. Lamb.
No. 199. Benjamin Cohen.

The following awards were made by the umpire:

ADJUDGED VALID.

No. 12.	Augustus C. Fretz, in American gold	$3,800.00
	Interest	2,301.50
		6,101.50
No. 39.	Palmer Orton	1,630.00
	Without interest.	
No. 73.	Ziba P. Eastman	60.00
	Interest	36.34
		96.34
No. 80.	W. P. Wilkins	560.00
	Interest	339.17
		899.17
No. 186.	Panama Railroad Company	8,678.96
	Interest	2,628.29
		11,307.25
	And without interest	14,540.00
	Total	25,847.25
No. 194.	Pacific Mail Steamship Company	4,047.14
	Interest	1,225.57
		5,272.71

ADJUDGED NOT VALID.

No. 7. Brig *Marcelino.*
No. 18. J. W. Holding, Joshua Jessop of Wm., assignee.
No. 83. Brig *Frederick.*
No. 151. John P. Adams, Eugenia D. Adams, administratrix.
No. 152. United States Mail Steamship Company.
No. 153. George W. and Joseph K. Riggs.
No. 154. James Craig Colt.
No. 155. Mrs. Emily Gibbs.
No. 156. Robert Oliver.
No. 158. David M. Perine.
No. 159. Robert and Thomas H. Oliver.
No. 160. Robert O. Colt.
No. 161. Margaret O. Shiff.
No. 171. James J. Fisher.
No. 173. Bolivar D. Danels.
No. 175. *La Constancia.*
No. 176. *Good Return.*
No. 177. *Medea.*
No. 178. John D. Danels.

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May 18, 1866, the commissioners made, in case No. 65, of the schooner *Ben Allen*, the following award:

"The commissioners award the sum of $5,559.50, with interest at 5 per cent from the 10th day of September 1857, as an equitable compromise, as advised by the umpire and without any consideration as to the question of principle involved."

No. 179. "R. W. Gibbes. Stricken from the calendar and docket, protest being made against the action of the board, and case not prosecuted."

No. 8. Brig *Fanny*. "And now this 18th day of May 1866, the claimant in the above case not having complied with the directions of the board as to the reproduction of certain purloined evidence, the said case is therefore rejected as not valid."

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CHAPTER XXIX.

CASE OF THE "MONTIJO": AGREEMENT BETWEEN THE UNITED STATES AND COLOMBIA OF AUGUST 17, 1874.

Seizure of the "Montijo."

On the evening of April 6, 1871, the steamer *Montijo*, belonging to Messrs. H. and J. Schuber, citizens of the United States, trading at Panama under the firm name of H. Schuber & Bro., was, while on a voyage from David to Panama, within the jurisdiction of Colombia, seized by revolutionists. It appears that several days previously, while the steamer was lying at David, two Colombians, named Herrera and Diaz, approached Mr. J. Schuber in the streets of that city and proposed to charter her. Mr. Schuber declined to enter into any contract with them, on the ground that they were contemplating a political revolution. When the steamer sailed from David on the evening of the 5th of April, Herrera and Diaz came on board as passengers. On the following evening, while the *Montijo* was at anchor repairing a tube, a schooner was seen to approach. Soon afterward Herrera and Diaz, supported by nine or ten partisans, arose and took possession of the steamer by force, and, after taking on board about 120 men, compelled the captain to put back to David, which they captured without much resistance on the night of the 7th of April. On the 8th a provisional government was proclaimed, with Herrera as president and Domingo Obaldia as prefect of the department of Chiriqui. On the 5th of May Herrera sent a letter to Mr. Long, United States consul at Panama, stating that the revolution which took place at David on the 8th of the preceding month, and of which he was the head, held the departments of Chiriqui, Beraguas, Los Santos, and Coele; that he expected soon to have possession of the whole State of Panama, and that foreigners would enjoy all the rights to which they were entitled. Two days previously to the date

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of this communication Mr. Long had addressed to Herrera a demand for the release of the *Montijo*, which was still in the latter's custody. Herrera replied (1) that the steamer, though she carried the American flag, had no register or other documents to prove her nationality; (2) that, even if she were "North American," she had lost her neutral character by having "previously mixed in our political disputes;" and (3) that the "government" had offered to pay for all the services which the steamer might render.

Mr. Long, in a dispatch to his government of May 30, 1871, stated that the *Montijo*, when captured, had on board his receipt for her register, which was deposited in the consulate, and other papers belonging to her. He also reported that President Correoso had come to an arrangement with Herrera, under which each party obtained "some of the spoils of victory;" that the *Montijo* had not, however, been restored, but had been dispatched by President Correoso to convey rebel troops back to David, in spite of protests that she was then unseaworthy. Mr. Long also adverted to the fact that the constitution of Colombia then in force acknowledged the right of the citizens of the several States at any time to change the State governments by force of arms, and required the federal government to recognize the ostensible governments *de facto*, however established.

Representations to Colombia.

When Mr. Fish received Mr. Long's dispatch he inclosed a copy of it to Mr. Hurlbut, then minister of the United States at Bogotá, with instructions to bring the case to the notice of the Colombian Government. Mr. Fish observed that, when the seizure took place, the persons by whom it was made—persons whom he described as members of "the faction in opposition to the Colombian authorities"—had established no organization and could not, it was presumed, "even under the constitution of Colombia, have been entitled to the rights of belligerents." "The seizure was, therefore," said Mr. Fish, "a piratical act, for which it is expected that the authors will be held to be judicially accountable. The treaty stipulates that no such seizure shall be made, even by the Colombian authorities, without just compensation to the aggrieved parties. When, therefore, such an act is committed in the waters of that republic by unauthorized persons, the obligation of that

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government to make amends therefor may be regarded as unquestionable. You will accordingly apply for reparation in this case."[1]

Mr. Hurlbut duly communicated the substance of his instructions to the Colombian Government. Not long afterward he reported that the demand for the punishment of Herrera and his accomplices as pirates had produced much excitement. The only offense defined as piracy in the code of the country was piracy by law of nations, and, especially in view of the provisions of the federal constitution in regard to revolutions in the several States, public opinion would not sanction a prosecution of the offenders for that crime. Besides, Herrera and Diaz, the chief offenders, had, said Mr. Hurlbut, established themselves in business in Central America on the money which President Correoso, of the State of Panama, gave them to make peace, and on the "spoils" which they had obtained in places held by them during the revolution. Another one of the revolutionary chiefs was a member of congress from Panama. Under the circumstances, there seemed to be no hope of any punishment being inflicted. On the other hand, Mr. Hurlbut stated that he had received claims from the Messrs. Schuber for damages for the detention of the *Montijo*, and for the imprisonment of Mr. John Schuber and of the master and crew of the steamer. These claims he proposed to present.

Presentation of Claims.

The proposal of Mr. Hurlbut in regard to the presentation of claims was approved, and on December 1, 1871, he presented to the Colombian Government a demand for $94,465.[2] The Colombian

[1] Mr. Fish, Sec. of State, to Mr. Hurlbut, June 21, 1871, For. Rel 1871, 230. By Article VIII. of the treaty between the United States and New Granada of December 12, 1846, it is stipulated: "The citizens of neither of the contracting parties shall be liable to any embargo, nor be detained, with their vessels, cargoes, merchandise, or effects, for any military expedition, nor for any public or private purpose whatever, without allowing to those interested an equitable and sufficient indemnification."

Article X. of the same treaty provides: "All the ships, merchandise, and effects belonging to the citizens of one of the contracting parties, which may be captured by pirates, whether within the limits of its jurisdiction or on the high seas, and may be carried or found in the rivers, roads, bays, ports, or dominions of the other, shall be delivered up to the owners, they proving in due and proper form their rights before the competent tribunals; it being well understood that the claim shall be made within the term of one year by the parties themselves, their attorneys, or agents of their respective governments."

[2] For. Rel. 1872, 146.

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Government, in reply, denied that it was liable for the losses which foreigners might suffer in consequence of "common crimes." The *Montijo* was captured "by certain individuals" who went on board as passengers. The government had taken and continued to take "all the means in its power" to the end that they might be "prosecuted and punished." Nothing more could justly be demanded. Mr. Hurlbut replied that the steamer was captured by conspirators against the legitimate government of the State of Panama; that she was in their possession for sixty-two days; and that the insurrection was closed by a treaty by which the State of Panama "granted amnesty to the wrongdoers for all their acts, and assumed the responsibility for all damages arising out of the revolution." These circumstances, said Mr. Hurlbut, distinguished the case from that of common crimes by private individuals.

The statement of the Colombian Government that it had taken and was continuing to take all the means in its power for the prosecution and punishment of the captors of the *Montijo*, referred to a prosecution for piracy which had been begun in the State of Panama. When the proofs in regard to the seizure of the steamer were presented by Mr. Hurlbut to the Colombian Government they were referred to the attorney-general, by whom they were transmitted to the authorities of the State of Panama, within whose jurisdiction the matter rested.[1] The prosecution, however, came to naught. The court of first instance held that the crime of piracy had not been committed; and its decision was affirmed March 25, 1872, by a judgment of the federal supreme court.[2] It seems that Herrera returned to Panama unmolested, and that Diaz became governor of the city.

Agreement of Arbitration.

In 1872 the diplomatic discussion of the case was suspended by the departure of Mr. Hurlbut from Bogotá, and the reference of the questions at issue to the Department of State at Washington. In the summer of 1873, however, Mr. William L. Scruggs, who had been appointed to succeed Mr. Hurlbut at Bogotá, was instructed to resume the negotiations at that capital.[3] In the

[1] For Rel. 1871, 239.

[2] For Rel. 1875, I. 426.

[3] Mr. Fish, Sec. of State, to Mr. Scruggs, August 8, 1873, MSS. Dept. of State.

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following December the Colombian minister for foreign affairs proposed arbitration,[1] and this proposal Mr. Fish, after consulting the claimants, accepted.[2] Besides, with a view to hasten the settlement of the claim, Mr. Fish suggested that, instead of a formal treaty, an agreement like that of February 12, 1871, with Spain, be concluded; and he sent Mr. Scruggs a full power for the purpose.[3] The President of Colombia, however, in view of the liability which might ultimately fall upon his government, applied to the Colombian congress for authority to arbitrate. Such authority the congress gave by a resolution of June 15, 1874.[4]

An agreement of arbitration was concluded, in English and Spanish, on August 17, 1874. It was signed by Mr. Scruggs, minister resident of the United States, and Jacobo Sanchez, secretary of interior and exterior relations of Colombia, on behalf of their respective governments. It provided for the appointment of two arbitrators, one by the minister resident of the United States and the other by the Colombian Government, and for the appointment of an umpire by the arbitrators, or, in case they should be unable to agree on any, by commissioners specially chosen for the purpose. The arbitrators and umpire were required to meet in Bogotá "within a month from the date of their appointment," and, before proceeding to business, to "make and subscribe a solemn declaration that they will impartially consider and determine, to the best of their judgment, and according to public law and treaties in force between the two countries, and these present stipulations, the claims herein submitted."

It was provided that the "official correspondence and documents relative to the case" should be submitted to the arbitrators, but that, before their decision was rendered, they should afford an opportunity for the argument of the case, either orally or in writing, by "the attorney-general or lawyer of the government of Colombia" and "the one designated by the minister resident of the United States."

The arbitrators were required to "decide, as a primary question," whether Colombia was obliged "to grant indemnification;" and, if their decision on that point should be in the

[1] Mr. Scruggs to Mr. Fish, December 11, 1873, MS.
[2] Mr. Fish to Mr. Scruggs, January 27, 1874, and February 26, 1874, MS.
[3] Mr. Fish to Mr. Scruggs, February 26, 1874, MS.
[4] Mr. Scruggs to Mr. Fish, June 27, 1874, MS.

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affirmative, they were empowered to "fix the amount of indemnification," in the legal coin—*pesos de ley*—of Colombia. The amount so fixed the Colombian Government was to pay to the minister resident of the United States, or to such person as he might name, within a year from the date of the decision.

The expenses of the arbitration, not to exceed $1,500, were to be defrayed by the two governments in equal moieties.

Proceedings of the Commission.

As arbitrator on the part of Colombia, that government appointed Mr. Mariano Tanco, a citizen of the country and a retired merchant. As arbitrator on the part of the United States, Mr. Scruggs appointed Mr. Bendix Koppel, a citizen of Denmark and also a merchant. The arbitrators chose as umpire Mr. Robert Bunch, British minister resident at Bogotá, who at one time held the post of British consul at Charleston, South Carolina.

The arbitrators and umpire met at Bogotá September 23, 1874, in the hall of the office of foreign relations, Mr. Sanchez and Mr. Scruggs being present. After the arbitrators had exchanged their powers and made the declaration required by the agreement, they named Mr. Venancio G. Manrique as secretary. It was then announced that Mr. Bunch had on the 16th of the month accepted the nomination as umpire and had made the necessary declaration.

The arbitrators adopted January 20, 1875, as the time within which the parties should present their respective proofs. The proofs were accordingly submitted, including, on the part of the United States, certain papers, the production of which Mr. Scruggs obtained from the Colombian Government.

A written argument was submitted by Mr. Gomez, attorney-general of the nation, on the part of Colombia, and a review of it on the part of the United States was presented by Mr. Scruggs.[1]

Award of the Umpire.

On April 10, 1875, the Colombian arbitrator filed an opinion, holding that Colombia had not incurred any liability to the American claimants. The arbitrator on the part of the United States filed on the 12th of the following month an opinion in which the opposite view was maintained. On the 1st of July counsel for Colombia submitted a supplemental argument, which was followed on the 3d of the month by a rejoinder from Mr. Scruggs.

[1] Mr. Scruggs to Mr. Fish, February 1875, MS.

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The umpire, on July 25, 1875, rendered an award in favor of the claimants for $33,401.

The text of the award was as follows:[1]

"In virtue of a convention between the United States of America and the United States of Colombia, dated the 17th of August 1874, it was agreed that there should be submitted to a tribunal of arbitration the final resolution and decision of a claim which had been preferred by the first-named republic against the latter for damages accruing from the occupation, in the months of April and May 1871, in the waters of the State of Panama, of the American steamer *Montijo*.

"The tribunal was duly constituted in the city of Bogotá, and consists of Señor Mariano Tanco, as arbitrator on the part of the United States of Colombia, of Mr. Bendix Koppel, as arbitrator on the part of the United States of America, and of the undersigned, Mr. Robert Bunch, Her Britannic Majesty's minister resident to the United States of Colombia, as final referee or umpire.

"After due examination of the facts and the emission of written opinions by Messrs. Tanco and Koppel, it was found that an entire discrepancy existed between the gentlemen, for which reason the question has been laid before the undersigned for a final decision, which he proceeds to give in the following manner and terms:

"The undersigned will begin by enumerating the—

"Points on which both arbitrators seem to be agreed:

Points of Agreement.

"1. The *Montijo* was a steamer built and registered in New York but put together in Panama, in the year 1867. She was owned by Messrs. Schuber Brothers, citizens of the United States, residing and doing business for many years in the city of Panama.

"Her papers were always in the custody of the consul of the United States in Panama.

"2. That from 1867 to the date of seizure in 1871 she was trading under the American flag in the Pacific, generally between the city of Panama and the town of David and intermediate ports of the State, but also between Panama and Buenaventura, and even between Panama and certain ports of Peru and Ecuador.

"3. That during the period between 1869 and 1871 the *Montijo* was engaged in the trade between the city of Panama and the town of David and intermediate ports as aforesaid, under a contract with the government of the State of Panama dated December 15, 1869, by which 'the President of the State, in conformity with his powers' (*en uso de sus facultades*), grants permission to the *Montijo*, although sailing under the flag of the United States of America, to enter the ports of the State

[1] Br. and For. State Papers, LXIV. 402–422.

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as a coasting vessel (*buque costanero*), and declares her to be exempt from all duties in such ports. By the same contract an exclusive privilege for eight years is granted to the vessel to enter a disused (*antiguo*) port called Mangote, and certain lots of land are ceded to her owners for the erection of warehouses, etc.

"In return for these and other privileges the owners of the *Montijo* pledge themselves to carry the official correspondence of the State gratuitously, and to give passage at reduced rates to the government troops and officials. It is also stipulated that in cases of disturbance of public order special contracts shall be made for the conveyance of troops, and that a sum not exceeding five hundred dollars a day shall be paid to the owners of the *Montijo*.

"4. That early in the month of April, 1871, the *Montijo* was lying in the port of David. Señor Tomas Herrera and other persons, who were desirous of making a revolution against the State government of Panama, endeavored to obtain by negotiation the services of the vessel from one of her owners, Mr. John Schuber, who was on board. That the proposal was rejected, and that on the 6th of April the vessel was taken forcible possession of by Herrera, Diaz, and others. The particulars of the seizure are fully detailed in the affidavits of the owner, captain, and engineer, and others.

"5. That the vessel remained in possession of the captors, and subsequently of the State government of Panama, for a certain period of time, when she was restored to her owners.

"6. That a treaty of peace was subsequently made between the President of the State of Panama, Buenaventura Correoso, on the one hand, and Tomas Herrera, chief of the revolutionary forces, on the other, by which a complete amnesty was reciprocally granted, and by Article VII. of which 'the government assumes as its own the expense of the steamers and other vehicles which the revolution has had to make use of up to that date.'

"7. That up to this day nothing has been paid by the State of Panama for the use of the steamer *Montijo*.

"8. That the Government of the United States has preferred a claim against the Government of Colombia for a sum of upward of $94,000 for the use of the *Montijo*, and for other matters arising from it, and that the entire question has since been submitted, by mutual consent, to the decision of the arbitrators, who were duly appointed under the terms of a convention between the two republics.

"9. That the said arbitrators have been unable to arrive at a common decision, the one holding that Colombia is not responsible for any of the damages inflicted on the owners of the *Montijo*, whilst the other sentences Colombia to pay to the claimants the sum of $33,401, with interest at the rate of 5 per cent per annum since the 1st of January 1872, until the day of payment.

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"10. That the final decision in the case has been left, under the terms of the aforesaid convention, to the undersigned, who now proceeds to the discharge of his duty.

Reasons of the Colombian Arbitrator.

"The undersigned commences by examining the reasons alleged by the honorable the Colombian arbitrator for exempting his government from all responsibility to the owners of the *Montijo*.

"These seem to be:

"First. That the Messrs. Schuber were domiciled in the city of Panama, where they carried on business for many years under the protection of the laws of the country, for which reason they were subject to those laws in every respect in the same manner as the citizens of Colombia.

"Second. That the Messrs. Schuber constantly took part in the civil disturbances of the State of Panama, by hiring their vessel indiscriminately to the constitutional government and to rebels; that they made a contract to place their vessel at the disposal of the local government whenever there might be a domestic war (*guerra interior*); that they were always paid for such services, which fact establishes on their part an organized speculation in all cases of public disturbance; that the use of the flag of the United States does not add force to their claim, but, on the contrary, was rather an abuse, particularly as the vessel had only a third part of her crew citizens of the United States, which was a violation of American law.

"Third. That in the case now under consideration the seizure of the vessel was only a natural consequence of the conduct of Schuber Brothers, and of the contract with the President of Panama, under which they were acting, because the revolutionists well knew that if they did not take possession of her she would be used by President Correoso, thus making of the *Montijo* an element of war of the government of Panama.

"Fourth. That it has not yet been proved that Herrera and Diaz took the steamer by force and against the will of the owners, because the only proof alleged is to be found in the affidavits of the persons interested in the present claim and therefore invalid, and also because there is a contradiction in the evidence given by John Schuber, one of the owners.

"Fifth. That Schuber Brothers navigated their vessel in the waters of Colombia under a foreign flag without obtaining permission, which, under penalty of confiscation, is required by a decree of the 13th of May 1862. This permission, it is alleged, Schuber Brothers knew to be necessary, as they obtained it to the contract of the 15th of December 1869 from the President of Panama, who, however, had not legal power to grant it, because such authority belongs only to the government of the Union.

"Sixth. That the President of Panama, in virtue of his constitutional authority, issued on the 18th of May an amnesty in which were included Herrera, Diaz, and other participators in the local revolution; that, in consequence of this

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amnesty, no judicial proceedings could be instituted against them (as the judge declared) in any case in which a foreigner, even if strictly neutral, might have ground of complaint; that the authority by which the amnesty was granted assumed voluntarily the obligation of paying to Schuber Brothers the sum due by the revolutionists for the use acquiesced in and indirectly authorized (*consentido e indirectamente autorizado*) by John Schuber of the vessel. That for these reasons the claim of Messrs. Schuber Brothers can only be considered as an attempt to recover from the federal government, in a largely increased form, the account which they could not obtain from the government of Panama, but with which the goverment of the Union has nothing to do, as it is a private debt, and moreover, one of vicious origin, the recognition of which would establish a ruinous precedent.

"The undersigned proceeds to reply to these reasons, in their order, with all the deference justly due to the honorable and distinguished gentleman from whom they emanate.

Question of Domicil.

"To reason No. 1, as regards the alleged domicil in Panama of the Messrs. Schuber, the undersigned must remark that there is perhaps no point of international law on which more difference of opinion exists than on that of domicil. It is, therefore, extremely difficult to lay down an absolute and invariable rule respecting it. Long and continued residence will not of itself constitute it. On the contrary, it is well understood that domicil may exist for commercial purposes without a person ceasing to be bound by his allegiance to the country of his birth or adoption.[1] That a distinction may be lawfully made between domiciled persons and visitors in and passengers through a foreign country is not to be lost sight of, because it must affect the application of the rule of law which empowers a nation to enforce the claims of its subjects in a foreign state; but even in this case the application of the right is only a matter of degree, as it undoubtedly exists in cases of flagrant violation of justice.[2] It would therefore seem that even in the case of domiciled foreigners the nation to which they belong, by birth or adoption, has a right to interfere on their behalf whenever, in its judgment, the ill treatment inflicted is of a sufficiently serious character to warrant it.

"But in the case of the owners of the *Montijo* the undersigned is not aware of the existence of any evidence that they were or intended to be domiciled in Colombia. That they have lived for many years (it is stated since 1849) in Panama is no doubt true; but it is equally so that they have constantly gone backward and forward between that city and the United States; that one of them at least passes with his family all his summers in New York, where he pays taxes on a considerable

[1] Foëlix, Droit International Privé.

[2] Phillimore, International Law, Vol. II. 25, 26.

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amount of property, and that in the case of neither has there been the *animus manendi*, or evident intention to fix on Colombia as his home, which constitutes one of the chief reasons for determining the question of domicil. The Colombian arbitrator does not allege that they have become naturalized in the republic; it is not said that they have voted at elections or exercised other privileges of citizenship. The undersigned has, therefore, a right to suppose that they have not done so. It is, moreover, certain that in the opinion of the Government of the United States of America the Messrs. Schuber have not ceased to be citizens of the republic. The fact of the presentation of a claim on their behalf by the minister of the United States, after careful examination of the case and discussion between the cabinets of Washington and Bogotá and their agents respecting it, is sufficient proof that they are still considered as citizens of the United States, and that Colombia has acquiesced in their being so regarded.

"Therefore, as regards the first reason of the Colombian arbitrator, the undersigned decides:

"First. That the Messrs. Schuber can not be considered as domiciled in Colombia; and

"Second. That even if they were so domiciled the Government of the United States would still have the right, under certain circumstances, to extend to them its protection.

"He will add, as an illustration of this latter point, that there lives at this moment in Bogotá a foreigner who has resided here for at least forty years, with only one very brief absence. Two years ago it became necessary for that foreigner to invoke the aid of the government of which he is a subject in defense of his rights. That assistance was given him without hesitation, and was certainly not objected to by the Government of Colombia on the ground of the domicile of the foreigner.

"Reply to reason No. 2.

Question of Neutral Conduct.

"It is evident that the Messrs. Schuber chartered the *Montijo* to various governments of the State of Panama, as described by the arbitrator of Colombia: In April and May 1868 to the constitutional government; in July 1868 to a *de facto* government, and in December 1869 to the constitutional government of Señor Correoso. It is also alleged that in August 1868 the *Montijo* brought to Panama from David, in concealment, José Aristides Obaldia, who was planning a revolutionary movement against the government of the State, and that the said Obaldia returned to David still in concealment in the same vessel. There is no doubt that Messrs. Schuber were paid for such services. But the undersigned fails to see how the charter of a vessel to a government of a state or country constitutes a breach of her neutrality. It will surely not be contended that a government is to be the only entity which is debarred from acquiring by hire or purchase any article of which it may stand in need. If this were the case, a government could never buy a musket

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or a bale of cloth or a barrel of flour for the use of its troops without subjecting the vendor, if a foreigner, to the penalties of violating his neutrality, or, if a native, to those of losing property should the government be subsequently displaced by a revolutionary movement.

"So far the general principle.

"In the cases alleged as against the *Montijo* it is to be observed that all the charters were made with what, to the owners, was the government of the State. One of these governments is called, it is true, by the Colombian arbitrator a government *de facto;* but it is not the part of a foreign merchant to decide on the legitimacy or the reverse of the government under which he lives. To do so would be really to interfere in the domestic concerns of the country. He has only to satisfy himself that the government with which he deals is the one actually in possession of supreme power. That done, he is at perfect liberty to enter into contracts with it without losing his neutrality. This is too obvious to require argument. It happens constantly under all sorts of governments, arbitrary, constitutional, monarchical, and republican.

"That for political reasons a foreign government may not see fit to recognize, except at its own time and convenience, a change in the administration of public affairs in another country is, of course, true. But the ordinary foreigner resident for purposes of business or pleasure has no such privilege. To him the government *de facto* is the government *de jure.* He owes it obedience and can claim from it protection.

"As regards the affidavit of Ricardo Araujo, José Manuel Russel, and José E. Diaz, that José Aristides Obaldia was a passenger in concealment in the *Montijo* in August 1868, both from and to David, when he was engaged in some revolutionary movement, it would, in the opinion of the undersigned, be necessary, in order to establish a breach of neutrality, to show that on this occasion the *Montijo* was chartered for the purpose of bringing Señor Obaldia to Panama and taking him back to David. That a solitary passenger should embark in a vessel engaged in her regular traffic, should arrive at a certain place, transact his business there (be it peaceful or revolutionary), and return in the vessel on her next trip to the place from which he started, could scarcely justify a charge against the owners of the ship of a breach of neutrality. As to the concealment, it is not alleged, much less proved, that the owners or the captain were parties to it. A passenger might easily, by remaining in his cabin or by keeping out of the way when an inconvenient visit was made, be said to be 'in concealment,' without the captain taking part in or perhaps being even aware of his intentions.

"The undersigned can not, therefore, admit that in any of the cases cited by the Colombian arbitrator the *Montijo* has violated her neutrality by taking part in civil contests.

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"The undersigned has entered into the details of these cases more out of deference to the elaborate argument of the Colombian arbitrator than out of the belief that such minute examination was really called for from him. In his opinion a simpler solution could be found of the point in dispute. This is, that the *Montijo* can not possibly be held responsible in 1871 for events which took place in 1868, with which those of the later date were in no way connected.

"Even if it be granted, for the sake of argument, that these contracts with a legitimate or a *de facto* government for the conveyance of troops or munitions of war were of questionable propriety, the time has gone by for making them a ground of complaint against the *Montijo*. That vessel was chartered, as has been above described; she was paid the sums stipulated in the charters. No complaint has ever been made by any of the governments of Panama, or by that of the Union, against her proceedings. If, during the performance of these contracts, she violated her neutrality, she might have been proceeded against at law, her captain and crew might have been punished; she might, at least, have been prevented from pursuing the same course in the future. But nothing of this has happened. Each party seems to have been satisfied with its bargain. The vessel was chartered for a given time, or for a given purpose, for a given sum. Each party to the contract has complied with its conditions. There is, therefore, no connection between the acts of 1868 and those of 1871.

"The undersigned is aware that the object of the Colombian arbitrator has been to show the general character of the *Montijo*, but he is compelled to remark that a good or a bad reputation is not a reason for condemning or acquitting a criminal. It can only be received in mitigation or aggravation of a punishment.

"For these reasons the undersigned is obliged to decide that there was no violation of neutrality in the proceedings of the *Montijo* in 1868, and that, had there been, her owner can not be held responsible in 1871 for them, especially as there is no similarity between the one and the other.

Nationality of the Crew

"There remains to be noticed the allegation of the Colombian arbitrator that the *Montijo* was not entitled to be reputed as an American vessel because only a third of her crew were American citizens, and that this is a violation of the law of the United States. The undersigned must remark, first, that this is rather a question for the Government of the United States than for this tribunal of arbitration; and, secondly, that it constantly happens that the requirements of such a law can not be carried out, owing to the impossibility of procuring such citizens. The meaning of the law is that the vessel, *when she leaves an American port*, shall have a certain proportion of her crew of the class required by its provisions. It would be absurd to

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condemn a vessel to enforced idleness in a foreign port because owing to desertion or death or any other cause that proportion has been disturbed, and American citizens could not be obtained to supply their places. Before the repeal of the British navigation laws the same condition was exacted as regards British vessels, but it was always understood that 'circumstances alter cases,' and that a vessel might lawfully navigate with such crew as she could get at a distance from home. The undersigned can not go behind the undoubted fact that the Government of the United States considers the *Montijo* as an American ship. On this point it is the sole judge.

Question of Military Justification.

"Reply to reason No. 3:

"As the undersigned has been unable to admit that the *Montijo* had forfeited her neutrality, it follows as a matter of course that he can not accept the statement of the Colombian arbitrator that Señores Herrera, Diaz, and others were justified in seizing her. That these gentlemen may have been right in considering her as an 'element of war,' which might and probably would have been used against themselves, and that on the principle of self-preservation they acted on a natural impulse in taking possession of her is freely admitted; but this is surely no reason for not paying for her. Had the government of Panama complied with its engagements to remunerate her owners (Article VII. of the treaty of peace), this claim would not have arisen. But the undersigned can see no possible ground for the owners of the *Montijo* being the losers, because first the revolutionists and subsequently the constitutional government of Panama failed in their promises.

"He is, therefore, under the necessity of expressing his dissent from the conclusion of the arbitrator of Colombia contained in his third reason for holding his government exempt from responsibility.

"Reply to reason No. 4:

Questions of Evidence.

"The arbitrator of Colombia asserts, in the first place, that it has not been proved that Herrera and Diaz took the steamer by force and against the will of the owners, because the only proof alleged is to be found in the affidavits of the parties interested in the present claim, which are *pro tanto* invalid; and, secondly, because there is a contradiction in the evidence given by John Schuber, one of the owners.

"To the first of the allegations the undersigned replies that, although independent testimony of any fact is always desirable, there are many cases in which it can not be procured. But this is no reason for excluding the evidence of eye witnesses of and participators in a transaction on the ground that they may be interested, pecuniarily or otherwise, in its solution. To render such testimony invalid it would be necessary to prove a notorious absence of credibility in the witnesses, or a manifest combination or conspiracy on their part to swear

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falsely. It would surely not be held that in a trial for mutiny committed on board of a ship on the high seas, the evidence of a portion of the crew could not be received against another portion because the informants might expect a reward from the owners, or a share in the property which they might have contributed to save by their resistance to the mutineers.

"But it is to be borne in mind that there is another and independent witness of the capture; the affidavit of Agustin Castellanos, a native of Cuba, but a naturalized citizen of the United States, who was on board of the *Montijo*, and who did not in any way belong to her crew, distinctly states that the hoisting of the American flag by order of Herrera and Diaz as a signal to a schooner which was lying in the offing, and which proved to be laden with men and supplies for the revolutionists, was done in absolute opposition to the wish of the captain of the *Montijo*, who even put the flag away in his own cabin to insure its safety. It is true that the arbitrator of Colombia asserts that this affidavit, being only made before the consul of the United States, without the intervention of any Colombian authority, would not be valid before a tribunal of the republic. But this court of arbitration is not a Colombian tribunal, but an international one. It consequently rests with the arbitrators alone to decide what evidence they will receive or reject, and the undersigned, as a final referee, can not see any reason for setting aside the declaration, on oath, of a respectable person, entirely impartial in the matter, against whose right to be believed, on oath, no allegation is or has been made. The undersigned is of opinion that, even if there were no other evidence that the *Montijo* was taken possession of against the consent of her owner and commander, the affidavit of Señor Castellanos would of itself suffice to prove that such was the case.

"As regards the contradiction which is stated to exist between the two affidavits of Mr. John Schuber, the undersigned admits that there is some discrepancy, as in the one Schuber declares that the life of the captain was threatened by Herrera and Diaz with revolver in hand, whilst in the other he affirms that neither Herrera nor Diaz threatened the captain with arms, although their companions had them in their possession.

"But whilst allowing, as the undersigned does, that the two versions of the same act do not entirely correspond with each other, he must observe that the main fact of the opposition of the captain to the delivery of the flag remains untouched. Whether Herrera or Diaz or their followers were or were not armed; whether, being armed, they or any of them did or did not menace the captain with the use of their weapons, does not affect the point at issue. The volume of proof that the *Montijo* was taken from the owners against their consent is so overwhelming, the facts connected with her retention by the revolutionists so notorious, that the undersigned will eliminate altogether from the record the affidavit of John Schuber. It shall be to him as if it had never existed.

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"For these reasons the undersigned is compelled to consider the evidence furnished by the captain and engineer of the *Montijo* and by Agustin Castellanos as quite unimpeachable. He has no doubt that the vessel was taken against the wishes of the owner and captain. That no actual violence, in the sense of coercion by deadly weapons was used is doubtless true, but the undersigned is quite convinced that moral pressure was exercised, and that the American flag was only surrendered by Captain Saunders because he could not help himself.

"Reply to reason No. 5:

Question as to Navigation License.

"The arbitrator of Colombia lays much stress on the fact that the *Montijo* was navigated in the waters of Colombia under a foreign flag without obtaining the license which, under penalty of confiscation, is required by a decree of the 13th of May 1862. It is true that in the contract of the 15th of December 1869 a permission was given by the President of Panama; but it is contended that this official had no authority to grant it, the power being reserved to the government of the Union. In connection with this branch of the subject it is further urged by the arbitrator of Colombia, supported by the opinion of the honorable the attorney-general, that the 'coasting trade' (*comercio de cabotaje*) being forbidden to foreign vessels in Colombia and expressly prohibited by Article III. of the treaty of 1846, between the United States and Colombia, no claim can be presented by the owners of the *Montijo* for consequences resulting from their violation of this arrangement between the two nations.

"The undersigned will examine these arguments in inverse order.

"As regards the term coasting trade (*comercio de cabotaje*) it is scarcely correct to say that it is *forbidden* by either party to the vessels of the other. The words of Article III. of the treaty are, 'But it is understood that this article does not include the coasting trade of either country, the regulation of which is *reserved* by the parties, respectively, according to their own separate laws.' It is clear from this reservation that it was lawful for each party to the treaty to open the coasting trade to the other if it saw fit at any time to do so. But the undersigned, whilst feeling it a duty of courtesy to advance this opinion in reply to the argument of the Colombian arbitrator, really attaches little importance to the point, as he agrees with the counsel of the United States of America that the voyages of the *Montijo*, either in the interior waters of the State of Panama or from Panama to Buenaventura or Tumaco, are not rightly described by the term *comercio de cabotaje*. The argument of the Honorable Mr. Scruggs on this point appears to the undersigned both exhaustive and convincing. For the sake of brevity he does not incorporate it into this decision, but he recommends its study to everyone who takes an interest in this case. He presumes that it will be published

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with the other papers. The most that the trade of the *Montijo* can be called is one of *comercio costañero*, which is certainly not prohibited or even provided for by the treaty.

"But it is further alleged that in order for a foreign vessel to carry on this limited traffic as described above the consent of the government of the Union was necessary, and that the *Montijo* incurred the penalty of confiscation by not obtaining it. The undersigned does not deny that a decree to that effect undoubtedly exists; but he is compelled to ask, Why was it not enforced? It is surely too much to expect that a foreign vessel should inform against itself, or insist on complying with the terms of a law or a decree which the authorities of Colombia, federal and state, allowed to be disregarded and violated for a series of years. No one can be allowed to take advantage of his own wrong. The execution of the laws of Colombia clearly belongs to her own officers, and if, as in the present case, these latter failed to enforce them, the blame must rest with the real delinquents and not with the owners of a foreign vessel. For years previous to the events of 1871 the *Montijo* seems to have made her voyages without the permission above alluded to; for years afterward the undersigned believes that she continued to do the same. She may be doing so now, although the undersigned has heard that she was wrecked some time ago, and he is not aware whether she was subsequently saved. If the laws of Colombia are so loosely administered as to allow, with the full knowledge of the federal and state authorities of Panama, a foreign ship to perform for years acts which are forbidden by those laws, the undersigned can not consent to punish the foreigner and acquit the native.

"Nay, more, in the contract of 1869 the President of the State of Panama distinctly permitted the *Montijo* to carry on this trade. If, as is alleged, he had no right to do so, he should have been reproved by the general government and his contract declared invalid. But no such steps were taken. The maxim that 'silence gives consent' is entirely applicable to this case, and so the undersigned must decide.

"He will add his belief that the arrangement by which the *Montijo* traded under the flag of the United States was a convenient one to both parties. To the *Montijo*, because it insured to her owners the protection of a great and powerful country; to the authorities and people of Panama, because the flag increased the probabilities that she would not be interfered with by revolutionary movements whilst she was performing a great service to Panama by her traffic with the northern part of the State, especially by supplying the capital with cattle. It is well known to the undersigned, by his experience of this and other countries where constitutional liberty and settled governments are not as yet as firmly consolidated as their friends could wish, that on the slightest appearance of danger property of every kind, from valuable estates down to a horse or a diamond ring, are transferred to the custody of foreigners, who

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are made to appear as the real owners. The undersigned considers such transactions as those just described as an open fraud, and neither has admitted or ever will recognize them when, as has been the case, they are brought to his official knowledge; but no one will deny that they exist. In the case of the *Montijo* there was, of course, no such deceit, as she is *bona fide* the property of foreigners.

"It follows that if the law has been broken both parties are in fault, the authorities of Colombia in a greater degree, as it was their duty to enforce the laws which were committed to their keeping.

"For these reasons the undersigned can not attach weight to the reasoning and deductions of the arbitrator of Colombia.

"Reply to reason No. 6:

The Effect of Amnesty. "The ground assumed by the arbitrator of Colombia on this point seems to be that as a general amnesty in favor of Messrs. Herrera, Diaz, and all other persons concerned in the attempted revolution of April and May 1871 was subsequently granted by the President of the State of Panama, in the exercise of his constitutional powers, no judicial proceedings could be instituted against the revolutionists, and consequently that no compensation for injuries done by them could be recovered from them by either foreigner or native.

"To this argument the undersigned sees two objections:

"The first is that, even in the absence of any express stipulation to that effect, the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon toward persons or things over which the grantor has no control. In the present case it will scarcely be contended that the captors of the *Montijo* had any right, beyond that emanating from a revolutionary movement, to take the vessel from the dominion of her owners. By the terms of the treaty with the United States it is clearly stipulated that 'the citizens of neither of the contracting parties shall be liable to any embargo, nor to be detained with their vessels, cargoes, merchandise, or effects for any military expedition, nor for any public or private purpose whatever, without allowing to those interested an equitable and sufficient indemnification.' If, therefore, the captors had no right before the amnesty to take the *Montijo*, it is evident that the President of Panama could not by the terms of that document confer it on them. *They*, therefore, are liable to the owners for the expenses incurred and damages occasioned. If no amnesty had ever been granted, and had Herrera, Diaz, and their associates been honestly and effectively proceeded against in the courts of the republic, and cast in damages toward the owners, the aspect of the case would have entirely changed. It would have been, at least, an open question whether their possible or even notorious inability to pay those damages would have rendered Colombia at large responsible for their acts. But the amnesty deprived

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the Messrs. Schuber of the power of trying the question. Therefore the President of Panama, having no right to dispose of interests which were not his property and which, on the contrary, he was bound by a public treaty to protect, assumed the responsibility to the owners of those interests of the persons by whom they had been injured. It is an old saying that one must be just before one is generous. In Spanish the version is, '*La bolsa ajena es muy franca*'—it is easy to pay one's debts out of another man's purse.

"This brings the undersigned to the second ground for dissenting from the decision of the Colombian arbitrator on the point under consideration.

"This is that the treaty of peace, of which the amnesty forms a part, contains in its seventh article a distinct engagement that the government of Panama will pay for the use of the *Montijo*. The undersigned considers this fact so important and conclusive that he contents himself with putting it on record without further comment. Why the engagement was not carried out the undersigned can not say. That arbitrators were appointed to fix the amount, and that they came to a decision respecting it is on record. But their sentence was apparently not ratified; at any rate, it was not carried out. The State of Panama therefore remains to this day responsible, both by implication and by express engagement, for the acts of the revolutionists in this matter.

National Responsibility for State Acts.

"There remains to be considered the concluding portion of the sixth reason advanced by the Colombian arbitrator, which is that the government of the Union can not be held answerable for the failure of that of Panama to compensate the owners of the *Montijo* because the former has no connection (*solidaridad*) with private debts, especially with those which have, as in the present case, a vicious origin.

"To this the undersigned replies, first, that in his opinion the government of the Union has a very clear and decided connection with the debts incurred by the States of the Union toward foreigners whose treaty rights have been invaded or attacked; and, secondly, that the debts so incurred by the separate States are in no way private, but, on the contrary, entirely public in their character.

"As regards the first point, it can not be denied that the treaties under which the residence of foreigners in Colombia is authorized, and their rights during such residence defined and assured, are made with the general government, and not with the separate States of which the Union is composed. The same practice obtains in the United States, in Switzerland, and in all countries in which the federal system is adopted. In the event, then, of the violation of a treaty stipulation, it is evident that a recourse must be had to the entity with which the international engagements were made. There is no one else to whom application can be directed. For treaty purposes the

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separate States are nonexistent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government.

"But, if it be admitted that such is the theory and the practice of the federal system, it is equally clear that the duty of addressing the general government carries with it the right to claim from that government, and from it alone, the fulfillment of the international pact. If a manifest wrong be committed by a separate State, no diplomatic remonstrance can be addressed to it. It is true that in such a case the resident consular officer of a foreign power may call the attention of the transgressing State to the consequences of its action, and may endeavor by timely and friendly intervention on the spot to avoid the necessity of an ultimate application to the general government through the customary diplomatic channel; but should this overture fail, there remains no remedy but the interference of the federal power, which is bound to redress the wrong, and, if necessary, compensate the injured foreigner.

"If this rule, which the undersigned believes to be beyond dispute, be correctly laid down, it follows that in every case of international wrong the general government of this republic has a very close connection with the proceedings of the separate States of the Union. As it, and it alone, is responsible to foreign nations, it is bound to show in every case that it has done its best to obtain satisfaction from the aggressor.

"But it will probably be said that by the constitution of Colombia the federal power is prohibited from interfering in the domestic disturbances of the States, and that it can not in justice be made accountable for acts which it has not the power, under the fundamental charter of the republic, to prevent or to punish. To this the undersigned will remark that in such a case a treaty is superior to the constitution, which latter must give way. The legislation of the republic must be adapted to the treaty, not the treaty to the laws. This constantly happens in engagements between separate and independent nations. For the purposes of carrying out the stipulations of a treaty, special laws are required. They are made *ad hoc*, even though they may extend to foreigners privileges and immunities which the subjects or citizens of one or both of the treaty-making powers do not enjoy at home.

"That under such a rule apparent injustice may occasionally be committed is probably true. But it is more apparent than real. It may seem at first sight unfair to make the federal power, and through it the taxpayers of the country, responsible, morally and pecuniarily, for events over which they have no control, and which they probably disapprove or disavow, but the injustice disappears when this inconvenience is found to be inseparable from the federal system. If a nation deliberately adopts that form of administering its public affairs,

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it does so with the full knowledge of the consequences it entails. It calculates the advantages and the drawbacks, and can not complain if the latter now and then make themselves felt.

"That this liability of the federal power for the acts of the States may produce to the nation at large the gravest complications is matter of history. Probably the most serious case of this inconvenience on record is that of a British subject named McLeod, whose arrest and trial by the State of New York nearly involved Great Britain and the United States in a war. During the Canadian rebellion, an American steamer called the *Caroline*, which had been engaged in carrying arms to the rebels, was boarded in the night by a party of loyalists, set on fire, and driven over the Falls of Niagara. In this affray an American citizen lost his life. In January 1841 Alexander McLeod, a British subject, was arrested while engaged in some business in New York State, and imprisoned on a charge of murder because, as was alleged, he was concerned in the attack on the vessel. The British Government demanded his release on the ground that he was acting under orders, and that the responsibility rested with Great Britain and not with the individual. The Secretary of State of the United States replied that his government was powerless in the matter, as it could not interfere with the tribunals of the State of New York. Great Britain then caused it to be distinctly understood that the condemnation and execution of Mr. McLeod would be immediately followed by a declaration of war. Lord Palmerston, then secretary for foreign affairs, told Mr. Stevenson, United States minister in London, that such would be the case. Great efforts were made by the friends of peace, and as much pressure as could properly be applied to the State of New York was brought to bear, and McLeod was acquitted. But two great and powerful nations were on the verge of a disastrous war because the federal power was held liable for the acts of a separate State.

"As regards the second point made by the Colombian arbitrator, that the debts incurred to foreigners by the separate States of the Union are private in their character, the undersigned can only express his dissent from the doctrine. If an engagement, pecuniary or other, made by the constitutional head of a State, acting, as in the present case, 'in virtue of powers conferred by law,' is to be considered in the same light as an ordinary mercantile debt and only to be recoverable in the same manner, the possibility of a State contracting with either native or foreigner would soon be reduced to very narrow limits. The chances of repayment would depend on the stability of the contracting government, and this of itself would introduce an element of considerable uncertainty into such transactions.

"The undersigned holds that all debts contracted by duly authorized officers of a given State are essentially public in

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their character, and that their nonpayment can be made the subject of remonstrance by a foreign nation should the engagements be contracted with its subjects or citizens. It is quite true that Great Britain, the greatest lender of money in existence, does not feel herself bound to interfere on behalf of her subjects in every case where they may have lent money to foreign countries, as she holds, as a general rule, that they may be left to find their own remedy for their imprudence; but she explicitly declares that this abstention on her part is a mere matter of discretion, and that she has the undoubted right to interfere whenever she may see fit to do so.

"As regards the 'vicious origin' of the present debt, the undersigned does not view it in that light; he can not, therefore, agree with any deductions from that assumption.

"For these reasons the undersigned holds, as a general principle, that the government of the Union is responsible in certain cases for the wrongs inflicted on foreigners by the separate States, and that debts contracted by the constituted authorities of those States are not private in their character. He is compelled, therefore, to dissent from the sixth reason of the Colombian arbitrator.

"The undersigned has now reviewed, to the best of his ability, the able and elaborate arguments of the honorable the arbitrator of Colombia on this question. He wishes he could have brought to the task the same brilliant qualities which Señor Tanco has so liberally displayed, and it would have been agreeable to him to have concurred in the views of a gentleman whom he so highly esteems.

Opinion of the Arbitrator of the United States.

"The next step in the discharge of the duty which the undersigned has contracted is the examination of the opinion of the honorable the arbitrator of the United States of America. This, however, is an easy task, as the undersigned fully concurs in and adopts that opinion as in conformity both with public law, as understood by him, and with the justice of the question in dispute.

"Mr. Koppel asserts the responsibility, to the claimants, of the government of the Colombian Union, and fixes the pecuniary amount which results from that responsibility. Although the undersigned may see reason to differ from the arbitrator of the United States on this latter point, he expresses his entire concurrence in the former. He believes, moreover, that the enlightened and moderate views held and ably advocated by Mr. Koppel will be cheerfully accepted by the government and people of Colombia, however unpalatable it may naturally be to them to be found liable in pecuniary damages. This fact, however, reflects no disgrace to the nation; on the contrary, the conduct of Colombia is calculated to advance her reputation in the eyes of the world, as it shows her willingness to adopt, for the solution of difficulties, the enlightened course which

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has found favor, especially of late years, with powerful countries which could have trusted with confidence to the arbitrament of the sword.

Umpire's Decisions.

"The task of the undersigned approaches its conclusion. He has reviewed, in the one case in considerable detail, in the other in a much briefer form, the opinions of the two honorable arbitrators of Colombia and the United States of America. It remains for him to give his own decision on the two points to which the convention of arbitration limits its labors.

"These are:

"First. Whether Colombia, as represented by the government of the Union, is or is not responsible to the owners of the *Montijo*, her captain, officers, and crew, for the events which have given rise to this arbitration?

"Second. If she be so responsible, then in what sum is she indebted?

"As regards the first point, the undersigned *decides:*

"That Colombia is responsible to the owners of the *Montijo.*

"That Colombia is not responsible to one of the owners (Mr. John Schuber), to the captain, officers, or crew, for personal damages as claimed by them.

"As regards the second point, the undersigned *decides.*

"That Colombia is responsible to Messrs. Schuber, owners of the *Montijo*, in $33,401, being—

For the use of the steamer by Messrs. Herrera, Diaz, and their followers for 43 days, at $500 a day	$21,500
For the use of the steamer by the government of Panama for 20 days before she was restored to her owners, at $500 per day	10,000
For certain necessary repairs	1,901
	33,401

Grounds of Decisions.

"The undersigned will give his reasons for the above decisions.

"As to the first point, he is compelled to decree the responsibility of the Colombian Government, because (A) it is the natural heir (if the expression may be permitted) of the liabilities of the State of Panama toward the owners of the *Montijo.* That this vessel was, at the time of her capture by Herrera and Diaz, engaged in the prosecution of a perfectly lawful and peaceful voyage there can be no doubt. With what she may have done in years gone by, with what she may have intended to do in some contingency which had not arisen, and did not subsequently arise, this tribunal can have nothing to do. She was on the 5th of April 1871 performing, with the full consent of and under special contract with the constitutional government of the State of Panama, a lawful voyage. That voyage was forcibly interrupted; the dominion of the owners was disturbed; she passed out of their control and was not restored to it for a period of sixty-three

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days. It is clear, on every principle of the plainest justice, that 'some one' ought to pay for this act and for its consequences. That 'some one' could not be Herrera and Diaz, because their responsibility was saved by the treaty of peace and its accompanying amnesty. We have then to fall back on the State of Panama, which granted the amnesty, and stipulated, moreover, as one of the conditions of the treaty of peace, that it would pay for the use of the *Montijo;* but that State has, for its own reasons, failed to do so. It is, then, to the general government alone that the claimants can apply. As the final result of such application, the undersigned decides that the said government is liable.

"But there is another and a stronger reason for such liability. This is (B) that the general government of the Union, through its officers in Panama, failed in its duty to extend to citizens of the United States the protection which, both by the law of nations and by special treaty stipulation, it was bound to afford. It was, in the opinion of the undersigned, the clear duty of the President of Panama, acting as the constitutional agent of the government of the Union, to recover the *Montijo* from the revolutionists and return her to her owner. It is true that he had not the means of doing so, there being at hand no naval or military force of Colombia sufficient for such a purpose; but this absence of power does not remove the obligation. The first duty of every government is to make itself respected both at home and abroad. If it promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer.

"For these reasons the undersigned holds Colombia liable to the owners of the *Montijo.* The sum of $500 a day has been fixed because that amount seems to have been constantly agreed upon by the governments of Panama and the Messrs. Schuber as a fair price.

"But the undersigned, whilst deciding on the liability to the owners, does not see any necessity for indemnifying either Mr. John Schuber, the captain, the engineer, or the petty officers and crew of the *Montijo.* No personal injury seems to have been suffered by any of these persons, and the inconvenience they experienced appears to have been small. In the case of the officers and crew probably there was none at all. The wages of all these latter have doubtless been paid by the owners, so that it really must have been a matter of indifference to them whether they were sailing under the orders of Captain Saunders or of Señor Herrera.

"As to Mr. John Schuber, the undersigned can scarcely consider as a case of false imprisonment his retention on board his own vessel. That he was not a free man is true, and that he suffered some inconvenience, and possibly some loss of

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business, by the act of which he complains, is probably the case. It is also possible that a court of law might consider him entitled to personal damages. But the undersigned believes that a tribunal such as this is may lawfully exercise considerable discretion of its own, and decide rather on broad general principles than on a strict interpretation of written law. Such being his opinion, he concurs with the arbitrator of the United States in striking out of the account presented by that government the claims for personal damages of all the parties concerned.

Disallowance of Interest.

"As regards the opinion of the arbitrator of the United States that interest at the rate of 5 per cent per annum should be allowed from the 1st of January 1872 to the date of payment of the claim, the undersigned is not prepared to say that such an allowance would not be strictly justifiable. He nevertheless decides against it for the following reasons:

"*First.* Because there is no settled rule as to the payment of interest on claims on countries or governments;

"*Secondly.* Because it seems open to question whether interest should accrue during the progress of diplomatic negotiations, which are often protracted in their character;

"*Thirdly.* That this reason applies with special force to negotiations which result in an arbitration or friendly arrangement;

"*Fourthly.* That, whilst doing what he considers strict justice to the claimants by giving to them the full value of the use of their vessel during her detention, he desires to avoid any appearance of punishing the Colombian people at large for an act with which very few of them had anything to do, and which affected no Colombian interests beyond those of a few speculators in revolutions in Panama.

Amount of the Award.

"The repairs rendered necessary during the occupation of the vessel seem fairly to belong to the claim, for which reason the sum of $1,901 is allowed.

"The undersigned wishes to point out that the sum now awarded is simply that which the government of Panama ought to have paid immediately that the vessel was returned to her owners, and for which it and the revolutionists against its authority received full value. If anything is to be paid at all, it can scarcely be less than the amount now awarded. It is true that the duty of payment is transferred from the State of Panama to the government of the Union, but it is, of course, open to this latter, should it see fit to do so, to claim the sum for the national treasury. If this course be pursued, and an offending State be held strictly accountable to the nation at large for all expenses caused by its local disturbances, the undersigned believes that these will become less frequent and less violent in their character. That this of itself will be a great gain to the republic, morally and materially, it requires no argument of the undersigned to point out.

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"The undersigned has decided, according to the best of his ability, this delicate and interesting question. If by his decision he has contributed to a fair and reasonable understanding of the relations existing, so far as foreigners residing in Colombia under treaty stipulations are concerned, between the separate States and the general government of the Union, he will be satisfied with his work. If, in conjunction with the honorable gentlemen, his colleagues in this tribunal, he has succeeded in removing a cause of misunderstanding between Colombia and the United States, both they and he will feel their labor has not been in vain.

"The undersigned desires to remark, in conclusion, that if he has only casually and even incidentally alluded in the course of this decision to the opinions and views of the counsel for the respective parties, the honorable the attorney-general of Colombia and the honorable the minister of the United States, it has not been from a want of appreciation of their distinguished merit, of their learning, or of their forensic ability; it has simply been because he has conceived his duty to lie exclusively in determining between the views of the two arbitrators who did him the high honor to choose him for that purpose. The undersigned acknowledges with profound gratitude the valuable assistance which he has derived from the arguments of the respective counsel, although he has abstained, with two exceptions, from any allusion to them. That he could not agree with both is evident from his position as umpire. But he is fully sensible of the obligations under which he stands to both of those distinguished and learned gentlemen.

"ROBERT BUNCH."

"Bogotá, July 26, 1875."

Payment of the Award.

The sum awarded by the umpire was duly paid by the Colombian Government to the minister of the United States at Bogotá, and the claimants wished it to be handed over to them after the deduction of $449.50, the amount of the expenses incurred by the United States in the arbitration. Mr. Scruggs, however, declined to hand over the money in the absence of instructions to do so.[1] Such instructions were given,[2] but before they were received Mr Scruggs, in apprehension of an attack on Bogotá by revolutionists, which would have rendered deposits of coin in the city unsafe, paid over to the Messrs. Schuber the sum of $25,000.[3] He paid over the remainder of the fund, less the

[1] Mr. Scruggs to Mr. Fish, August 7, 1856, MS.
[2] Mr. Hunter, Acting Secretary, to Mr. Scruggs, September 11, 1876, MS.
[3] Mr. Scruggs to Mr. Fish, September 13, 1876, MS.

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expenses, on the receipt of his instructions.[1] Mr. Scruggs was congratulated by his government on the results of the arbitration.[2]

[1] Mr. Scruggs to Mr. Fish, December 26, 1876, MS. In a dispatch of May 18, 1876, Mr. Scruggs said: "The Colombian congress have recognized the responsibility of the general government for the seizure and occupation of the Magdalena steamers by the insurgents during the revolution on the coast in July and August 1875, and have voted an appropriation of $100,000 as indemnity to the owners. The steamers in question are owned by an international company, composed of English, German, American, and Colombian citizens. The company was represented by one of its agents, no diplomatic action having been taken by any of the foreign representatives here in regard thereto."

[2] Mr. Fish to Mr. Scruggs, September 18, 1875, MS.

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CHAPTER XXX.

CASE OF THE BRIG "MACEDONIAN": CONVENTION BETWEEN THE UNITED STATES AND CHILE OF NOVEMBER 10, 1858.

Origin of the Case.

President Buchanan on April 28, 1858, communicated to the Senate, in response to a resolution of the 24th of the preceding month, a report of Mr. Cass, as Secretary of State, together with a voluminous correspondence, in relation to the seizure in the valley of Sitana, in Peru, by the authorities of Chile of the proceeds of the cargo of the American brig *Macedonian*. By the papers in question it appeared that on December 14, 1840, Mr. Forsyth, Secretary of State, inclosed to Richard Pollard, chargé d'affaires of the United States at Santiago, Chile, a memorial of Thomas H. Perkins, of Boston. This memorial represented that in 1818 the *Macedonian*, which was owned by John S. Ellery, and commanded by Eliphalet Smith, sailed from Boston with a valuable cargo belonging to Ellery, Perkins, and other persons, all citizens of the United States, on a trading voyage to South America and elsewhere, as might be found expedient. The brig, after visiting and trading at several places on the coast of Chile and Peru, proceeded to Callao, where Captain Smith disposed of the residue of his cargo for about $145,000. Of this sum upward of $60,000 in specie was forwarded by Captain Smith, in care of an agent, to Guamey, to which place the vessel had gone before the receipt of the money. Soon afterward Captain Smith himself left Lima with the remaining $80,000 and upward in specie, and was traveling with it toward Guamey when he was seized by a party of Chilean soldiers, and carried, together with the money, on board of the Chilean ship *O'Higgins*, commanded by Lord Cochrane, then admiral of Chile. This seizure took place on or about the 5th of April 1819. After several days' detention, and being compelled to sign a paper relinquishing all

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claim to the specie, Captain Smith was released and permitted to go to Guamey, where he expected to find the $60,000 which had been sent forward in charge of his agent. The agent however, having heard of the seizure of Captain Smith by Lord Cochrane, put the specie on board a French brig called the *Gazelle*, then lying at Guamey, instead of delivering it on board of the *Macedonian*, where he feared that Lord Cochrane might seize it. Lord Cochrane, hearing of the circumstance, captured the French brig and compelled her captain to sign a paper relinquishing the specie to him, in consideration of his releasing the master and the vessel. These two seizures were the subject of a memorial by the persons interested in the cargo to the Department of State in 1820, and they became the subject of a negotiation in which the Chilean Government finally offered to admit the claim for the $80,000 taken from Smith, and part of the claim for the $60,000 taken from the French brig, and to pay the sum of $104,000, with interest, in full settlement of the claims. This sum the memoralists signified their willingness to accept.

Considering, therefore, these claims as settled, Perkins submitted another and distinct claim, growing out of a third seizure by Lord Cochrane in 1821 of another large sum of money belonging to Perkins, and having no connection with the former seizures, though the money last taken proceeded also from sales of goods landed from the *Macedonian*, and under the charge of Eliphalet Smith. The circumstances of this new claim, which forms the subject of the present chapter, and which Mr. Pollard was instructed by Mr. Forsyth to present to the Chilean Government, were as follows: After the second seizure of specie in April 1819 the *Macedonian* continued to trade for some time on the South American coast, and then proceeded to Canton, with a permit obtained from the authorities of Peru to import into that country a cargo from China. In October 1820 the house of Perkins & Co., of which the memoralist was a member, shipped on the *Macedonian* a cargo worth upward of $54,000 at Canton, on a trading voyage to South America. Early in 1821 the brig arrived at the port of Arica, in Peru, where Captain Smith disposed of a part of the cargo at a profit of nearly three dollars for one of the invoice prices, receiving therefor upward of $70,000 in silver. With this sum and the residue of the merchandise he was proceeding to Arequipa when on May 9, 1821, he was

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overtaken and arrested in the valley of Sitana by a party of Chilean troops under the command of Don Lorenzo Balderrama, who required him to deliver up the silver on the spot. Smith begged the officer to take both the silver and the merchandise and to permit him to accompany them to Lieutenant-Colonel Miller, under whose orders they professed to act, in order that the matter might be represented to him. This request the officer refused, on the ground that his orders were peremptory to take the silver at once. Captain Smith then delivered up the silver, and received from the officer a certificate stating that he took it by order of Lieutenant-Colonel Miller, who was in the service of the Government of Chile, the silver being declared to belong to citizens of the United States. Miller was at the time in command of the land forces, which were under the general direction of Lord Cochrane, to whom the money was delivered at Arica, and by whom it was distributed among the squadron.

Captain Smith proceeded with his remaining goods to Arequipa, where he entered a complaint before a magistrate, and caused the deposition of three persons who were witnesses of the seizure of the silver to be taken and duly authenticated. He endeavored to obtain restitution of the money, but without success. It seems that the officer who ordered Balderrama to seize the specie was a Major Soler, who surmised that the specie might be Spanish property in course of removal from Arica, against which city his forces were then on the march. Balderrama, however, did not find it under the protection either of Spanish forces or of a Spanish flag, but in the charge of its apparent owner, who offered proof that it was the property of citizens of the United States. Lord Cochrane took the money with notice of the claim of American ownership.

Accompanying the memorial of Mr. Perkins there was a deposition of Gen. William Miller, of Peru, then at Boston, dated October 23, 1840.[1] He deposed that he was forty-four years of age and upwards, a native of Kent County, in England, and grand marshal of Peru, and that he remembered the circumstances of the seizure; that he was at the time a lieutenant-colonel in the service of Chile, in an expedition which sailed in 1820 from Valparaiso for the purpose of liberating Peru from the Spanish dominion; that Major Soler, who was second in

[1] See Memoirs of General Miller, in the Service of the Republic of Peru. By John Miller, London, 1828, 2 vols.

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command under him of the soldiers attached to Lord Cochrane's expedition, having received information that a large quantity of silver, supposed to be Spanish property, was then in his neighborhood, on its way from Tacna to Arequipa, sent Balderrama with a small party of soldiers to capture it; and that it was seized and taken on board of Lord Cochrane's vessel, and distributed by him among the squadron, either as prize money or on account of arrears of pay due to the officers and men in the service of the Chilean Government. General Miller did not believe that there was any judicial inquiry prior to the distribution of the silver as to whether it was lawful prize; and he declared that there was no way at the time of securing restitution of the property except by Lord Cochrane's direction.

Correspondence at Santiago.

The case was presented by Mr. Pollard to the Chilean Government May 19, 1841. No formal reply was made till October 19, 1843, when the minister for foreign relations addressed a note to Mr. Pendleton, then chargé d'affaires of the United States. A correspondence then ensued which was altogether unprofitable. The first defense set up by Chile was that of prescription. Mr. Pendleton declared that he had never heard of a case in which the doctrine of prescription was applied between sovereigns in respect of the seizure and appropriation of property, intimated that such a defense was incompatible with a desire to do justice, and suggested that an unfriendly collision would be forced on the United States. It is not strange that the developments of the discussion thus begun induced Mr. Crallé, acting Secretary of State, to say to Mr. Crump, Mr. Pendleton's successor, on October 30, 1844, that it was regretted that the correspondence had been conducted in a tone little calculated to secure an amicable adjustment of the controversy. Mr. Crump was instructed to present the claim in respectful but firm language, and to request a prompt and definite answer.

On March 18, 1846, Mr. Crump reported that the Chilean Government had obtained evidence from Peru to which Mr. Montt, the new minister of foreign relations, seemed to attach much importance. This evidence, in the opinion of Mr. Montt, tended to show that the *Macedonian* and her cargo were at least partly the property of Spaniards. Mr. Crump attached less importance to it, deeming it contradictory in character and in many respects inadmissible. He also discussed with

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Mr. Montt the question of prescription. In this relation Mr. Montt placed much emphasis on the circumstance that Captain Smith, at the time of the seizure of the specie, limited his efforts to obtain restitution or compensation to addressing a protest to the Chilean authorities through the captain of an American man-of-war at Valparaiso, and that this protest was not accompanied with any papers. Mr. Crump, on the other hand, in explanation of the delay in presenting the claim, referred to the unsettled condition of Chile, the irregularities in communication, the lack of proofs, and other circumstances tending to excuse delay; and he also adverted to the fact that the captors never libeled the property in the courts.

Mr. Montt at length submitted to Mr. Crump three propositions: (1) That, waiving the question of prescription, the intrinsic merits of the claim should be taken into consideration; (2) that, if there should be a difference with regard to the weight or value of the proofs, the question should be submitted to arbitration; and (3) that, if this should occur, the arbitrator should decide as well upon the question of prescription as upon the merits of the case.[1] Mr. Crump did not deem himself authorized to accept these propositions, but submitted them to the Department of State.

Mr. Carvallo's Mission.

With a view to settle the case the Chilean Government sent to Washington Mr. Carvallo, formerly its chargé d'affaires at that capital, who submitted to Mr. Buchanan a statement, together with three hundred and thirty-one manuscript pages of evidence. Mr. Carvallo maintained that this evidence demonstrated that the property seized in the enemy's territory was Spanish, and subject to capture as enemy's property. The question of prescription he expressly reserved.

Chilean Statement.

Among the papers which Mr. Carvallo presented there was a comprehensive statement of the Chilean view of the case. In this statement it was set forth that the battle of Maypiu of April 5, 1818, annihilated the Spanish army in the Chilean territory, and that the Chileans then pursued the Spaniards into Peru; that on February 28, 1819, the Chilean squadron blockaded Callao, the principal port in Peru, and the viceroy acknowledged the Chileans' superiority at sea; that on August 20, 1820, all the ports of the viceroyalty from Iquique to Guayaquil were

[1] Mr. Montt to Mr. Crump, October 11, 1845.

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declared in a state of blockade; and that after several partial engagements on land and on the sea, Lima, the seat of the Spanish viceroys, was taken by the Chilean army on the 10th of July 1821. Thus, at the time of the seizure of the money in the valley of Sitana there was a war between Chile and Peru, the latter being then a Spanish colony. At the same time there were, said the statement, two wealthy and eminent Spanish merchants at Lima named Don Pedro Abadia and Don José de Arismendi, who were able to obtain special favors from the viceroy. No foreigner could trade in the colony; and these two merchants could secure advantages to which no Peruvian and no other Spaniard could aspire. Under these exceptional circumstances, Arismendi obtained permission to introduce into Lima goods, the value of which in Asia or Europe should not exceed $200,000, on board of *one or two vessels of any nation which he might choose.* For this privilege he paid into the treasury $50,000 as a gift and advanced $150,000 on account of the duties on the proposed importation.

In order to carry out his adventure, Arismendi chartered the *Macedonian*, a neutral vessel, whose captain, Eliphalet Smith, had served in previous expeditions of the same kind. On November 25, 1819, he entered into a contract with Captain Smith, by which their interests in the enterprise were adjusted, and by which it was provided that they should share the risks of the adventure from its commencement at Canton to the sale of the cargo at Lima. On the 4th of December 1819 he acquired a half interest in the brig. In order to evade the Chilean squadron, the *Macedonian* left Callao at night, but before she sailed for China Arismendi, who feared that the blockade of Callao might continue, obtained permission from the viceroy for the vessel to land her cargo at Arica or some other port. When the time for her arrival drew near, Arismendi constituted Don Pedro Irribery and Don José Suarez Inclan, at Tacna, as his consignees to dispose of the cargo for a commission. Subsequently they went to Arica, where a part of the cargo was delivered. They effected the sale of it for Arismendi. The property was disposed of as his, and an attempt was made to have the proceeds deposited for safety on board of a neutral vessel.

It was, said the Chilean statement, while the money was on its way to this destination, and in the territory of the enemy, in charge of Smith, the partner or agent of Arismendi; of

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Inclan, the agent and consignee of Arismendi; of Domingo Esteran, the servant of Inclan, and of Domingo Barrios, the carrier, that it was captured. The receipt which was required from Captain Balderrama was written by Inclan. And, notwithstanding his deposition at Boston, General Miller certified at Lima, on April 1, 1831, that by order of Lord Cochrane there were captured "in the valley of Sitana eleven loads of bags of dollars and three loads of bars, which were carried by Eliphalet Smith, captain and supercargo of the American schooner *Macedonian*, coming from Canton *with a cargo, as was assured, belonging to Don Pedro Abadia, of Lima.*" From all the evidence it followed that the expedition of the *Macedonian* to China was originated by Spaniards on their own account, with their own funds, and in a vessel of which they were in part, if not absolutely, the owners; that the money seized was in the possession of their agents, and that by his participation in the adventure Smith lost his neutral character, and could not take from the property its hostile character.[1]

Answer of Mr. Gillett.

The statement and papers submitted by Mr. Carvallo were referred to Mr. Ransom H. Gillett, solicitor of the Treasury, whose report upon them was communicated to Mr. Carvallo.[2] In this report it was stated that when Captain Smith arrived at Arequipa, after the seizure of the money, he and those accompanying him immediately made a sworn statement before a judicial magistrate. This was immediately followed up by notarial protests. Certified copies of these papers were transmitted June 17, 1821, to Capt. Charles G. Ridgeley, of the United States frigate *Constellation*, then lying at Callao, and to Henry Hill, United States consul at Valparaiso, with a request to each of them to demand restitution from the Government of Chile. Mr. Hill had left Valparaiso to return to the United States. He was succeeded, however, by Michael Hogan, who made repeated applications on the subject. Captain Ridgeley soon afterward proceeded to Valparaiso for the express purpose of demanding an account of the money, as well as indemnity for the forcible use of the *Macedonian* for the transportation of Chilean troops, and for other injuries committed by Chilean officers on the persons and property of citizens of the United

[1] S. Ex. Doc. 58, 35 Cong. 1 sess. 137.

[2] Mr. Buchanan to Mr. Carvallo, July 25, 1848, S. Ex. Doc. 58, 35 Cong. 1 sess. 173.

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States. On his arrival he found Mr. Provost, who was acting as special agent of the United States in Chile and Peru, under the necessity of proceeding immediately to Lima; but Mr. Hogan, after proper arrangements for recognition, proceeded to Santiago, where he had a correspondence with the supreme director of Chile, to whom he communicated a copy of Captain Smith's protest. The supreme director subsequently answered that "the document and cause had been submitted to the court of prizes in order that they might examine and determine it according to the proofs and justice of the case." Some months later Commodore Charles Stewart arrived on the coast in the United States ship *Franklin*, particularly charged to call upon the Government of Chile for an account of the moneys known to have been taken by Lord Cochrane from the master of the *Macedonian*.

In April 1822 Commodore Stewart entered into a correspondence with the supreme director of Chile. He called attention to the seizures of the proceeds of a former cargo of the *Macedonian* by Lord Cochrane in 1819, and to the more recent seizure at Sitana, saying that they had been the subject of repeated applications to the Government of Chile. The supreme director inclosed copies of the sentences pronounced in respect of the seizures in 1819, but, as to the $70,000 taken at Sitana, merely referred to his former correspondence with Captain Ridgeley, repeating the assurance that Captain Smith's protest had been remitted to the prize court at Valparaiso. The files of the State Department showed that Thomas H. Perkins called the attention of the United States to the seizure at Sitana as early as August 1822. In 1824 Captain Smith, who was then in Arequipa, addressed a letter to Heman Allen, diplomatic representative of the United States in Chile, calling attention again to the several seizures connected with the voyages of the *Macedonian;* and he seemed to have received encouragement from Mr. Allen that the Chilean Government might do justice to his claims. In 1828, Captain Smith having returned to the United States, the Boston claimants seemed, said Mr. Gillett, to have prepared a memorial in relation to the Sitana seizure which they did not present. In 1840, General Miller happening to visit Boston, the fact was for the first time established by his deposition that the money seized by Balderrama was carried on board of Lord Cochrane's ship and appropriated by him to the service of the Chilean Government.

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General Miller's formal deposition was, so Mr. Gillett maintained, of more weight than his previous informal private certificate, without any proof of the circumstances under which it was made, or of the object for which it was asked.

The Peruvian evidence, said Mr. Gillett, consisted of an authenticated copy of the record of certain proceedings at Lima, in 1822, which resulted in a decree confiscating the *Macedonian* and part of her Canton cargo as the property of Arismendi, for the use of the government at Lima, which was then in the possession of the forces of Chile and Buenos Ayres under General San Martin. The United States through Commodore Stewart had demanded reparation for that proceeding. All these papers were presented by John S. Ellery, as administrator of Eliphalet Smith and T. H. Perkins, to the Attorney-General of the United States, under the act of Congress of 1816 for the distribution of the money under the convention with Peru of 1841. The Attorney-General decided that the property belonged to the claimants, and that its seizure constituted a just claim against Peru. He held that the voyage of the *Macedonian* from South America to Canton did not originate with Spanish merchants, but with John S. Ellery and others in Boston in 1818; and that, when the brig arrived in South America in that year she was the sole property of Ellery. Mr. Gillett contended that Ellery remained the sole registered owner, though an interest was "sold to another person," perhaps without Ellery's consent; and that Arismendi's title to a half of the brig, besides not being satisfactorily made out, had only a remote bearing on the question of title to the cargo. He maintained that Abadia and Arismendi were merely Smith's consignees and general agents in his transactions in Peru; that the contract with Arismendi of November 1819 was broken, and that Arismendi was notified, before Smith sailed from Canton, that the latter deemed the contract broken and at an end; that Smith then had no funds of Arismendi or of Abadia in his hands, but acted exclusively for his employers in the United States and Canton; that, on his return to Arica, he employed to a limited extent the persons who were the correspondents there of Arismendi and Abadia, but that the proceeds of his sales were collected and held by him for Ellery and others. Chile had, so Mr. Gillett declared, utterly failed to establish the allegation that the voyage was undertaken for Arismendi. The claimant on the other hand had produced

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original documents, consisting of books of account and letters, found among the papers of Ellery and Smith, which showed that the entire Canton cargo was composed of real shipments by citizens of the United States, and by one Chinese, of goods purchased with their own funds, and intrusted to Smith to be disposed of for the account of the respective shippers. No account whatever with Arismendi or any other Spaniard was kept relative to the voyage. The means employed by Smith to enter and land his cargo could not be certainly determined. If he did so through Arismendi's influence he would merely have been liable to repay what the privilege cost. Arismendi thereby acquired no title to the cargo itself.

As to the charge of violation of neutrality, Mr. Gillett said that in March 1821, when Smith returned from Canton, Peru was still under the government of Spain. Callao was blockaded by a Chilean squadron, but Arica, where Smith entered, was open. The first movement of the United States toward a formal recognition of any of the South American republics was the message of President Monroe to Congress of March 8, 1822.[1] Prior to that time the United States had no political relations with any government in Chile or Peru, except the government of the King of Spain. Chile, as a belligerent, could not inquire whether the goods of a foreigner found in Peru came there in violation of the municipal law. She must show a plain violation of neutrality. It was no violation of neutrality to land in Peru a load of Chinese goods and convert them into money, or to place the proceeds on neutral vessels of war. Chile had alleged that there was a contract with her enemies by which Smith furnished them with resources to continue the war. No such contract was shown. The mere payment of duties would not suffice to establish a charge of unneutral conduct.

Subsequent Correspondence.

In a review of Mr. Gillett's report, Mr. Carvallo, maintaining that the cargo was Spanish property, said that it was shown by the records of the United States Treasury that the claimant, Perkins, and the executor of the will of Ellery, had abandoned one-half of their interest in the award of the Attorney-General in the case of the *Macedonian*, under the treaty with Peru, to certain persons represented by Mr. Carlisle, a lawyer in Washington; and that Mr. Carlisle had filed a request that the money payable

[1] 4 Wheaton, Appendix, 23, and 5 Id., App. 154.

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on the interest so released might be delivered to him as the representative of the true owner. This owner, added Mr. Carvallo, doubtless was the widow of Abadia, whose power of attorney in the United States was held by a client of Mr. Carlisle's.

Mr. Carvallo further maintained that a belligerent had the right to confiscate things belonging to the enemy, whether on board the enemy's vessels or on those of friends or neutrals. Blending neutral interests with enemy interests imparted to the former the character of the latter. Mr. Carvallo also invoked the rule of 1756, prohibiting neutrals from engaging, in time of war, in traffic forbidden to them in time of peace. As the Peruvian commerce was forbidden to foreigners, the price of the license and advance of the customs duties were, he contended, all in the nature of a war subsidy. The Canton voyage was illegal from the beginning.

Replying to Mr. Carvallo's argument, Mr. Hunter, acting Secretary of State, May 24, 1852, maintained (1) that the seizure complained of could not be treated as a case of maritime capture; (2) that the private property of an enemy, even in his own country, was shielded by the modern law of nations; (3) that, even if the rule of the war of 1756, the validity of which had always been denied by the United States, were admitted to be sound, it would not justify the seizure of the property of citizens of the United States by Chilean soldiers on Peruvian soil. As to the ownership of the specie, Mr. Hunter declared that he would be content to leave the question to any intelligent and impartial tribunal on the evidence already produced.

Mr. Carvallo, responding to this statement, proposed to refer the whole case to an English jurist. Mr. Hunter declined this proposal, because Mr. Carvallo in his defense had to a great extent relied on the decisions of Sir William Scott. Mr. Hunter suggested the King of Sweden or the King of Denmark. Mr. Carvallo said that Chile had no representative at either of those courts, and suggested either the King of the Netherlands or the King of Belgium. Mr. Webster on September 2, 1852, informed Mr. Carvallo that the President would accept the King of Belgium.

Convention of Arbitration.

Though an arbitrator was thus agreed upon, more than six years elapsed before the conclusion of terms of submission. An attempt was made on the part of some of the claimants to secure a separation of the various interests involved in the case. The object

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of this effort was to avoid the contamination which might result from the possible association of some of the interests with Spanish interests.[1]

A convention of arbitration was signed at Santiago by Mr. John Bigler, envoy extraordinary and minister plenipotentiary of the United States, and Don Geronimo Urmeneta, plenipotentiary of Chile *ad hoc*, on November 10, 1858. By this con-

[1] At one time the United States refused to submit to arbitration the questions whether the claim was barred by prescription, and whether the American was mixed with Spanish property. (Mr. Everett, Sec. of State, to Mr. Perkins, November 22, 1852, MS. Dom. Let. XLI. 98.) Subsequently, however, it was decided to accept the Chilean proposal. (Mr. Everett, Sec. of State, to Mr. Gardiner, March 3, 1853, Id. 308.) On April 28, 1853, Mr. Marcy, Secretary of State, addressed to Mr. W. H. Gardiner the following letter:

"SIR: By previous appointment, I yesterday had an official interview with Mr. Carvallo, the Chilean minister, upon the subject of the claim in the case of the *Macedonian*. He expressed anxiety to bring the subject to a close. It seems to me that this is also desirable for the government and for the claimants. It is understood that a translation of his note to the Department of the 26th of August last proposing a reference of the claim to the King of Holland or the King of the Belgians was communicated to you as the agent of the parties interested. That note embraced the draft of a convention stipulating to submit to the arbiter the question whether the claim was not barred by the lapse of time between its origin and its presentation to the Chilean Government, and also whether, if the treasure was in part the property of Spanish subjects, that part which was owned by neutrals was not lawfully seized.

"This note has never been officially answered, and it does not appear from the files of the Department that the claimants have communicated their views in regard to the propositions which it contains.

"There was a correspondence upon the subject between Mr. Carvallo and Mr. Everett. It appears from this correspondence that conferences in regard to it took place from time to time between those gentlemen; that Mr. Carvallo offered to refer the case for the decision of the King of the Belgians upon the proofs and arguments which had been exchanged at Santiago de Chile and Washington, but that Mr. Everett was at last reluctant to accept the offer without your sanction, which does not appear to to have been received while he was Secretary of State.

"Under these circumstances I will thank you to inform the Department without any delay that can be avoided of the objections, if any, which you may have to Mr. Carvallo's overture.

"When the interposition of the government is solicited and granted for the purpose of presenting a claim against a foreign power, the claim is considered to be a national affair, in adjusting which the government is bound to exercise its best discretion, but is not considered to be under any obligation to proceed implicitly in accordance with the views of the claimants. Still, in some instances, and from its antecedents in this especially, those views are entitled to respect." (MS. Dom. Let. XLI. 347.)

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vention the contracting parties agreed to submit to the King of Belgium the following questions:

1. Whether the claim in question was "just in whole or in part?"

2. If it was just in whole or in part, "what amount" should be paid by Chile "as indemnity for the capture?"

3. Whether interest on the capital should be paid; and if so, at what rate and from what date?

It was expressly agreed that the question of prescription should be excluded from the consideration of the arbitrator.

It was stipulated that the questions at issue should be decided by the arbitrator on the diplomatic correspondence and the documents and other proofs produced during the controversy, together with a memorial or argument thereon to be presented by each party. Each party was required to present its memorial, correspondence, and documents to the arbitrator within a year from the date of its receipt of notice of his acceptance, and to furnish the other party with a list of the papers three months in advance of such presentation.

The Arbitrator's Acceptance.

By the convention "each of the governments represented by the contracting parties" was "authorized to ask and obtain the acceptance of the arbiter." On March 24, 1860, Mr. Cass, then Secretary of State, instructed Mr. E. Y. Fair, the minister of the United States at Brussels, to endeavor to ascertain in an unofficial manner, if possible, whether His Majesty would accept the trust confided to him by the treaty. Mr. Cass said it was understood that Mr. Carvallo, formerly Chilean minister in Washington, had been appointed to represent the Government of Chile at Brussels, and suggested that if he should be there when the instruction was received, or if he should be expected to arrive within a reasonable time, Mr. Fair might unite with him in making a formal application to His Majesty, which, however, Mr. Fair was instructed to do alone if necessary. On the 30th of April Mr. Fair replied that he had been unofficially informed by the minister for foreign affairs that His Majesty would act as arbiter. Mr. Fair further stated that Mr. Carvallo had arrived in Brussels, but had not yet presented his letters of credence or been received by the King; but that as soon as he had been officially recognized by the Belgian Government, a joint and formal application to His Majesty would be made. On July 9, 1860, Mr. Fair informed

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Mr. Cass that His Majesty had formally accepted the appointment as arbiter upon the united application of himself and the Chilean minister, and in a subsequent dispatch he stated that the arbitrator would require the documents presented to him to be translated into the French language.

Submission of Cases.

The memorial of the United States, addressed to His Majesty the King of the Belgians, was transmitted by Mr. Seward, Secretary of State, to Mr. H. S. Sanford, Mr. Fair's successor, on March 26, 1861. In the instructions with which it was sent Mr. Seward said that the other documents and proofs referred to in the convention had been intrusted to the care of Mr. C. G. Ripley, who, on account of his past connection with the claim, had repaired to Brussels for the purpose of rendering such services as his intimate knowledge of the subject might enable him to afford. Mr. Ripley, said Mr. Seward, would report to Mr. Sanford and deliver the papers to him, and Mr. Sanford was instructed to have them translated into French, the necessary expense to be paid out of the contingent fund of the legation.

On the 17th of April 1861 Mr. Fair, who was still in the legation, reported that Mr. Ripley had arrived in Brussels with the documents intrusted to his care, and that lists of the papers had been exchanged in compliance with the terms of the convention.

On July 8, 1861, Mr. Sanford reported that by an understanding between his predecessor and Mr. Carvallo the submission of the papers to the arbiter was fixed for the 7th instant, but that, as that day fell on a Sunday, he had agreed with Mr. Carvallo to send the papers on both sides to the minister for foreign affairs on the 8th of July, though their respective communications bore date as of the preceding day.

Rendition of the Award.

For some time after the submission of the papers the King was confined by a long and painful malady. The voluminous documents were, however, placed in the hands of a jurist attached to the department of justice for the preparation of an abstract for His Majesty. On May 23, 1863, Mr. Sanford inclosed to Mr. Seward the decision and award of the King, which was acknowledged by the Department of State on the 13th of June in an instruction transmitting a letter from the President of the United States to His Majesty the King of the Belgians

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acknowledging his services as umpire. At the same time Mr. Sanford was instructed that it might be proper to tender some pecuniary compensation to the persons employed to prepare the papers for His Majesty, the tender of course to be made openly and through the government. Mr. Sanford, in a dispatch of July 2, 1863, conveyed the opinion of the Belgian Government that gifts of some objects of value would be unobjectionable; and he was authorized to present such as he might deem most appropriate, the cost not to exceed a certain sum.

Mr. Sanford, in transmitting the award, said: "I have good reason to believe that His Majesty has given to the study of the bulky documents of this case great care and labor, and the award may be characterized, in fact, as his own personal work."

The text of the award was as follows:

Text of the Award. "Nous, Léopold, Roi des Belges:

"Ayant accepté les fonctions d'arbitre qui nous ont été conférées par une convention signée à Santiago le 10 novembre 1858, entre les Etats-Unis et le Chili, dans le différend qui s'est élevé entre ces Etats au sujet de la saisie d'une somme d'argent opérée le 9 mai 1821, par ordre de Lord Cochrane, vice-amiral de l'escadre chilienne, dans la vallée de Sitana, sur le territoire de l'ancienne vice-royauté du Pérou, laquelle somme provenait de la vente de marchandises importées par le brick 'Macedonian;'

"Animé du désir sincère de répondre par une décision scrupuleuse et impartiale à la confiance que les hautes parties contractantes nous ont témoignée;

"Ayant, à cet effet, dûment examiné et mûrement pesé la susdite convention ainsi que les mémoires avec leurs annexes que le Ministre Résident des Etats-Unis et l'Envoyé Extraordinaire et Ministre Plénipotentiaire du Chili à Bruxelles ont communiqués à notre Ministre des Affaires Etrangères sous la date du 7 juillet 1861;

"Voulant, pour remplir le mandat que nous avons accepté, porter à la connaissance des hautes parties contractantes le résultat de notre examen et notre opinion sur chacune des trois questions soumises à notre arbitrage, savoir:

"1. La réclamation faite par le Gouvernement des Etats-Unis d'Amérique à celui du Chili, au sujet de la saisie de l'argent mentionnée dans le préambule de la convention, est-elle fondée en tout ou en partie?

"2. Si elle est fondée en tout ou en partie, quelle somme le Gouvernement du Chili doit-il payer à celui des Etats-Unis pour l'indemniser de cette saisie?

"3. Le Gouvernement du Chili, outre le capital, doit-il l'intérêt, et dans l'affirmative, depuis quelle date et à quel taux l'intérêt doit-il être payé?

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"Quant à la première question:

"Il est de fait que la saisie a eu lieu le 9 mai 1821, dans la vallée de Sitana à plusieures lieues des côtes dans l'intérieur des terres;

"Considérant, que d'après les principes des droits des gens, la propriété privée n'est pas saisissable sur terre, qu'elle appartienne à un neutre ou à un ennemi;

"Considérant, toutefois, que le Gouvernement des Etats-Unis n'a pu réclamer qu'au nom des intérêts représentés par ses nationaux:

"Nous sommes d'avis que la réclamation faite par les Etats-Unis à celui du Chili est fondée en ce qui concerne la partie des valeurs saisies appartenant à des citoyens des Etats-Unis.

"Quant à la seconde question:

"Il est de fait que la somme saisie s'élevait à 70,400 piastres ou dollars.

"Considérant que cette somme provenait d'une opération entreprise en commun et dont la liquidation devait se faire sur les bases fixées dans le contrat intervenu entre les parties le 25 novembre 1819;

"Considérant que, d'après ce contrat, le produit de l'opération devait se répartir de la manière suivante:

"$\frac{2}{5}$ pour Arizmendi du chef de son permis d'importation et de 50,000 piastres qu'il apportait en capital;

"$\frac{1}{5}$ pour Smith, du chef du navire;

"$\frac{2}{5}$ pour les prêteurs du chef de leurs avances;

"Considérant que les prêteurs étaient des citoyens des Etats-Unis à l'exception d'un marchand chinois de Canton dont Smith était le mandataire;

"Nous sommes d'avis que le Gouvernement du Chili doit restituer à celui des Etats-Unis les $\frac{3}{5}$ des 70,400 piastres ou dollars saisis, soit 42,400 piastres ou dollars, dont 14,080 pour le cinquième de Smith, de 28,160 pour les deux cinquièmes des prêteurs.

"Quant à la troisième question:

"Il est de fait que les ayants-droit ont été privés depuis le 9 mai 1821, des intérêts de la somme saisie.

"Considérant que la saisie n'étant pas fondée, la restitution du capital saisi doit entraîner celle des intérêts;

"Considérant, toutefois, que jusqu'au 19 mars 1841, le Gouvernement des Etats-Unis n'a rien fait pour hâter une solution;

"Considérant, en outre, qu'à partir du 26 décembre 1848, les hautes parties contractantes étaient d'accord en principe, sur la nécessité d'un arbitrage;

"Considérant, enfin, que le taux légal de l'intérêt dans l'Etat de Massachusetts, auquel appartenaient le capitaine Smith et les réclamants, est de 6%;

Nous sommes d'avis que, outre le capital de 42,400 piastres ou dollars, le Gouvernement du Chili doit payer à celui des Etats-

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Unis les intérêts de cette somme au taux de 6% par an depuis le 19 mars 1841, jusqu'au 26 décembre 1848.

"Fait et donné en double expédition sous notre sceau royal au Château de Laeken, le quinzième jour du mois de mai 1863.

[L. S.] "LÉOPOLD."

[Translation.]

"We, Leopold, King of the Belgians, having accepted the office of the arbitrator, intrusted to us by a convention signed at Santiago, November 10, 1858, between the United States and Chile, in the difference which has arisen between those states, relative to the seizure of a sum of money, which took place May 9, 1821, by order of Lord Cochrane, vice-admiral of the Chilean squadron, in the valley of Sitana, in the territory of the former viceroyalty of Peru, which sum had been received for the sale of goods imported by the brig *Macedonian*.

"Being actuated by a sincere desire to respond by a scrupulous and impartial decision to the confidence manifested in us by the high contracting parties;

"Having to this effect duly examined and carefully weighed the aforesaid convention, together with the memorials and their inclosures, which the minister resident of the United States and the envoy extraordinary and minister plenipotentiary of Chile at Brussels communicated to our minister of foreign affairs, under date of July 7, 1861;

"Desiring, in order properly to perform the duty which we have accepted, to bring to the knowledge of the high contracting parties the result of our examination and our opinion on each of the questions which have been submitted to us for arbitration, to wit:

"1. Is the claim presented by the United States Government to that of Chile, on account of the seizure of the money mentioned in the preamble of the convention, well founded either in whole or in part?

"2. If it is well founded either in whole or in part, what amount should be paid by the Government of Chile to that of the United States, in order to indemnify it for the aforesaid seizure?

"3. Does the Government of Chile owe the interest in addition to the principal; and if so, from what date and at what rate should interest be paid?

"As to the first question, the fact has been established that the seizure took place on the 9th day of May 1821 in the valley of Sitana, several miles from the coast in the interior.

"Whereas, according to the law of nations, private property is not seizable on land, whether it belongs to a neutral or to an enemy;

"Whereas, however, the United States Government could present a claim only in the name of the interests represented by its citizens;

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"We are of the opinion that the claim preferred by the United States against Chile is well founded as regards that portion of the amount seized which belongs to citizens of the United States.

"As to the second question, the fact has been established that the sum seized amounted to $70,400.

"Whereas this sum was the product of an operation undertaken in common and the liquidation of which was to take place on the bases fixed in the contract made between the parties on the 25th day of November 1819;

"Whereas according to this contract the proceeds of the operation were to be divided in the following manner:

"Two-fifths for Arizmendi, on the ground of his permission to import and of $50,000 which he had given as capital.

"One-fifth for Smith, for the use of the vessel;

"Two-fifths for the lenders, on the ground of their advances;

"Whereas the lenders were United States citizens with the exception of a Chinese merchant of Canton, whose attorney Smith was;

"We are of opinion that the Government of Chile should refund to that of the United States three-fifths of the $70,400 seized—that is to say, $42,400, $14,080 of which are for Smith's fifth, and $28,160 of which are for the two-fifths of the lenders.

"As to the third question;

"The fact has been established that the parties interested have been deprived, since May 9, 1821, of the interest on the sum seized;

"Whereas, since the seizure was not a rightful one, the restitution of the principal seized should involve that of interest;

"Whereas, however, nothing was done by the United States Government to hasten a settlement until March 19, 1841;

"Whereas, moreover, from December 26, 1848, the high contracting parties were, in principle, agreed as to the necessity of arbitration;

"Whereas, finally, the legal rate of interest in the state of Massachusetts, of which state Captain Smith and the claimants were citizens, is 6 per cent.

"We are of the opinion that, in addition to the principal of $42,400, the Government of Chile should pay that of the United States interest on this sum at the rate of 6 per cent per annum from March 19, 1841, to December 26, 1848.

"Done in duplicate, under our royal seal, at the Castle of Laeken, this 15th day of May 1863.

[L. S.] "LEOPOLD."[1]

[1] Cases of the *Franklin* and *Good Return*: At the time when the convention for the arbitration of the case of the *Macedonian* was concluded, various other unsettled claims were pending between the two governments. Among these were claims on account of the whaling vessels *Franklin* and *Good Return*, which were seized at Talcahuano May 31, 1832, on a charge of violation of the customs laws. In the case of the *Good Return*, which

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[*Footnote continued.*]

put into Talcahuano May 21, 1832, in distress, the charge was based on the fact that one of her sailors, who went ashore intending to sell some articles of old clothing, took with him also 2 pounds of tobacco, which, as the Chilean officers alleged, he endeavored to sell. This circumstance led to the search of the vessel, even the trunks of the sailors being overhauled, and from twenty-five trunks aboard the ship there were collected altogether about 19 pounds of chewing tobacco. In the captain's cabin, exposed to view, a similar quantity of tobacco was found, together with a small quantity of tea and a few bottles of rum. The tobacco and all other stores found on board were intended for the ship's use The *Franklin* was similarly visited and seized, the only difference between the two cases being that, in the case of the *Franklin*, it was not alleged that a sailor had sold or attempted to sell any part of his rations on shore. After they were seized the vessels were dismantled; and they were detained till October 27, 1832, a period of five months, when they were released under a judicial order directing the master of the port, "no charges having been made," to allow them to continue their voyage. (Mr. Starkweather, United States minister to Chile, to Mr. Cass, Sec. of State, May 30, 1855, MS.) On August 28, 1833, Mr. McLane, Secretary of State, sent to Mr. Hamm, chargé d'affaires of the United States at Santiago, memorials from the owners of the vessels, and stated that the proceedings against them seemed to have been "unlawful and unjust." (MSS. Dept. of State.) For many years the claims do not appear to have been pressed; but in 1854 Mr. Marcy instructed Mr. Starkweather, then minister of the United States at Santiago, to seek a settlement of them. Mr. Marcy stated that the grounds of the seizure were too frivolous to warrant such a measure, and that the Chilean Government had at the time, as a "gracious" act, tendered the parties $6,000, without acknowledging any liability. (Instructions of September 18, 1854, MS.) The Chilean Government argued that, as the tobacco on board the ships was not included in their manifests, it was to be presumed that it was intended for sale. The United States replied that there could have been, under the circumstances, no intention on the part of the vessels to violate the law and no motive for so doing; that tobacco was as necessary for seamen as bread; and that the quantity found on board was too small to suggest anything beyond a personal use. (Mr. Marcy to Mr. Starkweather, June 2, 1855, MSS. Dept. of State.) The Chilean Government offered to pay $10,000 in the case of the *Franklin*, and this offer was accepted by the claimants (Mr. Cass, Sec. of State, to Mr. Bigler, August 2, MSS.), though it seems that Mr. Bigler afterward obtained nearly $15,000. The Government of the United States considered that the settlement of the claim of the *Franklin* involved an admission by the Chilean Government of the claim in the case of the *Good Return*. (Mr. Seward, Sec. of State, to the United States minister at Santiago, April 30, 1862, MSS.) The Chilean Government, however, maintained that there was an important dissimilarity between the two cases. In 1872 the Chilean Government offered to submit the case of the *Good Return*, as well as all other pending claims, to arbitration. (Mr. Root, United States minister at Santiago, to Mr. Fish, Sec. of State, April 8, 1872, MSS.) This proposition was not accepted, for the reason that the

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[*Footnote continued.*]

United States hoped to effect a settlement of the case of the *Good Return* immediately. In 1873, however, a protocol was concluded at Santiago for the submission of the case to the arbitration of Mr. Carl L. Levenhagen, German minister resident at Santiago. (Mr. Logan to Mr. Fish, December 15, 1873, MSS.) Subsequently Mr. Levenhagen was compelled to leave the country by reason of ill health, and Mr. Sanminiatelli, chargé d'affaires of Italy at Santiago, was substituted for him as arbitrator. But the case was not arbitrated. When the protocol was submitted to the Chilean congress the minister for foreign affairs asked for authority to settle the claim at once by the payment of a gross sum. Such authority was given by a law of July 18, 1874, and on December 18, 1874, an agreement was concluded at Santiago for the payment of $20,000 in Chilean gold in full settlement of the claim, and a draft for that sum was handed to the minister of the United States. Its value in United States gold was $18,229.16. (Mr. Logan to Mr. Fish, December 19, 1874, MSS.)

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CHAPTER XXXI.

UNITED STATES AND CHILEAN CLAIMS COMMISSION: CONVENTION OF AUGUST 7, 1892.

Provisions for Arbitration.

At the time when the *Macedonian* claims were settled other claims of citizens of the United States against Chile were pending. Of the latter claims some were afterward directly settled, but various new claims arose during the war between Chile and Peru of 1879–'82[1] as well as during the civil war in the former country of 1890–'91. By the convention of August 7, 1892, it was provided that "all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of Chile or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile," and on the other hand "all claims on the part of corporations, companies, or private individuals, citizens of Chile, upon the Government of the United States, arising out of acts committed against the persons or property of citizens of Chile, not in the service of the enemies of the United States, or voluntarily giving aid and comfort to the same, by the civil or military authorities of the Government of the United States," should be referred to three commissioners, one of whom should be named by the President of the United States and one by the President of Chile, and the third by mutual accord between the President of the United States and the President of Chile, or if they should be unable within a certain time to agree, by the President of Switzerland.

[1] For. Rel. 1888, I. 180.

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The commissioners thus named were required to meet in Washington within six months after the exchange of the ratifications of the convention and as their first act in so meeting to make and subscribe a solemn declaration in certain prescribed terms. They were then required to proceed to the consideration of the business before them, and within six months from the day of their first meeting to decide the claims presented for their consideration.

It was provided that the concurring decisions of any two of the commissioners should be adequate for the determination of any question arising in the course of their proceedings and for every final award.

The convention contained various other stipulations which it is unnecessary here to detail.

Organization of the Commission.

The commissioners met at the office of the Secretary of State, in Washington, at 11 o'clock a. m., July 25, 1893; and after having exhibited to each other their credentials, made and subscribed before Mr. A. A. Adee, Acting Secretary of State, the solemn declaration prescribed by the convention that they would impartially and carefully examine and decide, to the best of their judgment and according to public law, justice, and equity, without fear, favor, or affection, all claims within their cognizance.

The commissioner on the part of the United States was Mr. John Goode; on the part of Chile, Mr. Domingo Gana, the Chilean minister at Washington. As third commissioner there appeared Mr. Alfred de Claparède, minister of Switzerland in Washington, who had been named by the President of the Swiss Republic. Mr. Claparède was chosen by his associates as president of the commission.

Mr. George H. Shields appeared as agent and counsel for the United States, and Mr. J. Francisco Vergara Donoso as agent and counsel for Chile. The latter was assisted in his labors as counsel by Mr. George S. Boutwell.

Mr. Arthur Fergusson acted as secretary on the part of the United States, and Mr. Marcial A. Martinez de F. as secretary the part of Chile.

The agents of the two governments were instructed by the commission to draft rules for its consideration, and an adjournment was then taken to August 15, 1893.

Adoption of Rules.

On that day the commissioners reassembled and entered upon the examination of a draft of rules which the agents had presented. This draft was discussed and amended, and as amended was finally

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adopted. But during the discussion of it an apprehension was disclosed that the provisions of the convention would prove inadequate for the accomplishment of the task committed to the commission.

By Article V. of the convention it was provided that the commissioners should "without delay, after the organization of the commission," proceed to "examine and determine" the claims within their cognizance, and that "notice" should be given to the respective governments of "the day of their organization and readiness to proceed to the transaction of the business of the commission." By Article VIII. it was provided that every claim should, unless there were special reasons for delay, be "presented to the commissioners within a period of two months, reckoned from the day of their first meeting for business, after notice to the respective governments as prescribed in Article V.," and that the commissioners should "be bound to examine and decide upon every claim within six months from the day of their first meeting for business as aforesaid," exclusive of any time during which the sessions of the board might be interrupted by the death, incapacity, retirement, or cessation of the functions of any of the commissioners. In view of these provisions the commissioner and the agent of Chile urged that the commission should postpone the fixing of a day for the first meeting for business, since the period of six months, unless the commencement of its running should be deferred, would not afford time enough for obtaining testimony from Chile and Peru; and they suggested that the attention of the two governments should be called to this difficulty, and that they should be asked to provide for an extension of the treaty. The commissioner on the part of the United States, though willing to recommend an extension, thought that the board should proceed without delay to dispose of any cases that might be ready, while the agent of the United States expressed the expectation that he would be able to submit his cases with such promptitude that they could be disposed of within six months from the first meeting for business, with a reasonable allowance of time for defense. After further discussion, Messrs. Claparède and Goode determined upon October 9, 1893, as the day of the first meeting for business, Mr. Claparède accompanying his vote with the proviso that on the day in question the first act of the commission should be to communicate to the two governments a statement showing the

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necessity for an extension of time. Mr. Gana abstained from voting.[1]

After the adoption of rules the secretaries reported that they had secured quarters for the commission at No. 2 Lafayette square at the rate of $100 a month, and they were directed to close the contract for that purpose.

The commission then adopted the following orders:

"*Ordered*, That the secretaries purchase, at a reasonable cost, a seal for the use of the commission.

"*Ordered*, that the secretaries cause to be printed five hundred (500) copies of the rules of the commission, together with the convention, in Spanish and English, establishing the commission.

"*Ordered*, That in conformity with Article V. of the convention the secretaries give notice to the respective governments that the commissioners, on the 25th day of July 1893 signed the declaration required by Article IV.; that then they took a recess until the 15th day of August 1893, when they adopted a body of rules for the regulation of their proceeding; that they are now ready to proceed to the transaction of the business of the commission, and that they have fixed the ninth day of October 1893 as the day of their first meeting for business after the notice herewith given, from which day, under and in conformity with Article VIII., the period of two months within which every claim shall be presented will be reckoned.

"*Ordered*, That the secretaries publish in certain newspapers, to be by them selected under the advice of the agents, a notice that the commissioners have appointed the ninth day of October 1893 as the day of their first meeting to transact the business of the commission; that the convention provides that every claim shall be presented within a period of two months after such meeting; and that parties having claims will please forward the memorial and other papers to the agents of their respective governments; that the agent for the prosecution of

[1] Upon the face of the rules the period fixed by the convention for the disposition of claims appeared to be insufficient. By the convention claimants were allowed two months after the first meeting for business within which to present their claims. This potentially consumed sixty of the one hundred and eighty days allowed for the decision of claims. Then, after the presentation of the memorial, the rules allowed fifteen days for the filing of an answer, after which, as the rules at first stood, the claimant was allowed three months for the completion of his proofs; and this having been done, the respondent government was allowed three months for a similar purpose. The agent of the United States expressed the desire that it should appear that he protested against the extension of the time for completing the testimony beyond the limit fixed by the convention for the sessions of the commission. The time for taking testimony was subsequently reduced to seventy-five days for each side.

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American claims against the republic of Chile is Hon. George H. Shields, and his address is No. 2 Lafayette square, Washington, D. C., and that the agent for the prosecution of Chilean claims against the United States is Señor Don José Francisco Vergara Donoso, and his address is No. 2 Lafayette square, Washington, D. C.

"*Ordered*, That the secretaries procure a fireproof safe, copying press, and the necessary stationery for the use of the commission.

"*Ordered*, That the commissioner for the United States and the commissioner for Chile are each authorized to employ the services of one clerk to assist the commission in the transaction of the business which may come before it, at a salary not to exceed $80 a month." [1]

Meeting of October 9.

At the meeting on October 9—the first meeting for business—the commissioners, in accordance with their prior determination, adopted a memorial to the Secretary of State of the United States in regard to an extension of the convention. In this memorial the commissioners set forth the necessity for an extension of time, and recommended the allowance of an additional period of six months from April 9, 1894.[2]

Public Sessions.

At several meetings the commissioners discussed the question whether their sessions should be public or private. They at length decided that all sessions should be public, except when for any special reason they should determine to hold a private session, or when they should be deliberating on any interlocutory or final decision.

Question as to Private Counsel.

By Article V. of the convention the commissioners were "bound * * * to hear, if required, one person on each side whom it shall be competent for each government to name as its counsel or agent to present and support claims on its behalf, on each and every separate claim;" and by the rules of the commission it was provided that "all pleadings and arguments and briefs of the agents and counsel of the respective governments"

[1] In accordance with this order, Mr. E. H. McDermott was appointed by Mr. Goode as a clerk, and Mr. Luis Bolton by Mr. Gana. Mr. McDermott acted as stenographer to the commission. Subsequently Mr. Alfred Harrisse also was appointed as a clerk at a salary of $80 a month. H. T. Jones was appointed messenger at a salary of $30 a month. March 14, 1894, the secretaries were authorized to employ two copyists to assist them in their work.

[2] Printed minutes of the commission, 32.

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should be printed by the commission. No reference was made either in the convention or the rules to private counsel. In one of the first cases before the commission, however, the agent of Chile, against whose government the claim was made, consented that the brief of private counsel should be filed; but he afterward moved that it be stricken from the files on the ground that it contained language offensive to his government, to the commission, and to himself. The commission directed the brief to be withdrawn, and ordered that in future the briefs of private counsel be considered by the board only when it appeared that they were presented with the approval and upon the responsibility of the agent of the government in behalf of whose citizens the claim was filed. The particular brief in question, signed by the agent of the United States as well as by private counsel, and with the objectionable language stricken out, was subsequently permitted to be filed again.

Final Session.

The commission held its last session on April 9, 1894, the sitting extending into the night. After the last case which the commission disposed of was decided, the agent of the United States submitted the following resolution:

"Whereas under the provisions of the treaty between the United States and Chile, signed at Santiago, August 7, 1892, under which this commission has been acting, the commissioners are 'bound to examine and decide upon every claim within six months from the day of their first meeting for business,' which said first meeting was held October 9, 1893; and

"Whereas said six months expire April 9, 1894; and

"Whereas there are still pending claims of the citizens of either country against the other country in which the evidence has not been completed under the rules of the commission, and other cases are pending in which the United States has completed the testimony and closed the cases but in which Chile has not yet completed her testimony, and other cases in which both countries have closed but not submitted, and other cases which have been closed and submitted, which said cases time will not permit this commission to hear and consider; and

"Whereas it is evident that every endeavor of the parties has been made to submit these cases to the commission, but the shortness of the time limit of the treaty and the length of time required to take testimony in Chile and Peru have prevented any result of the proceedings of the commission therein without fault on the part of claimants:

"*Therefore*, It is ordered that all cases presented to but not finally determined by the commission be remitted to the respective governments of the United States and Chile for such disposition as they may hereafter agree upon."

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The commission ordered this resolution to be spread upon the minutes as adopted, and instructed the secretaries to transmit a duly certified copy of it to the two governments.

The agent of the United States then presented a draft of a final award and a schedule of cases considered and determined by the commission, which were duly approved, adopted, and subscribed by the three commissioners, and which were as follows:

"FINAL AWARD.

"We, the undersigned, commissioners appointed under and in pursuance of Article I. of the convention between the United States of America and the republic of Chile, signed at Santiago, August 7, 1892, do now make this our final award of and concerning the matters referred to us by said convention which we have been able to consider within the time limit of the treaty, as follows:

"I.

"We award that the government of the republic of Chile shall pay to the government of the United States of America, within six months from the date hereof, the sum of two hundred and forty thousand five hundred and sixty-four dollars and thirty-five cents ($240,564.35), without interest, in accordance with the provisions of Article IX. of the convention aforesaid, for and in full satisfaction of the several claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the government of the republic of Chile, arising out of acts committed against the persons and property of citizens of the United States by the civil or military authorities of Chile, which have been determined by us, said sum being the aggregate of the principal sums and interest allowed to certain claimants by the several separate awards to that effect made in writing and signed by us, or such of us as assented to said separate awards, which are among the records of this commission, and are hereby referred to for more definite information.

"II.

"All claims on the part of citizens of Chile against the United States, and on the part of citizens of the United States against the republic of Chile, which have been presented to the commission, except those in which awards have been made or which have been disallowed or dismissed in manner and form as will appear in the records of the commission by the several separate judgments in writing concerning the same, are hereby remitted, without consideration on their merits and without any result or determination by the commission, to the respective governments of the United States and Chile for further

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action and disposition, for the reason that the time limit of the convention under which this commission is acting is so short as to prevent the hearing, consideration, and determination of the same by this commission.

"III.

"We refer to the several separate awards made and signed as aforesaid as part of this final award in the cases which we have been able to consider, and to a list and statement thereof hereto attached giving the number of each claim, the name of the claimant, the character of the claim, the time when it arose, the amount claimed, the disposition of the claim, and, where an allowance has been made, the sum allowed in each case.

"Signed at Washington, D. C., this 9th day of April, A. D. 1894.

"ALFRED DE CLAPARÈDE,
"*President, and Commissioner appointed by the President of the Swiss Confederation.*

"JOHN GOODE,
"*Commissioner on the part of the United States.*

"DOMINGO GANA,
"*Commissioner on the part of Chile.*

"Although the commissioner on the part of the United States of America signs this final award, he solemnly declares that he does it reasserting the principles set forth by himself in the dissenting opinions that were filed by him in the respective cases as shown by the records of the commission; that he withheld his acquiescence from the dismissals and disallowances in said cases of citizens of the United States against the republic of Chile, and reasserts his abstention to participate in the aforesaid judgments, and he signs this final award this day made by the commission under this formal reservation as to those cases in which he has dissented.

"JOHN GOODE.

"Although the commissioner on the part of Chile signs this final award, he solemnly declares that he does it reasserting the principles set forth by himself in the dissenting opinions that were filed by him in the respective cases as shown by the records of the commission; that he withheld his acquiescence from the awards in said cases of citizens of the United States against the republic of Chile, and reasserts his abstention to participate in the foregoing judgments, and he signs this final award this day made by the commission under this formal reservation as to those cases in which he has dissented.

"DOMINGO GANA.

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"SCHEDULE OF CASES CONSIDERED AND DETERMINED BY THE COMMISSION.

"Claim No. 1, Central and South American Telegraph Company *v.* Chile, for damages to telegraph line, etc., in 1891, during Congressional Revolution; amount claimed, $163,858.55; award against Chile for $40,725.89, Commissioner Gana dissenting.

"Claim No. 2, Edward C. Du Bois *v.* Chile, for damages and destruction of railroad property at Chimbote in 1880–1882, during war with Peru; amount claimed, $2,451,155.58; award against Chile for $155,232, Commissioner Gana dissenting.

"Claim No. 4, Winfield S. Shrigley *v.* Chile, for destruction of property in 1891, during Congressional Revolution; amount claimed $12,717.51; award against Chile for $5,086.

"Claim No. 5, Eugene L. Didier *et al.* *v.* Chile, for breach of contract with Chile in 1817; amount claimed, $1,111,760.63; dismissed on demurrer, Commissioner Goode dissenting.

"Claim No. 6, John L. Thorndike *v.* Chile, for damages to railroad property at Mollendo in 1880, during war with Peru; amount claimed, $190,361.34; dismissed on hearing, Commissioner Goode dissenting.

"Claim No. 9, Gilbert Bennet Borden *v.* Chile, for damages, false arrest, and detention of ship in 1883; amount claimed, $32,209.10; award against Chile for $9,187.50, Commissioner Gana dissenting.

"Claim No. 10, Wells, Fargo & Co. *v.* Chile, for seizure of Peruvian money tokens in 1880; amount claimed, $58,389.97; compromise award for $29,194.98.

"Claim No. 11, Charles G. Wilson *v.* Chile, for destruction of property in 1891, during Congressional Revolution; amount claimed, $142,487; dismissed on demurrer.

"Claim No. 13, Jennie R. Read *v.* Chile, for destruction of property in 1891, during Congressional Revolution; amount claimed, $8,253.40; award against Chile for $1,137.98.

"Claim No. 15, Charles Watson *v.* Chile, for destruction of property in 1880, during war with Peru; amount claimed, $278,205.84; dismissed for failure to amend, Commissioner Goode dissenting on demurrer.

"Claim No. 16, Grace Brothers & Co. *v.* Chile, for damage to 200 bags of sugar in 1883; amount claimed, $14,521.68; dismissed for want of jurisdiction, Commissioner Goode dissenting.

"Claim No. 17, Frederick Selway *v.* Chile, for personal damages in 1847; amount claimed, $50,000 with interest at 6 per cent from 1847; dismissed on merits.

"Claim No. 19, Grace Brothers & Co. *v.* Chile, for detention of vessel in 1880, during war with Peru; amount claimed, $15,593.74; dismissed for want of jurisdiction, Commissioner Goode dissenting.

"Claim No. 20, Grace Brothers & Co. *v.* Chile, for seizure of cargo of coal in 1879, during war with Peru; amount claimed, $3,989.20; dismissed for want of jurisdiction, Commissioner Goode dissenting. . .

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"Claim No. 21, Grace Brothers & Co. *v.* Chile, for illegal seizure of guano and nitrate deposits in 1879, during war with Peru; amount claimed, $240,040.26; dismissed for want of jurisdiction, Commissioner Goode dissenting.

"Claim No. 22, William R. Grace & Co. *v.* Chile, for seizure of nitrate deposits in 1879; amount claimed, $1,076,764.67; dismissed for want of jurisdiction, Commissioner Goode, dissenting.

"Claim No. 23, Patrick Shields *v.* Chile, for personal damages in 1891; amount claimed, $100,000 and interest on the award; dismissed on demurrer, for want of jurisdiction.[1]

"Claim No. 24, Andrew McKinstry *v.* Chile, for personal damages in 1891; amount claimed, $25,000; dismissed on demurrer for want of jurisdiction.

"Claim No. 29, Grace Brothers & Co. *v.* Chile, for loss of shares in nitrate company of Peru in 1879 during war with Peru; amount claimed, $866,945.99; dismissed for want of jurisdiction, Commissioner Goode dissenting.

"Claim No. 34, Stephen M. Chester *v.* Chile, for personal damages in 1881, during war with Peru; amount claimed, $86,000; dismissed for want of evidence.

"Claim No. 36, Elizabeth C. Murphy *et al. v.* Chile, for destruction of property in 1881, during war with Peru; amount claimed, $17,122.50; dismissed on hearing, Commissioner Goode dissenting.

"Claim No. 38, John C. Landreau *v.* Chile, for damages for seizure of certain guano deposits in 1881; during war with Peru; amount claimed, $5,000,000 with interest at 6 per cent from 1882; dismissed on demurrer, Commissioner Goode, dissenting.

"Claim No. 39, T. Ellet Hodgskin *v.* Chile, for damages for seizure of certain guano deposits in 1881, during war with Peru; amount claimed, $3,333,000 with interest at 6 per cent from 1882; dismissed on demurrer, Commissioner Goode dissenting.

"(Claims Nos. 38 and 39 are different claimants for the same subject-matter.)

"Claim No. 43, Frederick H. Lovett *v.* Chile, for personal damages, detention and loss of bark *Florida* in 1852; amount claimed, $225,800; dismissed on demurrer.

CASES AGAINST THE UNITED STATES DISPOSED OF.

"Claim No. 28, Ricardo L. Trumbull *v.* The United States, for personal damages in 1891; amount claimed, $32,500; dismissed on demurrer."

The commission then announced the following orders:

"*Ordered*, That the secretaries be, and they hereby are, instructed to proceed at the earliest moment to properly arrange and index all the records and books of the commission,

[1] By a protocol signed at Washington May 24, 1897, Chile agreed to pay $3,500 in settlement of this claim.

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enter therein all proceedings, decisions, resolutions, or orders thereof not recorded upon final adjournment; cause to be bound all the printed minutes and decisions, and to be printed and bound the reports of the agents and counsel in convenient form, not to exceed fifty copies, all of which said bound volumes they will distribute as follows: Ten copies to the president of the commission, and one copy of each publication or volume to the members and officers of the commission, and the remaining volumes equally between the governments of the United States and Chile.

"*Ordered further*, That after carrying out the foregoing instructions they shall deliver to the State Department of the United States all the papers, documents, and evidence on file before the commission, and one copy of the original and attested records of the commission, delivering at the same time one copy of said original and attested records to the Government of Chile, taking receipts therefor.

"*Ordered further*, That the secretaries be instructed and empowered to retain the necessary assistants to wind up, in the shortest possible time, the business and work of the commission, in accordance with the foregoing orders.

"*Ordered further*, That the secretaries, after completing the work indicated above, proceed to sell at public sale all the property belonging to the commission, and pay over the proceeds thereof to the State Department of the United States for proper disposition."

These minutes were then read in English and Spanish and were approved.

This having been done, Mr. Claparède, the president of the tribunal, made the following address:

"We have arrived at the point established by Article VIII. of the convention of Santiago for bringing the work of our commission to a close. We (and I now speak for myself) regret to have to state that eighteen claims which were filed in due season, and upon a part of which we have already pronounced judgment on demurrer, and others, will remain unsettled.

"We express here the hope that the two contracting governments will, by a future understanding, afford the claimants whose claims have not been settled an opportunity to obtain judgment thereon, in harmony with the generous and peaceful intentions which animated the framing of the convention of Santiago.

"In expressing this wish, and also the hope that our work has contributed to the cementing of the good relations that both contracting governments are glad to maintain, I declare closed the sessions of our commission in conformity with the provisions of Article VIII. of the convention of Santiago, and I take great pleasure, in the name of the members of the commission, in expressing to the honorable agents of the contracting

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governments, as well as to the secretaries of this commission, our sincerest thanks for the distinguished manner, the courtesy, the intelligent zeal, and the great tact with which they have performed their difficult functions.

"Gentlemen, please accept the assurance of my high consideration, of my profound esteem, and my best wishes for you all."

And thereupon, at 8 o'clock p. m., the commission adjourned *sine die*, having held forty-five sessions.

Agent's Report.

On April 30, 1894, Mr. Shields, the agent of the United States, presented to Mr. Gresham, Secretary of State, a comprehensive report of the commission's proceedings. Some of the things stated in it have already been disclosed, and others will be referred to in the digest. The following extracts may be given in this place:

"Every effort was made on the part of the agent of the United States to impress upon claimants the necessity of filing their memorials as early as possible, both by letter to the parties and counsel where their addresses were known, and by sending copies of the rules to them, and to our ministers at Chile and Peru, asking them to furnish copies to the claimants whose addresses were known to them and request immediate compliance; also by the press notices hereinbefore mentioned.

"One case was filed September 26, 1893. Six were filed in October, to wit, one on the 6th, one on the 11th, one on the 12th, one on the 27th, one on the 28th, and one on the 30th. Seven cases were filed in November, to wit, one on the 1st, one on the 8th, one on the 14th, one on the 20th, two on the 22d, and one on the 23d. Twenty-eight cases were filed in December, to wit, two on the 2d, nine on the 7th, sixteen on the 8th, and one by leave of the commission on the 16th, showing that the majority of the claims were filed within a week of the last day allowed by the treaty for filing such claims.

"Of these claims, forty were presented by citizens of the United States against the Government of Chile, amounting in the aggregate to about the sum of $26,042,976.96, including interest. On the other hand, three claims were presented on behalf of citizens of Chile against the Government of the United States, amounting to about $264,740, inclusive of interest. Two of the claims against the Government of the United States arose out of the seizure of the steamer *Itata*, and one was for services rendered by the claimant as a lawyer to the United States legation in Chile. The claims against Chile cover a period beginning at 1816, during the first struggle of Chile for independence, down to and including the Congressional Revolution against Balmaceda in 1891.

"Ten claims were disposed of on demurrer against the claimants—nine against Chile decided in its favor, and one against

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the United States decided in its favor. Six claims—four against Chile and two against the United States—were not submitted by either government. Twenty-eight claims were submitted on the part of the United States. Nine of these were not closed by Chile, eight were determined by the commission on the merits, six were dismissed on motion for giving aid and comfort to the enemies of Chile, in one a compromise award was entered, one was dismissed for want of evidence, and three were not passed on by the commission.

"The commission found in favor of the United States claimants in six cases, making awards amounting to $240,564.35, and have left undetermined sixteen cases of the United States claimants against Chile, and two of Chilean claimants against the United States. * * *

"It was necessary to take depositions on behalf of the United States claimants, in many of the cases, in Chile and Peru, and the respondent government also took depositions in many of the cases in those countries, so that the first case was argued on the merits on the 13th day of February 1894. In all the cases against the United States the defense was managed by the agent and counsel for the United States, he making the briefs and arguments in person. In the cases against Chile special counsel who represented the respective claimants had charge of the several cases, attended to the taking of the testimony, and prepared their briefs. In each case, however, the agent and counsel for the United States made oral arguments in behalf of the claimants, and replied to the arguments of the agent and counsel for Chile and his assistant. * * *[1]

"In addition to the cases that were disposed of by the commission, and which have been heretofore mentioned, the following cases:

"No. 18. The South American Steamship Company *v.* United States, claim for $226,242, United States gold coin;

[1] The report here gives a detailed account of the following cases: Central and South American Telegraph Company *v.* Chile, No. 1, award of $40,725.89; Edward C. Du Bois *v.* Chile, No. 2, award $155,232; Winfield S. Shrigley *v.* Chile, No. 4, award $5,086; Eugene L. Didier, administrator, *v.* Chile, No. 5, dismissed; John L. Thorndike *v.* Chile, No. 6, dismissed for want of proof; Gilbert Bennet Borden *v.* Chile, No. 9, award $9,187.50; Wells, Fargo & Co. *v.* Chile, No. 10, award $29,194.98; Charles G. Wilson *v.* Chile, No. 11, dismissed; Jennie R. Read *v.* Chile, No. 13, award $1,137.98; Charles Watson, executor of Henry Meiggs, *v.* Chile, No. 15, dismissed; Grace Brothers & Co. *v.* Chile, No. 16, dismissed; Frederick Selway *v.* Chile, No. 17, dismissed; Grace Brothers & Co. *v.* Chile, Nos. 19, 20, and 21, dismissed; William R. Grace & Co., No. 22, dismissed; Patrick Shields *v.* Chile, No. 23, dismissed; Andrew McKinstry *v.* Chile, No. 24, dismissed; Ricardo L. Trumbull *v.* United States, No. 28, dismissed; Grace Brothers & Co. *v.* Chile, No. 29, dismissed; Stephen M. Chester *v.* Chile, No. 34, dismissed for want of proof; Elizabeth C. Murphy *v.* Chile, No. 36, dismissed; John C. Landreau *v.* Chile, No. 38, dismissed; T. Ellet Hodgskin *v.* Chile, No. 39, dismissed; Frederick H. Lovett *v.* Chile, No. 43, dismissed.

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"No. 27. Ricardo L. Trumbull *v.* United States, claim for $6,000, United States gold coin;

"No. 33. Julia L. Williams and Frank A. Robinson *et al. v.* Republic of Chile, claim for $130,600, United States gold coin;

"No. 35. Austin D. Moore *v.* Republic of Chile, claim for $15,930, United States gold coin;

"No. 37. James M. Hallowes *v.* Republic of Chile, claim for $117,266, Chilean currency, and $10,400, United States gold coin;

"No. 40. William W. C. Dodge *v.* Republic of Chile, claim for $5,387, gold coin United States—

could not be made ready for submission to the commission, under the rules thereof, within the time limit of the treaty, and if they had been ready, as the sequel shows, could not have been disposed of by the commission.

"The following cases:

"No. 3. Henry Chauncey *v.* Republic of Chile, claim for $1,435,815, gold coin United States;

"No. 25. Andrew Moss *v.* Republic of Chile, claim for $74,092, United States gold coin;

"No. 42. Peter Bacigalupi *v.* Republic of Chile, claim for $49,362, United States gold coin—

were submitted by both parties, but the commission, for lack of time, failed to consider the same, and so announced at their last meeting.

"The following cases:

"No. 7. The North and South American Construction Company *v.* Republic of Chile, claim for $6,334,000, United States gold coin;

"No. 8. Kate E. Leach *et al. v.* Republic of Chile, claim for $517,500, United States gold coin;

"No. 12. Michael O'Brien *et al. v.* Republic of Chile, claim for $40,811, United States gold coin;

"No. 14. Clifford D. Blodgett *v.* Republic of Chile, claim for $3,972, United States gold coin;

"No. 26. Henry Chauncey *et al. v.* Republic of Chile, claim for $60,427, United States gold coin;

"No. 30. Henry S. Prevost *et al. v.* Republic of Chile, claim for $7,829, United States gold coin;

"No 31. Grant Walker *et al. v.* Republic of Chile, claim for $76,409, United States gold coin;

"No. 32. George W. L. Mayers *v.* Republic of Chile, claim for $88,286, United States gold coin;

"No. 41. Mauricio Levek *v.* The Republic of Chile, claim for $279,800, United States gold coin—

were submitted on the part of the United States, but were not submitted on the part of Chile, the time limit preventing the necessary testimony from being taken; consequently the cases were not passed upon by the commission.

"These undisposed of cases against the United States, according to the claim of the memorials, including interest, amount to $232,240, United States gold; and the cases against

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Chile, according to the claim of the memorials, including interest, amount to $9,130,620, the greater proportion being for interest. * * *

"I feel it my duty to call attention to the fact that on the 8th day of December 1893, which under the rules was the last day for filing claims before the commission, inasmuch as Article I. of the treaty provides that *all claims* against either government shall be referred to three commissioners, etc., and as Article IV. required the commissioners to declare that they would examine and decide *all claims* within the description and true meaning of Articles I. and II. which shall be laid before them on the part of the United States and of Chile, respectively, and in view of Article XI. which bars *all claims*, whether presented to the commission or not under certain circumstances, I deemed it to be my duty to present to the commission all documents and papers on file in the State Department of the United States in claims against the republic of Chile for such disposition as the commission might determine. In these claims there was no compliance on the part of the claimants with the rules requiring memorials to be filed in English and Spanish; but being of the opinion that it was the duty of the commission to consider the same, and as the Venezuelan claims commission had decided that it was its duty to dispose of all pending claims, these were presented for the purpose of preserving whatever rights the claimants might have.

"Objection was made to the presentation of the same by the associate counsel for Chile, on the ground that the commission could not take any notice of them in the absence of a memorial. No action was taken by the commission in the premises. The list of such cases will be found on page 68 of the minutes.[1]

"On the 16th day of December 1893 the case of the bark *Florida* was presented to the commission under the name of

[1] The entry in the minutes in regard to these cases is as follows:

"The honorable agent of the United States then informed the commission that he desired to present to it the documents and papers in the following cases, on file in the State Department as claims against the republic of Chile:

"John Monahan, William H. Swain, B. F. Mahan, Philander L. Rice, B. Willstatter, William Trevitt, Daniel J. C. Williams, Julia Fognoli, Enrique Bidie, Bowen & Cole, Lilly Davis, William Lambert, John L. Crawford, Dr. John Whipple, J. E. Dockendorff, ship *Revere*, Lorenzo Young, W. S. Perkins, Charles Retan and George Cohen, bark *Eliza*, whaleship *Addison*, Geo. C. Cotton, Justo B. Casablanca, bark *Florida*, W. R. Grace, Luis Hirshfield, William Langhill, Rev. J. A. Swaney, A. J. McKim, Albert Suess, John W. Foster, J. E. Burton, Charles S. Rand, brig *Mariana*, Josephine P. de Ruden, Joseph W. Merriam, Nathaniel Kirby, Daniel Calvin, M. Rosenstock, Frank Hutchinson, Thomas Gaige, John W. Grace, and Marshall Blakely.

"The honorable agent stated that his reason for presenting these cases without at this time asking any order regarding them was that the treaty barred all claims, whether presented or not, and it was made the duty of

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Frederick H. Lovett *et al.*, No. 43, and cause was shown why the memorial had not been filed, and leave was granted to file the same, and the case disposed of on demurrer, as hereinbefore stated.

"Subsequently, on February 13, 1894, a memorial and affidavit showing why the same had not been presented in time were filed in the case of Josephine P. de Ruden, and permission asked to file the same in the name of Carolina Valencia, which, on February 16, the commission refused, on the ground that the reasons given for the delay in presenting this claim were not satisfactory.

"On the 7th day of December 1893, the next to the last day under the rules for filing memorials, I received by mail a paper purporting to be a claim of James Montgomery against Chile on account of the 'Cochet' claim for one-third of the guano in Peru, said claim being based on the alleged discoveries of guano by one 'Cochet,' and claiming, with interest, $1,475,000,000. As this memorial in no way complied with the rules, no printed copies in English and Spanish being filed, and there being no documents or papers of any kind showing on what the claim was based, and not being sworn to before an officer attaching his seal, or showing his official character, and it being too late to remedy these defects, I did not present the claim, and notified the counsel for the claimant thereof by letter on December 8, 1893, after which nothing whatever was heard of the said claim.

"I trust that it is not improper, in conclusion, for me to record my sense of obligation to yourself and other officers of the Department of State and to our ministers in Chile and Peru for the prompt assistance rendered me as the representative of the government when requested; and also that my thanks are due to the secretary of the commission on the part of the United States for his intelligent aid in the work before the commission. It is also a pleasure to mention the uniform personal courtesy shown me by the members of the commission and the representatives of the Government of Chile."

the commission to dispose of all pending claims, and he read a decision of the Venezuela commission in support of his contention.

"The Hon. George S. Boutwell, associate counsel for Chile, objected to the presentation of these claims, on the ground that they were of an entirely different nature from those considered by the Venezuelan commission, which were certificates of indebtedness, and their validity was passed upon without reference to the claimants. He said that he did not see how this commission could take any notice of these papers unless there were a citizen of the United States standing behind them, which was certainly not the case in the absence of a memorial.

"The honorable agent of the United States replied that he merely desired the record to show that he had offered the claims as being on file in the Department of State; that the rules had not been so far complied with by the claimants, and that he had presented the cases so that the commission might take such action as was proper. No action was taken in the premises."

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CHAPTER XXXII.

CLAIM OF THE UNITED STATES AND PARAGUAY NAVIGATION COMPANY: COMMISSION UNDER THE CONVENTION BETWEEN THE UNITED STATES AND PARAGUAY OF FEBRUARY 4, 1859.

Origin of the Company.

In 1845 Edward A. Hopkins, a citizen of the United States, who had at one time been an officer in the Navy, but who had resigned and left the service, visited Paraguay as a special agent of the Department of State for the purpose of reporting upon the condition of the country. While engaged in this mission he won the favor of the Paraguayan President, Carlos Antonio Lopez, and, believing that he had discovered an opportunity for successful enterprise, conceived the idea of organizing a company for the purpose of developing the resources of the country by commerce and manufactures. In this project he enlisted the interest of certain citizens of Rhode Island, who in 1852 formed an association which was chartered by the legislature of the State in the following year under the title of "The United States and Paraguay Navigation Company." The capital stock of the company was fixed at $100,000, with liberty, however, to increase it for the general purposes of trade to $1,000,000.

The Company's Misfortunes.

The capital stock was paid in, and the company purchased a steamer, to which it gave the name of *El Paraguay*, and which it freighted with the various articles that were required for the agricultural and manufacturing operations which it proposed to carry on. The steamer, however, never reached Paraguay. She sailed from New York in March 1853, but, encountering a succession of gales, was wrecked off the coast of Brazil and obliged to put into Maranham, where she was abandoned as a total loss, and condemned and sold. So much of the cargo as

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was saved was reshipped to Montevideo, whence it was forwarded by another vessel, chartered for the purpose, to Asuncion. A second expedition, sent out by the company on the schooner *E. T. Blodget*, was similarly unfortunate. The schooner, which was laden with merchandise and with two small steamers in detached pieces, was wrecked above Buenos Ayres, at the Tigre River, and the wreck was sold.

Difficulties of Company's Agent.

Mr. Hopkins arrived in Paraguay with the remnant of the cargo of *El Paraguay* in October 1853, uniting in himself the functions of consul of the United States and general agent of the company. His reception was cordial. He established a cigar factory and a sawmill, and enjoyed the patronage of President Lopez, who gave the necessary orders for obtaining native labor, placed a government barracks at his disposal, and advanced the sum of $10,000 to supply the immediate wants occasioned by the company's misfortunes. But before a year elapsed the aspect of affairs had materially changed. Mr. Hopkins and the President fell into difficulties. Their estrangement originated in an incident which happened in July 1854. On the 22d of that month Mr. Hopkins's brother was riding along the road with a French lady, when they met a herd of cattle in charge of a Paraguayan soldier. The soldier requested them to stop or turn aside, but misunderstanding or disregarding the request, they rode into the herd, and the soldier, becoming enraged, struck the young man with the side of his saber. Mr. Hopkins, when he heard of the occurrence, demanded that the soldier be punished. This demand was complied with, and the soldier was flogged and degraded; but the manner in which the demand was made gave offense to President Lopez. It was not only couched in peremptory language, but it was accompanied with other complaints, expressed in terms that were deemed offensive, of various indignities inflicted on American citizens by the people of the country, consisting in the use of rude and improper language toward them in the streets and the throwing of orange peelings, pieces of cigars, and sand into the doors and windows of their houses. It seems also that the written communication was reinforced by a personal visit, in which Mr. Hopkins, in spite of the remonstrance of the guards, forced his way in his riding dress, whip in hand, into the presence of President Lopez and demanded satisfaction.

From this time on the attitude of President Lopez toward

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Mr. Hopkins, and, it was alleged, toward the company, was completely altered. Complaint was made to the Government of the United States of Hopkins's conduct. The support which had been given to the company in obtaining native labor was withdrawn, and a suit was instituted to dispossess the company of some land which it had purchased. Annoyances by the people increased. Mr. Hopkins was forbidden by the government to use the title of general agent of the company. And finally he withdrew from the country, alleging that he was expelled, and the property and business of the company were abandoned.

Case of the "Water Witch."

In the year 1855 an incident occurred which, though originally unconnected with the affair of the United States and Paraguay Navigation Company, became so intimately associated with it that it is necessary to notice it in this place. In 1853 the Government of the United States sent out a naval vessel called the *Water Witch*, under the command of Lieut. Thomas J. Page, to make a survey of the tributaries of the Rio de la Plata and report on the commercial condition of the countries bordering on its waters. On the arrival of the *Water Witch* at Rio de Janeiro, Lieutenant Page took measures to inform the Brazilian Government of the objects of the expedition and to enlist its interest in the exploration of the Paraguay, on both banks of which it held territory. At first the imperial government objected to any exploration of the river above Albuquerque, beyond which it had not then been opened to the navigation of foreign vessels; but it subsequently granted permission to the *Water Witch* to explore all the waters of the Paraguay that were under Brazilian jurisdiction. Permission was also obtained from the Provisional Director of the Argentine Confederation for the exploration of all the rivers within the jurisdiction of his government; and the surveys of La Plata, the Paraguay, and the Parana had been in progress for about a year and a half when, on January 31, 1855, Lieutenant Page started from Corrientes with a small steamer and two boats to ascend the river Salado, leaving Lieut. William N. Jeffers in charge of the *Water Witch*, with instructions to ascend the Parana so far as her draft would allow. Lieutenant Jeffers sailed from Corrientes on the 1st of February, and had proceeded only a few miles above the point where the Parana forms the common boundary between Paraguay and the Argentine province of Corrientes when he ran aground near the Paraguayan fort of Itapiru. An hour later the *Water Witch* was

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hauled off and anchored, but while the crew were at dinner it was observed that the Paraguayans were getting their guns ready. Lieutenant Jeffers, though not anticipating anything serious, had the *Water Witch* cleared for action, and gave directions to proceed up the river at all hazards. While he was weighing anchor, a Paraguayan canoe came alongside and a man on board handed him a paper in Spanish.

This paper Jeffers declined to receive, on the ground that he did not understand the language in which it was printed, and as soon as the anchor was raised he stood up the river, the crew at quarters. The pilot informed him that the only practicable channel lay close to the fort, on the Paraguayan side of the river, and this channel he directed the pilot to take. When he was within 300 yards of the fort he was hailed, presumably in Spanish, by a person who he was informed was the Paraguayan admiral, but not understanding the import of the hail he did not regard it. Two blank cartridges were then fired by the fort in quick succession, and these were followed by a shot which carried away the wheel of the *Water Witch*, cut the ropes, and mortally wounded the helmsman. On receiving this fire Lieutenant Jeffers directed a general fire in return. The action continued for some minutes. A Paraguayan gunboat lay near by but took no part in the conflict.

On the 4th of February 1855 Mr. José Falcon, secretary of state of Paraguay, addressed to the Secretary of State of the United States, Mr. Marcy, a note in regard to the transaction which has just been described. This note Lieutenant Page declared to contain a "fancy sketch" of the incident. Into this question it is unnecessary now to enter, since there are certain facts that are undisputed. The Paraguayan Government had forbidden foreign men-of-war to enter the waters within its jurisdiction. This fact was admitted. But Lieutenant Page claimed that, at the point in the Parana where the *Water Witch* was fired on, the channel on the Paraguayan side of the river was the main and only navigable channel; that, as the river at that point formed a common boundary between the Argentine Confederation and Parguay, the navigation of that channel belonged equally to both countries, and that he therefore had the right to navigate it under his license from the Argentine Government without regard to the Paraguayan prohibition.[1]

[1] S. Rep. 60, 35 Cong. 1 sess. Calvo discusses this incident, as well as the claim now under consideration, and criticises the course of the United States. (Droit Int. (4th ed.), § 1268; Wharton's Int. Law. Dig. III. 115.)

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Treaty of 1853.

Besides the cases of the United States and Paraguay Navigation Company and the *Water Witch*, there was yet another question that affected the relations between the United States and Paraguay. On March 4, 1853, a treaty between the two countries was concluded, Mr. John S. Pendleton representing the United States in the negotiations. In this treaty, which was ratified by Paraguay on the 12th of March, there were various verbal errors, attributable to the inadvertence of the American representative, such as the use of the titles "United States of North America" and "North American Union" instead of the "United States of America." These and similar errors, to the number of thirty-two, the Senate of the United States corrected, and on the 2d of June 1854 Mr. Marcy sent the treaty as thus amended to Lieutenant Page, with a view to the exchange of the ratifications. When Lieutenant Page received the treaty he had become somewhat involved in the controversy respecting Mr. Hopkins and the United States and Paraguay Navigation Company, and President Lopez had issued a decree forbidding foreign men-of-war to ascend the Paraguay. Lieutenant Page therefore dispatched an officer in the autumn of 1854 to Asuncion with a note to the secretary of state, saying that he was authorized to exchange the ratifications of the treaty, and inquiring whether he should proceed to the capital for that purpose. This note Señor Falcon, the Paraguan secretary of state, returned unanswered, on the ground that it was written in English and not accompanied with a translation. He referred to the fact that he had previously returned two communications from Lieutenant Page for the same reason, and expressed surprise that the latter should continue to try to "mortify" him. Lieutenant Page, in his report to Mr. Marcy, stated that his reason for sending the note in English was that the only person with him who could translate English into Spanish was his clerk, whose knowledge of the latter language was imperfect. He moreover declared his belief that the reason alleged by Señor Falcon for returning the note was a mere excuse for not answering it, and he expressed the hope that such measures would be adopted as would "convince the President of Paraguay that the United States will not tolerate the indignities it has been his habit to bestow upon other governments." To this end he suggested that he should be instructed to proceed to Asuncion in the *Water Witch*, or, better still, that the commodore of the Brazil squadron be

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instructed to proceed thither "on board of the *Water Witch*, with the brig *Bainbridge* in tow."

No instructions to this effect were given, but on August 5, 1856, nearly two years later, Mr. Richard Fitzpatrick was sent out by the United States as a special commissioner to exchange the ratifications of the treaty. He was furnished with a letter to the minister of foreign affairs of Paraguay, and was instructed on presenting it, and on other occasions when he might have intercourse with the minister, and with other persons in authority, to endeavor to convey an impression of the strong desire of the President to maintain friendly relations with the country, and of his hope that this disposition would be reciprocated. When Mr. Fitzpatrick reached Asuncion Señor Nicolas Vasquez had succeeded Señor Falcon as minister of foreign relations, and when Mr. Fitzpatrick presented his letter of credence Señor Vasquez asked him to declare the objects of his special mission, in order that the Government of Paraguay might understand why its complaints against the United States, on account of the "scandalous hostilities" and "unprovoked outrages" committed by the *Water Witch* remained unanswered. Señor Vasquez also desired to be informed whether the United States wished to interfere in the "claims for millions of dollars" with which Edward A. Hopkins had "thought to intimidate the government of the republic." He declared that Hopkins had been allowed to depart freely, together with all those who were associated with him, "abandoning the little property of the company, itself burdened with a debt of ten thousand dollars which it received from the national treasury at an annual interest of six per cent when no one would lend it a dollar to pay its matured obligations which it had deceptively contracted." This aid Hopkins had, he said, "requited by unheard of insolences, and by excesses which at last occasioned the supreme decree revoking the exequatur that had been accorded to his credentials as consul of the United States in Paraguay." Señor Vasquez therefore deemed it proper to ascertain the intentions of the United States in regard to the "outrages" of the commanding officers of the *Water Witch*, and the "pretended claims of Hopkins," in order to determine "whether the occasion had arrived" for "a plain and full exchange" of the ratifications of the treaty. To these inquiries the reply of Mr. Fitzpatrick proved to be unsatisfactory. The principal object of his mission was to exchange the ratifications of the treaty, and he

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answered that when that object was accomplished he should consider his mission as ended. Señor Vasquez then declined to exchange the ratifications of the treaty, but stated that the President of the republic was disposed to enter on the negotiation of a new treaty, if the United States should send out a plenipotentiary with suitable instructions for that purpose, who might also settle the "pending questions" to which he had referred in his previous note. Mr. Fitzpatrick urged in vain the exchange of the ratifications of the treaty that had already been concluded, pointing out the purely formal character of the Senate's amendments. Señor Vasquez, however, declared that as the treaty was "plainly and fully ratified" by the President of the republic soon after it conclusion, it was "not easy for His Excellency * * * to submit to a new ratification" in the terms proposed; and he pronounced the correspondence closed.

Non-presentation of the Company's Claim.

At this time no claim on behalf of the United States and Paraguay Navigation Company had been presented by the United States to Paraguay. The first memorial of the company to the Department of State bears date January 15, 1855, and requests that measures be taken to enforce the payment by Paraguay of the sum of $935,000 as an indemnity for its losses and the destruction of its business in that country. A representative of the company reported that Mr. Marcy, who was then Secretary of State, was "at first somewhat prejudiced against" the claim. In fact, Mr. Marcy stated that he deemed the proofs of ownership of property, as well as of loss and damage, "very inadequate." The company, however, continued to urge its claims, submitting various papers and petitions, and on July 18, 1856, a year and a half after the presentation of its first memorial, Mr. Marcy instructed Mr. Peden, the minister of the United States at Buenos Ayres, that the conduct of Paraguay appeared "to have been not only unjust and oppressive, but to have produced the loss of a large amount of property;" that Mr. Fitzpatrick would be directed "to present to the Paraguayan Government a claim for the damages sustained by its unjustifiable proceedings toward the company;" and if there should be, as probably there would, a difference of opinion "as to the character and amount of indemnity" to which the company was entitled, Mr. Fitzpatrick would "be instructed to investigate the transaction and

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report thereon to the government."[1] On the 5th of August 1856 Mr. Fitzpatrick, on setting out on his mission, was instructed that no doubt was entertained that injustice was done to the company, and that the Government of Paraguay was, under the condition of things existing in that country, accountable for it. He was accordingly directed "at a proper time and in a proper manner" to make known the views of the United States on the subject, but before adverting to it to propose the exchange of the ratifications of the treaty of March 4, 1853. It seems that Mr. Fitzpatrick either construed his instructions as precluding the transaction of any other business, if he should be unable to exchange the ratifications of the treaty, or else as investing him with discretion to present or not to present the claim of the United States and Paraguay Navigation Company, in accordance with the judgment he should form after his arrival in Paraguay. It is, at any rate, certain that on the 10th of November 1856 he stated, in a note to Senor Vasquez, that his mission was "solely for the purpose of exchanging the ratifications of the treaty," and that, this having been done, he should "consider his mission near the republic ended." He withdrew without mentioning the company's claim.

Message of President Buchanan.

Thus matters remained till the Congress of the United States assembled in December 1857, when in his annual message of the 8th of that month President Buchanan referred to the relations with Paraguay in a manner that indicated a desire to take decisive action. He first referred with regret to the refusal of President Lopez to ratify the treaty of 1853. He then took up the case of the *Water Witch*, maintaining that she was not, properly speaking, a vessel of war, so as to fall within the prohibition against the navigation by foreign vessels of war of Paraguayan rivers, and that as Paraguay owned only one bank of the river on which the attack occurred, her right to enforce obedience to her decree in those waters could not be acknowledged. Under the circumstances, he was constrained

[1] In a letter to Mr. Gallup of July 7, 1856, referring to the claim, Mr. Marcy said: "I do not know what other instructions can be given but strenuously to urge the allowance of it. Other steps can not be authorized until we know what view Paraguay will take of it. That government ought to be heard before coercive measures are determined on." (MS. Dom. Let. XLV. 376.)

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to consider the attack on the *Water Witch* "as unjustifiable, and as calling for satisfaction from the Paraguayan Government." "Citizens of the United States, also," he continued, "who were established in business in Paraguay, have had their property seized and taken from them, and have otherwise been treated by the authorities in an insulting and arbitrary manner, which requires redress. A demand for these purposes will be made in a firm but conciliatory spirit. This will the more probably be granted if the Executive shall have authority to use other means in the event of a refusal. This is accordingly recommended."

Joint Resolution of Congress.

This recommendation was taken into consideration by Congress,[1] and on June 2, 1858, the President approved a joint resolution by which he was authorized, "for the purpose of adjusting the differences between the United States and the republic of Paraguay, in connection with the attack on the United States steamer *Water Witch*, and with other matters referred to in the annual message," "to adopt such measures and use such force as in his judgment may be necessary and advisable, in the event of a refusal of just satisfaction by the Government of Paraguay."[2] By section 4 of the act of June 12, 1858, making an appropriation for the Navy, the sum of $10,000, or so much thereof as might be necessary, was provided "to defray the expenses and compensation of a commissioner to the republic of Paraguay" in execution of the joint resolution.[3]

Expedition to Paraguay.

On the 9th of September 1858 Mr. James B. Bowlin, of Missouri, was appointed special commissioner, and steps had then been taken toward fitting out an expedition to accompany him. In his annual message of December 6, 1858, President Buchanan was able to announce to Congress that Mr. Bowlin had proceeded to Paraguay, and that in view of the contingency that his efforts to obtain just satisfaction might be unsuccessful, the Secretary of the Navy had fitted out and dispatched a naval force to rendezvous near Buenos Ayres, which would, it was believed, prove sufficient for the occasion. This expedition consisted of 19 vessels, large and small, "carrying 200 guns and 2,500 men, well supplied with ammunition, small arms, and

[1] S. Rep. 60, 35 Cong. 1 sess.
[2] 11 Stats. at L. 370.
[3] 11 Stats. at L. 314, 319.

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whatever was necessary to its success in the waters of La Plata." The frigate *Sabine*, having on board Commodore Shubrick, to whom the command of the expedition was intrusted, and Mr. Bowlin, left New York on the 17th of October 1858, and arrived in La Plata on the 18th of December, finding most of the vessels comprising the expedition already there. On the 30th of the same month Mr. Bowlin and Commodore Shubrick left Montevideo with the steamers *Fulton* and *Water Witch*, and on the 25th of January arrived at Asuncion.

Provision for Arbitration.

On the 10th of February Mr. Bowlin took leave of the President of Paraguay, and on the 17th set out for the United States.[1] In his annual message of December 19, 1859, President Buchanan announced that "all our difficulties" with the republic of Paraguay had been "satisfactorily adjusted;" that "the President of that republic, in a friendly spirit, acceded promptly to the just and reasonable demands of the Government of the United States;" and that the treaties which Mr. Bowlin had concluded would be immediately submitted to the Senate.

The treaties to which Mr. Buchanan referred were a treaty of commerce and navigation, with which we are not at present concerned, and a convention for the settlement of the claims of the United States and Paraguay Navigation Company. In the case of the *Water Witch* Mr. Bowlin obtained "ample apologies" and the payment of $10,000 for the family of the seaman who was killed at the wheel.[2] As to the claim of the company, he was instructed if the Government of Paraguay should consent to pay $500,000 not to refuse to adjust it for that amount, but if he found it impossible to reach an agreement as to the amount of the indemnity, to propose to leave this question to an impartial tribunal, it being an indispensable preliminary that the Paraguayan Government should acknowledge its liability to the company. Mr. Bowlin was unable to obtain the sum specified as the basis of compromise, and on the 4th of February 1859 concluded a convention, by which it was declared that the two governments, desiring "to come to a definite understanding" as to the "mode of settling" the "pending question" of the claims of the company, had "agreed to refer the same to a special and respectable commission, to be organized and regulated by the conven-

[1] Report of the Secretary of the Navy, December 2, 1859.

[2] Curtis's Life of Buchanan, II. 225.

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tion hereby established between the two high contracting parties." By Article I. the "government of the republic of Paraguay binds itself for the responsibility in favor of the 'United States and Paraguay Navigation Company' which may result from the decree of the commissioners," whose appointment was provided for in the next article. By this article the high contracting parties, "appreciating," as they said, "the difficulty of agreeing upon the amount of the reclamations to which the said company may be entitled, and being convinced that a commission is the only equitable and honorable method by which the two countries can arrive at a perfect understanding thereof," engaged that the Government of the United States should appoint one commissioner and the Government of Paraguay another, and that in case these commissioners disagreed, an umpire should be chosen by them, or if they were unable to concur in his selection, by the diplomatic representatives of Russia and Prussia at Washington. "The two commissioners named in the said manner," the article further provided, "shall meet in the city of Washington to investigate, adjust, and determine the amount of the claims of the above-mentioned company, upon sufficient proofs of the charges and defenses of the contending parties." By Article III. it was agreed that the commissioners, before entering on their duties, should take an oath "that they will fairly and impartially investigate the said claims, and a just decision thereupon render, to the best of their judgment and ability." By Article V. the Government of Paraguay bound itself to pay in Asuncion, thirty days after presentation, the draft which the United States "shall issue for the amount for which the two commissioners concurring, or by (*sic*) the umpire, shall declare it responsible to the said company."[1]

[1] "DEPARTMENT OF STATE, *Washington, May 28, 1859.*

"C. S. BRADLEY, Esq., *Providence.*

"SIR: Your letter of the 14th instant has been received. The special convention negotiated by Judge Bowlin with the Paraguayan plenipotentiary provides, substantially, for the appointment of a joint commission composed of one commissioner from each government, and an umpire in case of disagreement, to decide differences.

"The commission is to assemble in this city within one year after the ratification of the commercial treaty concluded at Asuncion on the 4th of February 1859—said ratification to take place within fifteen months from date of signature—and is to close its session within three months, by which time, if no agreement has been concluded, the umpire is to be selected.

"The commissioners are to take the usual oath fairly and impartially

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Organization of the Commission.

By an act of Congress passed to carry the convention into effect, and approved May 16, 1860, the President was authorized to appoint, by and with the advice and consent of the Senate, a commissioner, whose duty it should be, "conjointly with a commissioner appointed by the Government of Paraguay, to investigate, adjust, and determine the amount of the claims of the 'United States and Paraguay Navigation Company' against the Government of Paraguay," and also in the same manner to "appoint a secretary to said commissioner, in behalf of the United States, versed in the English and Spanish languages."[1] As commissioner under this act and the convention, President Buchanan appointed Mr. Cave Johnson, of Tennessee. Mr. Johnson, who was by profession a lawyer, had served on the bench and in Congress, and was a colleague of Mr. Buchanan in the Cabinet of Polk, in which he held the position of Postmaster-General. The President appointed as secretary and interpreter of the commission Samuel Ward. The commissioner on the part of Paraguay was Don José Berges.

The commissioners held their first meeting in a room in the Treasury Department in Washington on June 22, 1860, and, together with the secretary, exhibited their commissions, after which they all subscribed an oath before a judge of the courts of the District of Columbia, the commissioners taking the oath prescribed by the convention, and Mr. Ward swearing faithfully to discharge the duties of secretary and interpreter.

Messrs. John Appleton and C. S. Bradley appeared as counsel for the company, and Mr. J. Mandeville Carlisle as counsel for the republic of Paraguay.

Statement of the Claimants.

The second meeting of the commissioners was held on the 25th of June, when the opening statement for the claimant was made by Mr. Appleton. He said that the persons who formed the

to investigate and decide the claims of the 'United States and Paraguay Navigation Company.'

"The Government of Paraguay binds itself 'for the responsibility which may result from the decree of the commissioners' and to pay, thirty days after presentation, the draft which may be drawn on it by the Government of the United States to meet said award.

"These points embrace the material stipulations of the convention referred to.

"I am, etc.,

"LEWIS CASS."

(MS. Dom. Let. L. 344.)

[1] 12 Stats. at L. 15.

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company were induced to engage in the enterprise by their knowledge of the vast and undeveloped resources of Paraguay, and of the neighboring provinces of Brazil and Bolivia, with which they became acquainted not only from published sources of information, but through the travels of Governor Arnold, of Rhode Island, the president of the company, and through the residence in Paraguay for nine years of their agent, Mr. Hopkins, who had during that period sustained the most friendly relations with President Lopez. But the special inducements were, he said, the public decrees and laws of Paraguay, which invited foreigners to develop her resources by the offer of grants or privileges in the nature of patent rights for a term of years to all who should first introduce into the country any implements or processes of manufacture not before in use there. He filed with the commission a copy of the laws in question, together with a translation. They bore date May 20, 1845, and in substance granted a patent right for a term of years on industrial inventions, and extended a similar privilege to persons who first introduced into the country foreign discoveries. Mr. Appleton claimed that these laws had been interpreted by Mr. Gelly, secretary of state of Paraguay, as applicable to an enterprise like that of the company. In proof of this he filed with the commission a copy and translation of a letter written by Mr. Gelly to Mr. Hopkins on December 15, 1848, while the former was at Rio de Janeiro on a special mission. It appears by this letter that Mr. Hopkins had written to Mr. Gelly in regard to the establishment in Paraguay of a school of practical agriculture. Mr. Gelly in reply expressed satisfaction with the design and said it was his opinion that President Lopez would donate some land for the purpose and exempt the school from all taxes and imposts. At the same time he expressed the opinion that a proposition which Mr. Hopkins had made to obtain the exclusive privilege or monopoly of certain branches of agriculture could not be granted. The decree of May 20, 1845, had, he said, regulated this subject, and it would neither be just nor possible to make an exception in Mr. Hopkins's favor; but if Mr. Hopkins introduced into the country machines or new means of industry which it did not already possess, the decree would give him a monopoly for ten years at least, if he did not require a special concession. Mr. Gelly also expressed the opinion that there was a promising opportunity for success in any kind of enterprise and speculation in Paraguay of an agricultural or commercial character,

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but discouraged the idea of attempting to establish manufactories on an extensive scale.

Such were the inducements which were said to have led the company to commence its enterprise and to establish between the United States and Paraguay "a great and permanent business." Though the enterprise had only commenced when it was terminated, the actual expenditures and losses amounted, with interest, said Mr. Appleton, after deducting all returns, to $402,520.37. The expenditure was chiefly for the cost and equipment of steamers and other vessels sent to Paraguay, for machinery and implements sent thither, for land and buildings purchased there, and for salaries and wages paid to employees. A portion of the loss, however, arose from the sale of bonds at less than par—a sacrifice which the company was compelled to make after its hopes and credit were depressed by the action of Paraguay.

Besides the actual expenses and losses referred to, the company made a claim for indemnity for the value of the position of which it was wrongfully deprived by the act of Paraguay. Its outlay, said Mr. Appleton, was not only money, but intelligence, investigation, time, enterprise, risk, and anxiety, and these things went to make up the actual investment which created the company's position. The precise figures of this branch of the claim it would, he said, be difficult to specify, and the measure of damages must be determined by the discretion of the tribunal.

Another branch of the claim arose from the destruction of grants made by the laws of Paraguay in the nature of patents for machinery and processes first introduced into that country. The company sent to Paraguay a steam engine, two beehives, a brick machine, a bark mill, a portable sawmill, and various other articles, many of which were unknown in the country. It also introduced a new mode of making cigars. To illustrate the value of the latter Mr. Appleton said that at the time its cigar factory was closed the company was employing 115 operatives, who would make 897,000 cigars a month. He estimated the profits of this business at $236,808 per annum, or for ten years, $2,368.080.

The company also had in operation, he said, the first and only steam sawmill in Paraguay, the profits of which he estimated at $34,725 a year, or for ten years, $347,250.

The company also had a brick machine which could turn

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out 10,000 bricks a day. The profits of this machine were estimated at $32,000 a year, or for ten years, $320,000.

The company also claimed to have introduced the first steam engine into Paraguay. These things were cited as but illustrations of the company's rights, the value of which might, said Mr. Appleton, be left to the judgment of the commission. In addition to these things, the claimants were entitled to a reasonable allowance for the expense of procuring redress for their wrongs; to compensation for time, labor, anxiety, and suffering expended and incurred in their enterprise; to damages for their expulsion; and finally, to compensation or an equivalent for the patent rights, grants, and franchises bestowed upon the company by the laws of Paraguay, all of which were abrogated by the wrongful acts of President Lopez. It was submitted that the award of the commission should exceed the sum of a million dollars.

Statement of Paraguay.

Under the rules adopted by the commission it was provided that a formal statement of the claims of the company should be followed by a similar statement on the part of the republic of Paraguay. This statement was presented by Mr. Carlisle. He denied that any wrong and injury had been done by the republic of Paraguay to the claimants. As to any inducements held out by the republic, they were, he said, to be found in its general laws, and it was denied that the company had acquired any rights of patent or monopoly for any term under those laws or in any manner whatever. The laws prescribed the specific and appropriate evidence of such rights, upon which alone could they have been exercised or enjoyed. The letter of Mr. Gelly was admitted to be genuine, but it was denied that he was ever secretary of state or that he ever held any office under the Government of Paraguay, except that of special commissioner to treat concerning the boundary between that republic and Brazil. The letter purported on its face to be private, and expressly referred to the general laws of the republic, to which, it said, no exception could be made in Mr. Hopkins's favor.

It was also denied that the agents of the company were expelled from Paraguay, or that its business was interrupted or disturbed otherwise than in due execution of the laws of the land to which the claimants were subject. On the other hand, it was said that the most extraordinary favors were

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extended to Mr. Hopkins and to the company until they could be continued no longer without disgrace.

Should the commission find that the republic of Paraguay was liable in damages, Mr. Carlisle insisted that the amount of damages actually sustained should be made out by clear and distinct proofs. No prospective, conjectural, or speculative damages could be allowed in any form; nor could the measure of damages be affected by the amount of outlays made in the United States, the results of which never came within the territory of Paraguay. Still less could compensation be made for "intelligence," "enterprise," and "anxiety of mind generally." The first and second items in point of magnitude in the company's claim were, said Mr. Carlisle, for two vessels which were wrecked without any apparent combination between President Lopez and the elements, and which never came within Paraguayan jurisdiction. Nor was it perceived how the republic of Paraguay could be held responsible for the difference between the par value of the bonds issued to raise money for the company and the minor sums which people were willing to pay for them. Proofs would, said Mr. Carlisle, be offered of the importations actually made by the company and of their value and disposition. It would also be shown that the sum of $10,000 was loaned to Mr. Hopkins for the use of the company by the Government of Paraguay, and that this sum remained unpaid, except so far as the value of the property abandoned by the company might be applicable to it. The "lands" which figured so largely in the complaints of the company would be shown to have been procured upon a void title for the price of $70 or $80. It would also be shown that the "cigar factory" was of insignificant value, that the sawmill never paid expenses, and that the whole enterprise, even in the hands of a judicious and skillful agent, could never have realized the enormous profits which the commission was asked to consider as having been wrested from the actual grasp of the claimants.

Award.

At the third session of the commission the taking of testimony was begun. Witnesses were produced and examined, both for the company and for Paraguay, and various written proofs were filed on both sides. The hearing of witnesses and the filing of evidence were concluded at the sixteenth session of the commission.

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On July 19, Messrs. Appleton and Bradley submitted an argument for the claimants, together with a summary of the evidence. An argument for Paraguay was submitted by Mr. Carlisle. The commission then adjourned on the 23d of July for consultation, and again from the 23d of July until the 27th. When the commissioners met again they agreed upon an award, which they signed provisionally, with a view to its being inscribed on the record when the American commissioner should have prepared an opinion and report, which he desired to present to his government with the award. Mr. Johnson completed his opinion on the 10th of August. The last session of the commission was held on Monday the 13th, when the commissioners filed their final award, which was adverse to the claims of the company. The text of the award was as follows:

"And now, on this thirteenth day of August, anno Domini one thousand eight hundred and sixty, the undersigned, commissioners appointed and empowered respectively, as appears fully in the aforegoing record, having heard and maturely considered the 'proofs of the charges and defenses of the contending parties,' in respect of the 'claims of the United States and Paraguay Navigation Company—a company composed of citizens of the United States—against the Government of Paraguay, and having conferred together and deliberated upon the same, and upon the printed arguments of counsel thereupon, in virtue of the powers invested in them by the convention in this record recited and set forth, do hereby determine and award:

"That the said claimants, 'The United States and Paraguay Navigation Company,' have not proved or established any right to damages upon their said claim against the government of the republic of Paraguay; and that, upon the proofs aforesaid, the said government is not responsible to the said company in any damages or pecuniary compensation whatever, in all the premises.

"In testimony whereof, the said commissioners have hereunto subscribed their names and directed the attestation of the secretary and interpreter the day and year aforesaid.

"C. JOHNSON,
"*Commissioner on the part of the United States.*

"JOSÉ BERGES,
"*Commissioner on the part of the Republic of Paraguay.*

"Attest:
SAMUEL WARD,
Secretary and Interpreter.

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Opinion of Mr. Johnson.

The grounds on which this award was based were stated in the following opinion of Mr. Johnson, the United States commissioner:

"The United States and Paraguay Navigation Company had been organized by an association of enterprising citizens of Rhode Island in the fall of 1852, and chartered by the legislature of that State in June 1853. The capital was one hundred thousand dollars, with liberty to increase it to a million, for the general purposes of trade.

Mr. E. A. Hopkins.

"Mr. E. A. Hopkins, who had been mainly instrumental in getting up the company, became its general agent for the transaction of its business south of the equator, with a salary of two thousand dollars per annum, and by the same contract entitled to five per centum on its profits, until his share of the profits should reach thirty thousand dollars, when he was to be paid ten thousand dollars in cash, and the other twenty thousand dollars in stock of the company at par. He had been likewise appointed the consul of the United States for Paraguay.

"Mr. Hopkins had resided many years in that country. His favorable accounts of the valley of the La Plata, of the fertility of its soil, its salubrious climate, the absence of industry and enterprise among its citizens, their total ignorance of the mechanical arts, commerce, and agricultural pursuits, presented to his associates a field for enterprise that promised, in their estimation, unbounded wealth, such as had never been realized, except by British merchants in the East Indies.

"Paraguay was selected as the chief theater of their operations; but the contract with Mr. Hopkins constituted him their agent for all parts 'south of the equator,' indicating a more extended field.

"For thirty years the government of that country, nominally a republic, had been, under the control of Doctor Francia, an absolute despotism. His policy had excluded foreigners, and prohibited all intercourse with foreign nations; had paralyzed the industry of the country, and rendered its population entirely subservient to his will.

Policy of President Carlos Antonio Lopez.

"Upon his death, which occurred nearly twenty years ago, Carlos Antonio Lopez had been selected as his successor, under a modified government, and with the title of President. He had the sagacity to see the evil influences experienced by the people from the policy adopted by the dictator, and patriotism enough to seek a remedy. He encouraged the arts and industry by the most liberal patent laws, securing rights for inventions, improvements, and the introduction of new and useful machines, thereby promoting agricultural and mechanical industry; and still more, by opening to commerce the great rivers Parana and Paraguay, which nearly surround the country. In the efforts to improve the condition of the citizens,

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long accustomed to oppression and injustice, he could not fail to perceive that such a change in their condition, to be permanently beneficial, must necessarily be gradual.

"He found the republic surrounded by states constantly in agitation, at war with each other and among themselves; all was anarchy and disorder. Under such circumstances it was no easy task to establish order and peace and to promote industry and the arts among his own people. It could only be accomplished by a firmness, vigor, and energy in his administration which would be regarded in other countries (more enlightened and more accustomed to self-government) as tyrannical and oppressive. It could scarcely be expected that the ideas of rights of person and property, of political and civil liberty, and the administration of justice, as understood and practiced in the states of this Union, could be at once introduced and put into successful operation in the infancy of a republic like Paraguay.

"That a more rapid advancement of industry and civilization has been attained under his administration is generally conceded. Proceeding in this spirit he seems to have hailed with alacrity the prospect of friendly relations with the United States.

"Captain Page, in his narrative of the scientific expedition under his command, says that the government extended to him 'a series of national courtesies,' which commanded his respect. 'Indeed (he says), government hospitalities represent a characteristic of the Paraguayans. A more generous, single-hearted people it is impossible to find, and they have a native tact which rarely offends even the conventional ideas of those who have associated more with the outer world.'

Aid Extended to the Company.

"The kindest treatment was extended to him and his officers until the rupture with Hopkins. Upon the arrival of Consul Hopkins and his employees, which took place in the fall of 1853, they were received with the utmost cordiality, and every possible aid generously extended to them. The soldiers of the republic were turned out of a barrack for their accommodation, without any compensation for its use. Aid was cheerfully given to Mr. Hopkins for the selection of suitable sites for the works he contemplated. Laborers were selected and ordered into his service, for a very moderate compensation; and when President Lopez found the company embarrassed with disasters, and with the debts they had contracted, he liberally and generously extended to them an accommodation of ten thousand dollars for two years, from the treasury.

"Stronger evidence of a desire to cultivate the good will of the company, and to secure the confidence and respect of the citizens of the United States could not have been given than was exhibited in the conduct of President Lopez, and the citizens generally, in courtesies and favors freely and cheerfully

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extended to Captain Page, his officers and men, and to the agent and servants of the United States and Paraguay Navigation Company.

"Many of these acts, so beneficial to these claimants, were of a nature peculiar to a government of strong powers, and a people unaccustomed to question their extent, and without which the establishment could not have been put in operation. Mr. Hopkins, in his letter to Governor Marcy, of 22d August 1854, says, 'I knew well enough its [the government's] arbitrary character, and believed the people to be unfit to govern themselves.'

"Mr. Hopkins, then, with a full knowledge of the institutions and laws, the customs and habits of the people, voluntarily selected for himself and employees that country as a residence and place of business. Thus they became entitled, as citizens of the United States resident in Paraguay, to all the immunities, rights, and privileges granted to the people of that state by their laws, and made themselves equally liable with them to the penalties and punishments imposed for an infraction of those laws. And more, as citizens of the United States, they owed it to themselves and to their own country, as well as to the infant republic just emerging from tyranny and oppression, to have set an example of forbearance, moderation, and justice that would have reflected honor upon the institutions of their own country, and have inspired the people of Paraguay with new zeal and energy in their struggles to secure for themselves institutions producing such results.

"Whilst the company were indulging in golden dreams of 'untold wealth' seldom if ever realized, there seems to have been lurking in the mind of their agent, Hopkins, an enthusiasm for 'progress and civilization' and 'reform' approaching fanaticism, which led him to censure other institutions than those of his own country, and to condemn the conduct of other public officers with whom he was brought into connection by his consular position, whose ideas did not conform to his visionary notions.

"Mr. Hopkins continued to act as general agent of the company, as a partner, and as consul of the United States, until the 1st September 1854, when his exequatur was withdrawn by President Lopez, and he and his employees abandoned the country, alleging that they *were expelled*, their *business broken up*, and their property confiscated by him. For these alleged wrongs and injuries heavy damages are demanded.

Jurisdiction of the Commission.

"A question arose, upon the opening statements of the counsel for the claimants and the republic of Paraguay respectively, touching the jurisdiction and duty of the commission to inquire into the origin and nature of the transactions upon which this claim was based, so as to determine whether, in fact and law, the republic of Paraguay owed any pecuniary satisfaction whatever to the claimants.

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"The question was discussed orally by counsel, after the reading of their opening papers, and was again treated to some extent on both sides in the concluding arguments. It has received the most deliberate consideration.

"On the part of the claimants, it is fully presented in their summing up of the case. They say:

"'In this case, the wrong is beyond question. It appears from the memorials of the company, from the recorded judgments of the Department of State under two administrations, from the messages of the President, from the solemn action of both branches of Congress, and from the treaty itself, which assumes the wrong, and constitutes a commission to assess the damages.

"'It is a peculiarity of this commission that it is formed with reference to a single case and for a single purpose. Ordinarily, a claims commission is authorized to consider and determine all such claims of a certain character as may have been presented within a given time. In such cases the treaty assumes only certain general facts, such as the previous existence of a war, the appropriation of a sum of money, or some general principle of liability. Neither of these assumptions would be inquired into by a commission. In this case, the whole subject-matter of the negotiation which led to the treaty having been a single claim, it was easy to make the convention definite, and to confine the duties of the commission to a single point. This has been done. The treaty assumes the wrong committed, and the liability of Paraguay, and only authorizes the commissioners to assess the amount of damages. It is a simple question of how much?

"'If there was any ambiguity in the convention on this point, it could not fail to be removed by a reference to the proceedings which led to the convention.

"'The first application of the company to their government was dated January 15, 1855, and requested that "such measures may be taken as to him [the President] may seem meet and proper, to demand of the government of Paraguay, and enforce the payment, as indemnity for our losses and the destruction of our business in that country, the sum of $935,000."

"'The statement of Mr. Gallup (see his letter to Mr. Bradley of July 8, 1855) shows that Mr. Marcy, the Secretary of State, "although at first somewhat prejudiced against it [the claim], at the last interview I had with him, expressed himself satisfied that a great outrage had been committed upon our citizens by the President of the republic of Paraguay, and that he should make a demand upon his government for indemnity." * * *

"'On the 2d of June 1858 Congress adopted a resolution authorizing the President to adopt such measures and use such force to secure justice from Paraguay as he might think necessary.'

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"On the part of the Republic of Paraguay, the counsel, in his opening statement, said:

"'I. The counsel for the claimants assume as a foregone conclusion that wrong and injury in the transactions upon which this claim is based have been done by the republic of Paraguay.

"'This is utterly denied. And it will be respectfully insisted that it will be for this honorable commission not to take for granted, but to require to be here proven and established in fact and law, the allegation that by reason of any matter or thing done or permitted by the Republic of Paraguay in the premises any responsibility in damages to these claimants rests upon it.

"'This commission is organized under the law of nations and the terms of a treaty or convention between sovereigns of equal dignity in the view of that code. The instructions given by one of these high contracting parties to its minister, its executive messages, the reports of committees, or other proceedings of its legislature, referred to in the opening statement, can have no other weight or value than as exhibiting in an imposing form the claim which is here made, and is here to be establised or rejected. They are not even entitled to be regarded as the deliberate conclusions of the government from whom they emanated, since they are founded exclusively upon the case as made *ex parte* by those whose interests and feelings may have naturally colored their representations. By the solemn act of the United States in entering into this convention it is stipulated that this claim shall be here "*investigated*" and "*adjusted*," and "*its amount determined*," "*upon sufficient proof of the charges and defenses of the contending parties.*" (Convention, Art. II.)

"This is the general outline of the argument.

"The question which it presents seemed to be altogether of a technical nature and quite too narrow and unsubstantial to be of any practical importance in a matter of public law. Nevertheless, it is very evident that from a very early period in the history of this claim the claimants steadily looked to the foreclosure of all inquiry into the *foundation of the claim*, and labored to place the republic of Paraguay in the condition of a defendant in an ordinary suit at law who had suffered judgment to pass, reserving only the right to have an inquisition of damages. If this could be admitted—and it would be certainly an anomaly in international affairs—the result would be practically unimportant; because, in order to ascertain the damages, especially where they are claimed to be punitory or vindictive, there must necessarily be an investigation into all the facts and circumstances, so as to determine the *animus* and every other element properly entering into the measure of damages.

"Such an inquiry, conducted according to the municipal law, might possibly result in merely nominal damages. But a formal award, made by a mixed commission, under treaty,

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giving to the claimants '*one cent damages*,' would be simply ridiculous. Such a technicality would be unbecoming the dignity of nations and repugnant to the spirit of the public law.

"There was no difference of opinion between the commissioners upon the question. They concurred in holding that their respective commissions, the oaths which they had taken as prescribed by the third article of the convention, the language of that convention in all its parts referring to the matter, and the nature of the subject submitted to them, required a full and unrestricted examination of the claim. To ascertain the '*amount*' of the claim necessarily obliged them to determine between 0 and the highest amount which figures could express, according to the exigencies of the proofs.

"Any other view of the subject would seem to be equally irreconcilable with the terms of the convention, as with justice and fair dealing.

"By the first article of the convention, 'the government of the republic of Paraguay *binds itself* for the *responsibility* in favor of the United States and Paraguay Navigation Company *which may result* from the decree of the commissioners, who, it is agreed, shall be appointed as follows.' By this article the liability of Paraguay was distinctly admitted, no doubt. But *what* liability? The article answers, 'the responsibility which *may result* from the decree of the commissioners.' Can this be understood as a stipulation that the commissioners shall at all events fix *some* responsibility to *some* amount upon that republic? If so, *what* amount was to be this minimum? If it were not fixed by the terms of the convention (and it was not), in what other mode was it to be arrived at? The second article answers by 'sufficient *proofs* of the charges and defenses of the contending parties;' and the third article requires that the commissioners shall be sworn 'fairly and impartially to investigate the said claims and a just decision thereon render, to the best of their judgment and ability.' It then necessarily follows that the whole matter of this claim was submitted to the 'decree' of this commission.

Various Demands of the Company.

"Before entering upon an investigation of the accounts submitted, it seemed desirable to ascertain the precise demand made by the company, and for this purpose all the papers on file in the Department of State were carefully examined. The following statement will show the claims set up at different times:

"The letter of Mr. Hopkins to the Secretary of State, dated 30th of August 1854, advises him that 'if the extraordinary avarice of this *old man Lopez* should be compelled to pay *two or three hundred thousand dollars* for our *reclamations*, expenses, etc., all would go well for years to come.' And again, in a communication to the Secretary, of 2d September 1854, he tells him:

"'The *delay* in having the claim settled; the entire ruin of

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their commercial operations; the expenditure of $116,000, shown in their last balance sheet; the destruction of their credit; the destruction of my own personal, official, and mercantile character; the calumnies of the press—*all will not be satisfied, principal and interest, by the payment of a less sum than four hundred thousand dollars.*'

"So the claim for damages stood, until their memorial of 15th January 1855 was presented to the President of the United States, claiming $935,000.

"No specification of items accompanied the memorial, but there was filed in the Department of State, under date of 31st January 1855, by Messrs. Arnold and Gallup, the following statement, exhibiting the items upon which the claim was founded:

For property in Paraguay, being real estate in Asuncion and San Antonio, with costly improvements made there, sundry mills, heavy machinery, tools, etc., confiscated, seized, and rendered worthless by the arbitrary conduct of the government, valued as per the accompanying deposition of George M. Boyd, and certificate of Lieutenant James H. Moore.....	$500,000
Property at the mouth of the river, being a clipper schooner, two river steamboats, built for the upper waters, a large sawmill, and other machinery and general merchandise, costing the claimant nearly $80,000 in cash, and rendered useless to the company by the acts of said government, valued, as per aforesaid deposition and certificate, at.....	100,000
For interest from 1st September 1853 to 1st May 1855 (average time) upon $350,000, the present cash liabilities of the company, at 6 per cent per annum.....	35,000
The actual damages sustained in the interruption of business in Paraguay, destruction of commercial interests along the river, and entire loss of credit, upon the sudden and wanton outrage committed upon the company by the Government of Paraguay, estimated at a moderate consideration of 50 per cent upon the valuation above of $600,000, which was accompanied by the affidavit of George M. Boyd and a certificate of Lieutenant James H. Moore.....	300,000
	935,000

"Governor Marcy replied, 7th March 1855, stating to them the propriety, if not the necessity, when making a demand on a foreign government, that the claim should be just, '*and the amount of losses and damages should be fairly estimated. In this latter respect particularly, the proofs submitted by you are very inadequate. There is no evidence filed of the company's title to the property, no evidence as to the nature and character of the grants, and no reliable evidence as to the quantity or value of the property owned by the company.*' He further informs them that, '*the actual cost of the property, and not only the amount, but the items of the expenditure on improvements, with a particular description of the improvements, ought to be given.*'

"On the 14th March Mr. Gallup, in the absence of Mr. Arnold, replies to this letter, vindicating the demand as presented, and informing him that there was 'no other testimony in the country as to the value of the property than the deposi-

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tion of Boyd and the certificate of Moore; *that the title deeds, grants, and other evidences of property, are all in the possession of our agent in South America, retained by him for use before the commissioner, when the claims shall be finally adjudicated.*'

"On the 16th March the company filed with the Secretary a statement of their treasurer, Bailey, exhibiting the liabilities and assets of the company, which is annexed to this report, marked B, viz:

Liabilities of the company in the United States	$361,103.10
And their assets	23,854.54

"This was the extent of their response to Mr. Marcy's requisition.

"The company continued, from time to time, to urge upon the department some action in their behalf, in various supplemental memorials, accompanied by affidavits from themselves or employees not materially varying the proof, and not paying that respect to the suggestions of Governor Marcy which they merited. They, however, furnished a statement, in connection with these memorials, of the expenditures of the company, which is annexed to this report, marked A and No. 3, by which the expenditures appear to have exceeded the receipts by the sum of $402,520.37, and which statement, it may be observed, furnishes no dates for the respective transactions; and a supplemental statement, marked No. 1, is also exhibited.

"These demands were twice sent to an agent of the Department in South America, with instructions for their settlement, but without any satisfactory result.

"A serious misunderstanding took place between that government and the United States in relation to the attack upon the *Water Witch*, and other indignities alleged to have been offered to citizens of the United States, which induced Congress to authorize the Executive to send a commissioner, accompanied by a naval force, to demand satisfaction for the insults and wrongs complained of, against the United States flag and citizens. He was instructed to have the claims of this company adjusted; his authority being limited to the reception of $500,000, in accordance, it is supposed, with the wishes of the company.

"Commissioner Bowlin was selected for this mission, and found no difficulty in adjusting all the demands of this government, without resorting to force, except the claims of this company, which President Lopez regarded as unjust. Nevertheless, Mr. Bowlin says, in a dispatch, that he could have secured a large sum in cash, by way of compromise, if he had not been restricted, but further adds: '*It is due to President Lopez to say, whatever offer he made was avowedly to purchase his peace, protesting the smallness of his liability, if any at all,*' upon the claim of this company.

"The company also instructed Mr. Bowlin in a *private* letter to receive $500,000, in satisfaction, if it should be paid without

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resort to force, but if coercion became necessary, to insist upon $1,000,000. They also sent a memorial to him, setting forth their claim to patent rights for the new machinery claimed to have been introduced by them under the decree of 20th May 1845, and representing, at not less than $5,000,000, the value that these alleged rights would have been to them if the government, without interruption, had permitted their use.

"The foundation on which were erected 'such golden dreams of untold wealth' as seem to have been constantly present to the mind of Mr. Hopkins, and more or less of his associates, will be best understood by their representations to Mr. Bowlin of the immense value placed upon their favorite machines, and then exhibiting the facts as proven before the commission.

"They inform Mr. Bowlin that 'the company had in operation the first and only steam sawmill in that country, which at the time of our interruption by the Government of Paraguay, produced seven hundred feet, or two hundred and forty-seven Spanish varas per day, valued at the mill at fifty to sixty-two cents per vara, say fifty cents per vara, is $123.50. The cost of logs in South Carolina or Maine, with labor at one dollar per day, to produce the above quantity would be five dollars, and labor sawing two dollars and seventy-five cents, making the whole cost of seven hundred feet per day seven dollars and seventy-five cents. Three hundred working days per annum would yield $34,725 net profit of one saw per year, and for ten years, $347,250.'

"Similar and more extravagant calculations were gone into for the purpose of showing the extraordinary profits of the cigar factory, which had been established, and the brickmaking machine which they proposed to put into operation. Their statements accompany this report, marked E and G.

"Similar claims were alleged to exist for patents for other machinery and agricultural implements, but no estimates are given of the profits anticipated from their use. From all these advantages secured to them, as they allege, by the decree of 20th May 1845, they expected to realize '*a wealth akin to that which the great commercial companies of Europe have realized in the East Indies.*'

"Such are the claims and demands made by the company upon the Government of Paraguay, and for which the Government of the United States was urged to enforce payment, even to the extent of a war with that new and feeble republic.

"Neither the original estimate of damages by Mr. Hopkins, the items furnished to the Secretary of State of 31st January 1855, nor the statement of capital by Mr. Bailey, the treasurer, now seem to be relied on as the basis upon which damages are to be estimated; but only the losses of the company as exhibited in the annexed papers A and C. The former, as has been said, is somewhat remarkable in having furnished no dates to most of its items; the proofs, however, enable us to decide upon each of them with all the accuracy necessary for

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this report. The paper C deserves a passing remark upon a few of the largest items, as illustrating the mode by which the claim has grown to its present size. It will be observed that the accounts embrace the whole expenditures of the company, and the profits and losses from its origin to the present year; a period of over six years, embracing traveling expenses, the fees of counsel, etc.

"The first two items, amounting to about $114,000, constitute the cost of the vessel *El Paraguay* and its cargo, which sailed from New York about the 20th March 1853, and cleared for '*Montevideo and a market*,' and which vessel, after encountering storms, and having cost large sums for repairs, was finally abandoned on the coast of South America near Maranham, was taken into port, condemned as unseaworthy, and sold, with a part of the damaged cargo, before reaching her destination at Montevideo. So much of the cargo as had been saved was reshipped to *Montevideo*, and then forwarded by the steamer *Fanny*, chartered for that purpose, to Asuncion, the capital of Paraguay, where the cargo was examined by the officers of the government, and a statement made of each article by Mr. Hopkins himself, and was valued by the regular appraisers, and the *ad valorem* duties paid by Mr. Hopkins.

The value of the whole cargo amounted to	$15,300
On the 3d February 1854 there was reshipped, out of the country, and drawback allowed Mr. Hopkins	3,726
	11,574
February 7th, afterwards, he imported other goods, valued at....	291
	11,865

"These were all the goods ever taken into the country by the company, exclusive of the machinery, sawmills, etc.

"It does not appear from the evidence that President Lopez had any connection with the company, or even knew of the proposed enterprise, until the arrival of the *Fanny*, in October 1853, with a part of the cargo of the steamer *El Paraguay*. This steamer is proved to have cost from sixty-five to seventy thousand dollars. What became of the residue of the cargo beyond what was shipped by the *Fanny* and taken into Paraguay, is not satisfactorily shown. Nor does this seem at all important; for it may be justly said there would seem to be as much propriety in charging the loss upon the ship and cargo to the government at Montevideo, to which place the goods had been shipped, or to Buenos Ayres, where the company afterward had a trading house, as to Paraguay. Whatever might have been the tyranny and oppression practiced by that government toward Mr. Hopkins and his employees, after their arrival and during their stay, surely can form no excuse for charging the losses which occurred by the dangers of the sea before their arrival.

"Under this same head belong the charges on account of

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what is called 'the second expedition,' to wit, the schooner *E. T. Blodget*, with merchandise and two small steamers in detached pieces on board, and which never entered Paraguay. The schooner was wrecked above Buenos Ayres, at the Tigre River, and had no insurance to that point. The wreck was sold. The cargo, so far as saved, was taken to other countries, and disposed of in other markets by the company. This ground of claim is charged in the statement of 31st January 1855 at $100,000.

"The whole amount of property taken into Paraguay was either sold or taken away by Mr. Hopkins when he left the country, except the mills, machinery, and agricultural implements, and some personal property of little value left in San Antonio, and the effects in the cigar factory in the city.

"All the property left, including the real estate and a large portion of that taken off by him, was under mortgage to the Government of Paraguay to secure the loan of ten thousand dollars.

"Nevertheless, as is stated by Captain Page, in his dispatch of 26th September 1854, President Lopez satisfied him, 'there was no intention on the part of the government to prevent Mr. Hopkins taking out of the country any of his effects, merchandise, or property, notwithstanding the indebtedness of the company to the government to the amount of ten thousand dollars, for the payment of which he would not hold the property.' At the time Mr. Hopkins was ordered to leave the cuartel (barracks) at San Antonio he was requested to remove all the property. He removed some of the articles, declining to remove others. They were removed by the government, an inventory having been taken and an appraisement made. These articles—a list of which, together with the proceedings, will be found in the papers sent—were stored in the city, they having been 'thrown on the hands of the government by Mr. Hopkins, and will be sold; the money given to Mr. Hopkins if he will receive it, and if not, will be put into the treasury for the benefit of his creditors or for the company.'—[Captain Page's dispatch.]

"Another item of loss, not less extraordinary, grew out of the mode adopted by the company of increasing their capital stock by issuing their bonds for $100,000, bearing interest, and selling them to the stockholders of the company at a loss of over $57,000. Such losses, and other like losses and expenditures of the company, can, upon no principle of law or equity, be made chargeable to the republic of Paraguay.

Questions of Liability.

"There is no evidence showing any encouragement held out by Paraguay to this company to induce them to go into that country as new settlers, or for the employment of their agricultural implements, machinery, etc., or to engage in trade generally, other than the patent law of 1845. The enterprise was undertaken upon their own judgment, conducted by their own officers, in their own way. If they desired to avail themselves of

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patents, as offered by that law, they must necessarily be compelled to comply with its provisions. Patent laws, giving exclusive privileges, are always made not only with a view to the interests of the patentees, but also of the people after the expiration of the patent; and hence they generally require, as the decree of 28th May 1845 did, that explanations must be made to the proper officer, in *writing*, *setting forth* the *particular invention* or *improvement*, or, as in this case, the *new machinery* to be introduced. The officer is then to judge of its importance and utility, decide upon the propriety of its allowance, and the time for which it should be allowed; and then it is for him to issue the patent. Until the patent is granted no right accrues, under the law, to any person.

"The opinion or recommendation of Señor Gelly, no doubt honestly made, and with the best motives, can have no more influence upon the construction of the decree than the opinion of any other private citizen, and could by no means be holden to excuse a noncompliance with the provisions of a law of the republic. But he says distinctly that the President would have no authority to do so, and that the granting of other monopolies than those provided for in the law would be unjust.

"If the company had been induced by the liberal provisions of the decree of 1845 to engage in so important an enterprise, in which so much of their capital had been invested, it is remarkable that no effort was made, for eight or ten months, to secure the patents authorized by it, and which are now esteemed of such immense value.

"The shipments made by the steamer *El Paraguay* and the *E. T. Blodget*, and the claims now set up for the losses sustained in these respects, present the naked question of the liability of a foreign government for shipments made to its territory, under the expectation of profits, which are lost by the perils of the sea before reaching the port of destination. If such liability exists, then favorable commercial regulations, liberal laws for settlers, or favoring immigration into any country, would make the government the insurer not only against the perils of the seas, but also for the prudence and discretion of officers having charge of the vessels. The character of the government of the country to which such shipments are made can have nothing to do with the question of its liabilities for such enterprises. Whatever of tyranny or oppression may have been practiced (it may well be repeated) after the arrival of Hopkins and his employees in Paraguay, could have no influence in producing the disasters which caused them such heavy losses.

"Surely no one can believe that the loss of $57,000 on the bonds of the company can, with any propriety, be chargeable to that government. Again, interest on the debts of the company, amounting to thousands of dollars, is charged against Paraguay, which, for the reasons before suggested, is wholly inadmissable.

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"To cap the climax, the extraordinary sum of $300,000 is demanded as a remuneration for the trouble, anxiety, and loss of credit growing out of the imputed misconduct of President Lopez.

"Such are the details of the claim of $935,000, so often and so earnestly pressed upon the consideration of Congress, and the executive government of the United States, and the spirit in which the same has been presented will be seen in the letter of their counsel, Mr. C. S. Bradley, to General Cass, Secretary of State, hereto annexed, marked F.

"The commissioners did not entertain a doubt that the Government of Paraguay could not, in any view of the case, be holden liable for any losses or expenses incurred by the company before October 1853, when they took up their residence in Paraguay.

"Nor can that government be justly holden responsible for any expenses or losses which they sustained in the business or trade prosecuted by them with other governments in South America, after they had abandoned Paraguay, which trade was continued for three or four years, at a very heavy loss to the company, as shown by the accounts exhibited with their memorials.

Charges of Expulsion.

"The remaining question, and the only one upon which the claimants have made even a plausible case, arises upon the allegation that their business was wrongfully broken up, their property confiscated, and their agents expelled from the country, and involves the inquiry whether such wrongful acts were done, and if so, what damages should be allowed in the way of compensation for actual losses, or in addition by way of punishment.

"Upon this branch of the case it is proper to say that as to the alleged wrongful acts of Paraguay, the evidence adduced by the company consists in the main of the productions directly or indirectly of their agent, Mr. Hopkins, in his character of consul, evidently influenced by that of general agent and partner of the company. His correspondence with the Secretary of State, and the papers inclosed in his dispatches, all bear the impress of his own peculiar character and mind, and are little calculated to have weight before any tribunal of a judicial character; indeed, it may be truly said that upon a critical examination they furnish strong internal evidence against the justice or validity of the claim. Among these may be noted the formal proceedings of a regularly organized meeting, consisting of himself and five or six persons connected with the company, at which certain resolutions were passed, condemning the conduct of Lieutenant Page and President Lopez in terms equally violent and vague, and a paper purporting to have been drawn up for publication in answer to charges against Mr. Hopkins in the newspaper at Asuncion, but which appears only to have been used as a defence of Mr. Hopkins's consular conduct with the Secretary of State, to

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impugn the character of President Lopez, and to advance the interests of the company in this claim. Of the same nature are certain depositions of some six or eight Paraguayans, resident in Buenos Ayres, who are shown to be refugees, and members of a revolutionary club in that city, for the overthrow of President Lopez's government, none of whom profess to have knowledge of any fact upon which this claim is founded, but who denounce in strong language the personal and political character of President Lopez, and the general operations of his government, to which they attribute an influence, descending to the most minute affairs in the private life of the humblest citizens.

"This kind of evidence; the action of Congress, or the executive officers of the government, upon the *ex parte* statements of those most deeply interested in this claim; the public opinion in the adjoining states, which may have been formed by the misrepresentations and falsehoods of those whose interests are involved and who may be entitled to the profits arising from the successful prosecution of this claim—do not seem to be a safe foundation upon which heavy damages are to be awarded. The acts of tyranny and oppression should be shown, which, as is alleged, expelled the company and broke up their business; the value of the property confiscated should be exhibited as the best, if not the only, means of ascertaining the true amount of damages.

Case of Mr. Hopkins's Brother.

"The company, aware of the necessity of some such proof as suggested by Secretary Marcy, have shown that the brother of the consul, C. E. Hopkins, was stricken on the back by a soldier with the flat side of his sword, for which, according to the affidavits of C. E. Hopkins and Mrs. Guillemot (who was in company with him), there was no excuse whatever, no act done or word uttered by him to produce the blow, but which, according to the affidavits of the soldier and his two companions, C. E. Hopkins had provoked, by riding into the herd of cattle which he was driving, dispersing them and causing him much trouble in gathering them together; and *this* after he had been notified not to do so.

"The consul, Hopkins, became greatly excited to find that his brother had been stricken by a common soldier, and instead of having the case brought before a judicial tribunal of the district in which the offense had been committed, and having the soldier punished according to the laws of the country, made it a national case; his dignity as consul had been assailed in the attack upon his brother; the rights of an American citizen had been trampled upon; and the Government of Paraguay was to be made responsible for the outrage! He accordingly addressed the government an angry and offensive note, demanding punishment of the soldier, and satisfaction for the offense to his brother, and alluded in the most offensive terms

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to other alleged indignities suffered by the American citizens from those of Paraguay. This led to a correspondence between him and the Secretary of State.

"President Lopez, upon examining the case, seems to have entertained the idea that the brother of the consul had not in reality much cause of complaint against the soldier, as he had probably committed the first wrong; yet it was held to be the duty of the soldier to have reported the conduct of Hopkins to his superior officer, instead of redressing the injury when perpetrated, and therefore the soldier was ordered to be punished with three hundred lashes.

"This transaction, which occurred 22d July 1854, Mr. Hopkins states in his letter to the Secretary of State, to have been 'the commencement of the difficulties between himself and the President.'

"Some newspaper publications on the subject seem to have produced violent language on the part of Mr. Hopkins against President Lopez, wholly unbecoming the position he occupied.

Acts of Annoyance.

"The other charges to which he alluded in his letter seem to have been of petty annoyances, rude and improper language addressed by some of the populace in the city to Mr. Hopkins and some of his companions, whose supercilious and haughty conduct toward the people, as well as the government, had rendered them very odious, and occasioned harsh words to be used in the streets, throwing 'missiles,' such as orange peelings, pieces of cigars, and sand into the door and windows of their houses, by day as well as by night, and which is attributed to the influence, if not direct sanction, of the President or his officers, and not to any misconduct or provocation on their own part; and yet when the complaint was made, without designating any offender, a guard of soldiers was stationed at their house for their protection. The annoyances are alleged to have continued, and become even worse; yet no individual could be named, so as to enable the police officers to punish them.

"Such acts of incivility and rudeness toward the consul of the United States and his family resident in the city deserved punishment, which would undoubtedly have been inflicted on the offenders if they could have been discovered. Mr. Hopkins could not ascertain their names, at least made no report of any to the government, at the same time most injudiciously imputing to the officers of the government a knowledge of their commission, and strongly intimating a connivance at the conduct of the offenders.

Provocations.

"It never seems to have occurred to Mr. Hopkins or his associates that his own arrogance and presumption, his haughty and overbearing conduct among the citizens, his violent and denunciatory language toward the government and officials, were well calculated to arouse the hostile feelings of the people

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against them, and produce the annoyances of which he complained. Mr. Falcon, the secretary of state, in his letter to Governor Marcy of 2d September 1854, speaks of 'the *repeated complaints* made by the officers of the districts *against the conduct of Mr. Hopkins* and *his servants;* the want of *respect and civility*' to the justices, '*his shocking expressions*' against any who dared to complain of his conduct, his 'disregard of port regulations,' and 'contempt toward the police officers.' And further telling him, when speaking of the excesses of Mr. Hopkins, '*they have been repeated by a series of rudenesses, and bitter recriminations against the most excellent government of the republic,* which has for some time been *astonished* at the audacious provocations of Mr. Hopkins;' and concludes by telling him, '*If Mr. Hopkins had accepted the consulate for the express purpose of discrediting the worthy government of the United States, and his fellow-citizens, he could not have done more to create disaffection.*'

"When speaking of the punishment of the soldier Sylveiro, Captain Page says, 'Had Mr. Hopkins been content with making a *simple statement* of the affair, and not have accompanied his *communication with irrelevant remarks, passing censure upon the government and people of Asuncion,* I am informed by the President that the difficulty would not have occurred.' And again, he says, in his letter of 1st September, 'If Mr. Hopkins expects to involve me and the *Water Witch* in the *disgraceful affair between the Government of Paraguay and himself,* he deludes himself with very false hopes.' Referring to the publications in the *Seminario,* he says, 'By a most impolitic and unauthorized course, he has brought upon himself the wrath and indignation of a government which has the power, because of its peculiar relations with its people, to embarrass and render profitless the entire enterprise of those American citizens who have so unwisely put him at its head. This may be most effectually accomplished (if such be the disposition of the government), without infringing one single article of the treaty between the two nations, or committing one single overt act which would form the basis of complaint.' Lieutenant Powell, among the most intelligent officers of the navy, says of him, 'Mr. Hopkins was well known in the navy as an egotistical and presuming man, and one who had constantly embroiled himself in all kinds of difficulties while in it.'

"Mr. Ferguson, the millwright, who had been in the employment of the company all the time in Paraguay, whose good sense, modesty, and frankness before this commission made a most favorable impression, says, when speaking of the deportment of Mr. Hopkins while there, '*I think his conduct was scandalous, according to my ideas of morality, and shocked even the people of that country.*' And being further interrogated as to his course generally among the people, and officially, whether it was kind and conciliatory, answers, '*It was quite the reverse.* It was

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overbearing and *tyrannical.* He had a *swaggering, bullying way* with him *in all his relations of life*, and his deportment was always tyrannical and overbearing.'

"Such conduct on the part of the consul toward the government and the people of Asuncion, was well calculated to produce an unfavorable impression toward him and his associates, as well as their countrymen, who were but little known except through them, and to lead to the petty annoyances of which they complain. His conduct seems to have made a not less unfavorable impression upon the officers under the command of Captain Page. Mr. Hopkins, in his letter to Secretary Marcy, 25th August 1854, says, 'In the midst of these affairs and publications, the five or six officers of the navy who are now here *continue to cut my house and presence*, thereby causing *infinite moral aid and comfort to President Lopez.*'

"So wholly forgetful did he seem to be of that dignity and propriety of conduct which should characterize a representative of the United States, and of the respect and courtesy due and always extended to the chief officers of another government, that it was made a matter of boast that he had forcibly entered the audience chamber of President Lopez in his riding dress, whip in hand, despite the remonstrance of the guard and in violation of the rules adopted in that country of intercourse between the President and citizens, as if designedly to bring into contempt the authority of the President among his people.

"Such conduct toward the people of Paraguay and their President, without *reference to his moral conduct*, which Ferguson designates as 'scandalous,' may be supposed to account more satisfactorily for the 'indignities' and 'annoyances' of which so much complaint has been made than any supposed interference or encouragement of them by the President or his officers.

"In relation to this whole subject of the alleged 'insults' and 'outrages' complained of by the company in their memorials, and which could not fail (coming from a respectable source) to attract the attention of the executive and of Congress, it is proper to make a few remarks.

"In the first place, no complaints of this sort appear to have been made until the occurrence between Mr. C. E. Hopkins and the soldier on the 22d July 1854. The letter addressed by Mr. Consul Hopkins to the Paraguayan secretary of state on the 25th of the same month asserts in general terms that such things had taken place. The affidavits of Boyd, Morales, Hines and his wife, all made subsequently, make the same accusations. Giving to these affidavits all the weight that can possibly be claimed for them, it would seem that nothing had occurred to which private persons are not liable under the oldest and best ordered governments, if there should be any provocation in their own personal deportment and intercourse with the people. There is nothing in the evidence tending to show

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a denial of justice to any person who had recourse to the ordinary tribunals under such circumstances, and surely there can be no propriety or pretext of right in claiming for the persons engaged in this speculation a *status* different from that of the citizens of the country generally. No claim whatever is set up on account of these supposed insults and outrages. The persons who may have been annoyed by them make no claim, but appear as witnesses for the company upon the claim made by it in its corporate capacity.

"All this part of the case, therefore, even if it were satisfactorily made out by the proofs (which it is not), could have no effect beyond that of aggravating and giving color to the charges of 'expulsion,' 'confiscation,' and 'breaking up' of the business of the company.

Groundlessness of Charge of Expulsion.

"As to the '*expulsion*,' it is perfectly clear that nothing of the kind took place. If there had been an expulsion of the company generally, or of any person in particular, without doubt there would have been some explicit or intelligible evidence of the fact. Not only is there no affirmative evidence of it adduced by the company, but there is clear evidence to the contrary. The conclusion arrived at by Mr. Marcy upon the official dispatches and the first memorial and proofs of the company is abundantly sustained by the thorough examination of the whole case before the commission. In his letter to Messrs. Arnold and Gallup, 7th March 1855, he says:

"'It is evident throughout the whole correspondence that the opposition of the Government of Paraguay was confined solely to Mr. Hopkins; and Lieutenant Commander Page, in his dispatches on the subject to the Navy Department, while condemning in strong terms the arbitrary and oppressive conduct of the government, confirms the opinion that the hostility was to Mr. Hopkins, and not to the company of which he was the agent; and Mr. Falcon, in a letter to Mr. Hopkins, wherein he informs him of the resolution of President Lopez to decline any further communication with him in his capacity of agent, holds the following language: "It is, however, to be well understood that any other person of better conduct toward the government of the republic can make such propositions as time shall render proper."'

"But even as to Mr. Hopkins there was no expulsion. The account given by Captain Page on the spot, in his dispatch to the Secretary of the Navy, dated Asuncion, 26th September 1854, is relied on as truthful and accurate. The following extracts are deemed important to the proper understanding of this pretended expulsion:

"'Mr. Hopkins declined allowing any one of the persons under him to carry on these works, and came to the conclusion that the course for him to pursue was to throw the responsibility on this government, and look to a reclamation being made by the government at home. * * * The opposition

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of the government was confined to himself and a Mr. Morales, who had made himself odious to the government by some very imprudent and ridiculous remarks. * * *

"'Acting Lieutenant Powell used his best endeavors, both for the interest of this company and to avoid collision with the government. He desired to know from Mr. Hopkins if he would allow another to act in his stead, stating that to this the government had no objection. He declined doing so. * * *

"'I called on the President on my arrival. He expressed himself as having been outraged by the remarks, the communications, and conduct of Mr. Hopkins and Mr. Morales, and said that matters had gone to such a length that he would not now permit Mr. Hopkins to do any more business here. *I requested to be informed if other Americans belonging to the company would not be allowed to do business. He said that any Americans would be allowed to do business with the same privileges that were accorded to other foreigners, and that his objections were confined to Mr. Hopkins and Mr. Morales.* I stated to him that some of the persons of this company had said they did not feel themselves protected, and desired to know if they would not receive every protection from insult and injury. He said they should.

"'The day following I saw Mr. Hopkins on board this vessel, having sent him word to meet me at a certain hour, for I had expected to have seen him the day before. He explained the circumstances involved in this difficulty, stating to me that he had thrown all the work they had in hand on the responsibility of this government, having been compelled to do so because of its action *toward him*, and that he *required or demanded of me* to join him in a protest to this government for the outrages that had been committed. His tone and manner were *in his usual style of presumption*, and I promptly informed him that his requisition and demand would not be granted. I assume this, in my humble judgment, as the proper course for me to pursue, because I could see no good resulting from such an empty boast, Mr. Hopkins having taken *such steps before my arrival* as to preclude any action on my part toward a continuation of the operations of the company. *I stated to him the nature of my interviews with the President*, and at the same time assured him that if he or any American citizen residing on shore considered himself unprotected from insult or injury, he or they would find protection on board of the *Water Witch*. *He said he desired to leave the country, with those who were attached to the company*, and to take with him such effects and merchandise as he had in store and in his dwelling house; but that he apprehended no merchant captain would consent to receive him on board, lest he should incur the displeasure of the government. I informed him that I would see the President on the subject, and if I could not procure him a passage with his effects, I would take himself, company, and effects on board of the *Water Witch* to Corrientes, where he desired to go.

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"'I called to see the President—singular as it may appear, nothing is done in this country without his knowledge and assent—and learned from him that he was willing and desirous that Mr. Hopkins should leave the country, and said that he would instruct the captain of the port to procure a vessel. No captain of a vessel would decline taking Mr. Hopkins on board, with his company and merchandise, if requested to do so by the captain of the port, because he would be assured that by so doing he would be acting in accordance with the wishes of the President. * * *

"'*This, Mr. Hopkins is aware of*, and for the interest of his company he should have withdrawn himself actively from its operations, and *have made a trial, at least, of the sincerity of the government in its professions of friendly disposition toward the company.* * * *

"'I should have mentioned in another part of this letter, that I ascertained from the President there was no intention on the part of the government to prevent Mr. Hopkins taking out of the country any of his effects, merchandise, or property, notwithstanding the indebtedness of the company to the government to the amount of $10,000, for the payment of which he would not hold the property.

"'At the time Mr. Hopkins was ordered to leave the cuartel at San Antonio, he was requested to remove all the property. He removed some of the articles, declining to remove others. They were removed by the government, an inventory having been taken and an appraisement made. These articles, a list of which, together with the proceedings, will be found in the papers sent, were stored in the city, they having been *thrown on the hands of the government by Mr. Hopkins*, and will be sold, the money given to Mr. Hopkins, if he will receive it, and if not, will be put in the treasury for the benefit of his creditors, or for the company.

"'The operations of the cigar factory were stopped because Mr. Hopkins would not take out a license, in accordance with a decree of the government. These are arbitrary acts, and show the power of this government, but still, it is its mode of proclaiming the laws, and all have to abide by them.'

"There is no proof in the case, putting any other face upon the transaction than that which is here given by Captain Page. On the contrary, it is supported by all the evidence.

"The passports were made out the very same day on which they were applied for, the 29th September; and although some difficulty occurred as to their delivery from the custom house, as reported by Morales to Captain Page, they were delivered, in fact, before the sailing of the *Water Witch*, and no obstacle interposed to the shipment of the goods, or the departure of the vessel; which was attributable, in a great degree, to the prudence and judgment of Captain Page. The President might justly and properly have insisted that the mortgaged goods should remain in the republic until the debt was paid.

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By the practice in most of the States of this Union, an attachment, or other process, in such case holds the mortgaged property until the maturity of the debt. The property sold corresponded with the valuation made, and the opinion given of its value by Ferguson as nearly as might be expected; and in the opinion of the commission, from all the evidence before them, *for its full value.* It is evident, therefore, that there was neither 'expulsion' nor 'confiscation' unless it be *expulsion* to require foreigners to conform to the laws, or *confiscation* to retain and take care of the property which they refuse to remove with them, though freely authorized to remove it, while under mortgage to the state.

The Company's Property and its Disposition.

"But it may be proper, even at the hazard of repetition, to review more particularly, and under a distinct head, the effective property of the company in Paraguay, and the disposition which was made of it.

"Setting aside the 'privileges,' 'patents,' and 'monopolies,' which we have seen had no legal existence or foundation in justice, the remainder consists of the cigar factory in Asuncion, and the San Antonio establishment. For the cigar factory, it is in evidence, as before remarked, that the sum of $2,500.75 was paid, and there was a license duly issued by the government, authorizing this property to be transferred to and held by aliens. This establishment was in operation about ten months. It is proven by the claimants themselves that it could not have been carried on without the active aid of the government. The people of the country, according to this testimony, were unwilling to labor regularly, and would only have engaged themselves for a few days at a time; and thus no valuable progress could be made in the projected improvement upon their mode of making cigars, which required regular instruction and practice. This appears at page 51 of the record, in the testimony of C. E. Hopkins.

"By the orders of the government this difficulty was avoided, and the necessary labor was supplied, *under compulsion.* Upon this point it will suffice to quote from the affidavit of a single witness, which, besides being in the record, is appended to the Senate report (No. 60, 35th Congress, 1st session) made by Mr. Douglas, upon the 'difficulties with Paraguay.' Mr. Hines, the 'general cashier' of the company, says, 'Upon first commencing in Paraguay, the government, through the judge of *peons*, provided us with *peons* for our mechanical department' (meaning the establishment at San Antonio), 'women and other laborers for our cigar factory.' This point is clearly and very carefully made out by the claimants; indeed, it is insisted on in their memorial (Senate report, p. 66), in order to show that when these facilities were withdrawn by the government the failure of the enterprise necessarily followed. But it is not perceived that there was any pretext of vested right in these

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facilities. It has been seen that the company founds its claims upon the decree of 1845—the patent law—and the letter of Mr. Gelly written to Mr. Hopkins in the year 1848, more than four years before the incorporation of the company. There is not a particle of evidence of any other inducements or invitations or promises, expressed or implied, leading to the enterprise of the company. In neither of these papers (the decree or the letter) is there anything upon which to found a claim for the exercise by the government of its practically absolute powers (if they be so) to compel the *peons*, or laborers, to work for the company. It can not be said, therefore, that the company proceeded upon any implied agreement that these powers should be exercised for their benefit at all, still less that they should be continued to be exercised any longer than the Paraguayan Government should find it consistent with the public order and its own policy and institutions to do so. These remarks apply to both the establishments of the company, that at San Antonio, as well as the cigar factory in Asuncion.

"It appears by the evidence from the books of the claimants that during the whole period of the existence of this factory it produced a little over five hundred thousand cigars, and that the sales of cigars made by the company amounted to $3,382.51, viz, in the United States, $1,895.71, and in South America, $1,486.80. The whole amount, and all the particulars, of the goods, chattels, and effects in that factory at the time it was closed, appear in the judicial proceedings put in evidence on the part of Paraguay; and no attempt has been made to contradict, impeach, or discredit the inventory or appraisement, notwithstanding that Morales was in attendance before the commission as a witness for the company, and was several times examined. These values may therefore be safely taken to be unquestionably correct. In addition to these, the company claim that they would have made large profits by carrying on the factory with the privileges of the decree of 1845; but it has been shown already that no rights were acquired under that decree. It has been asserted and argued that President Lopez had dispensed with the terms of that decree, so as to give the company all its benefits, without a compliance with any of its corresponding obligations; but there is no evidence whatever in support of this; nor is it at all reasonable or probable.

"The circumstances under which this factory was closed have been made the ground of claim; but it appears distinctly in the evidence that the license required by law had not been taken for the factory. If, as has been stated, but not proven, the delay in taking it had been assented to, or even procured by the government, yet by the thirteenth article of the decree of August 1854 it was provided: '*13. Every industrial or commercial factory unlicensed will be shut, if the persons interested do not take out a license within three days.*' [Senate report, p.

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79; Record, p. 55.] The testimony of Morales, the company's witness, shows that this factory was unlicensed, and C. E. Hopkins proves that the cost of the license was that of the stamped paper only upon which the application was made. Morales further shows that upon the publication of this decree, Mr. Hopkins made application for the license for the cigar factory and the San Antonio mill, thereby recognizing the obligation to take out such license, and his previous omission to do so.

"But in the same decree, article 14, the use of 'any foreign commercial title' in the republic, without express permission of the government, was forbidden. This prohibition may seem absurd, as well as arbitrary, tested by the institutions and circumstances of our own country. But whether it was expedient and proper at that time in Paraguay, is a question which it was for that government alone to determine. And if it were never so unnecessary and arbitrary, it is difficult to see how it could possibly affect the interests of the company. Mr. Hopkins had used the 'foreign commercial title' of 'General Agent of the United States and Paraguay Navigation Company.' It is alleged that this article of the decree was directed specially to prohibit *him* from further using that title. Doubtless this is true. But if it be so, what was Mr. Hopkins's duty? Manifestly to conform to the decree, which could in no wise affect the interests of his principals or himself. But upon the first knowledge of the decree, he gave notice to the government that he was 'General Agent of the United States and Paraguay Navigation Company' (a fact well known before), and immediately thereafter, without waiting for any reply, he makes the application for the licenses, *carefully using the prohibited title.* The application was returned to him, with the explanation that it could not be entertained, as in it he violated the decree referred to. Now, it may be repeated, that all this importance attached to the use of this 'title' is entirely foreign to American usages and ideas. But can the claimants sincerely believe that the internal policy of the country where they had established themselves was to yield to them, and not they to it, in a matter of this sort? Were they to take all the advantages of this species of government—such as the impressment of laborers for their benefit—and yet claim exemption from a decree forbidding 'the use of any foreign commercial title?' This seems to be the theory of this part of the case, for no other application was made for the license. Mr. Hopkins preferred to have the license refused upon this ground, and to submit to the terms of article 13 of the decree, which provided that 'every industrial or commercial factory unlicensed' should be closed unless the license should be taken out in three days. The cigar factory was accordingly closed by the chief of police in execution of this decree. The deposition of Morales shows that he was required by the chief of police to carry the sign 'to the station house.' Morales proves by his own deposition

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(and no objection has been made to this proof), that he is a naturalized citizen, a native of Cuba. This fact of obliging him to carry the sign was well calculated to produce a feeling of indignation and resentment. But it is not perceived how it could affect the claims of the company, or alter the fact that the closing of the cigar factory was in pursuance of a law to which all persons in Paraguay owed obedience.

"The evidence shows that there was no seizure or confiscation of the property. It was perfectly competent for the company to have reopened the factory on the same day, by merely complying with the terms of the law, which imposed no other obligation than that of applying for the license required in all cases, and paying $16 for the stamp, without at the same time defying the government by using the prohibited title.

"The sawmill at San Antonio was in the same condition with respect to this law. But in addition to this, there were other and more serious difficulties, provoked entirely by the indiscreet and unjustifiable conduct of the company's agent, Mr. Hopkins. In this connection it may be proper to make an extract from the statement or memorial of the company, which is appended to the Senate report, at page 66. They say:

"'Notwithstanding unforeseen delays, upon the arrival of the expedition at Asuncion, the capital of Paraguay, in October 1853 the agents of the company were received with the greatest favor. Permission to purchase land was conceded by the President; the use of the government barracks was granted to the company, free of expense, for the use of their employees; a loan of money was made upon the credit of the company for a term of two years; a large number of persons were impressed by the government, and paid by the company, to work in their cigar factory and other establishments.

"'The President, Lopez, accepted, in his official capacity, the presents sent him by the company, and granted many other extraordinary facilities for their operations. In verification of these statements, we refer to the affidavit of W. E. Hines, general cashier of the company in Paraguay, hereunto annexed.

"'The Government of Paraguay has never denied, but makes a boast of these facts. We give an instance of its decrees for our benefit, and also the letter accepting and returning presents.

"'"The justice of peace of Ipiane will select from the natives of the suppressed community ten men, bachelors or married, of good conduct and assiduous in labor, and will deliver them to the citizen of the United States, Mr. Edward Augustus Hopkins, to be destined to work for him during one year in his establishment at San Antonio, with the monthly wages of three dollars, which he offers to pay, and providing victuals, upon the condition that every Saturday, after concluding the labors of the day, they can retire to their lodgings, and will present themselves the following Monday at daybreak; and

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that they will receive said salary every two months, on condition, also, that if any one of the ten individuals should happen not to be of good character required, they will be withdrawn, with less wages for the days they have had hire in proportion to that assigned to men of labor, and will be supplied by men capable of performing the labors of the contract, it being recommended to said justice of peace to make the best choice of workmen. The same order will be understood on the same terms by the justices of peace of Guarambaré.'"

"This is the account which the claimants themselves give of the reception they met with. It appears by the evidence (and there is no contrariety on this point) that Mr. Hopkins, acting for the company, attempted to procure a title to the government barrack and appurtenances, which he was then occupying by favor. All the proceedings are appended to the record, as well those under which Mr. Hopkins claimed as those subsequently instituted by the government. They speak for themselves. Without recapitulating them minutely, it might suffice to say that Mr. Hopkins never applied for, or obtained, any license or permission to purchase the land, which was necessary, in the case of aliens, even where the government was not directly concerned, as in the instance of property occupied as a national barrack; that he never had any official survey, but of his own authority directed the line to be run so as to include the barrack; that he actually inclosed it, and with it a public road, the only one leading to the port; and that he refused to evacuate the barrack when requested so to do by the government, which had gratuitously loaned it to him.

"The proceedings instituted by the government resulted in a decree, declaring the land where the barrack stood to be the property of certain infants, from whose mother, the widow Bedoya, Mr. Hopkins had purchased it for the sum of *seventy-five dollars*. That this was the whole purchase money has not been denied. The requisite steps were not taken to divest the infants of their title, or to authorize the holding of the land by aliens.

"The real estate of the company was also embraced in the beforementioned mortgage, and consisted of about twelve acres of land at San Antonio, purchased from different individuals, costing $237.50, and also the cigar factory at Asuncion, costing $2,500.75. To the factory the title had been perfected by deed registered and possession given, and the assent of the President indorsed thereon, authorizing them as foreigners to hold the land, as required by the laws of Paraguay.

"The President esteemed the position of the barrack as an important point for the defense of the state against the incursions of the Indians from the opposite side of the river, and thought the most ready mode of getting out of the difficulty with Mr. Hopkins was to pay him back double the consideration money, which was submitted to him. He (Hopkins) de-

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sired time to consider of the subject, that he might himself make some proposition. Before he did so the irregularity of the title was made known to the President, and a decree was passed declaring his deed void and that the property was necessary for public use, and directing the money to be refunded. It was offered to him and declined. The President then took possession of it as public property for the reestablishment of the barrack, and it was immediately occupied by his soldiers.

"Whether the decree and other proceedings were right or wrong, so far as it concerned the rights of the widow and children, it could not be considered unjust to the company; *their titles had not been perfected, and could not have been, except with the assent of the President*, and besides they were his tenants in the barrack, by sufferance, and could set up no opposing claim to his title, and they had mortgaged the lands to secure the payment of a much larger sum than they were worth—and their title was sold under a decree made according to the laws of Paraguay, and the full value applied toward the payment of the mortgage debt, leaving a balance of the loaned money still due and unpaid, of over *six thousand dollars*.

"It is further alleged that they were indirectly compelled to give up their business and leave the country by the tyrannical and oppressive decrees of President Lopez. One of the most complained of was the prohibition of 'all meetings of foreigners, except for the ostensible purpose of visiting and innocent diversions, are forbidden by day or night.' This was evidently designed to prevent the assemblage in the city of sailors and others accompanying the ships in port, which often ended in riots and bloodshed, and not for the purpose of preventing foreigners from meeting and transacting their ordinary business, as is alleged. There is no allegation that any such meeting for business or for any lawful purpose was in fact interrupted. Of the same character was the prohibition of any persons from wearing arms, or being out of their houses after night without carrying a lamp.

"These were mere police regulations, which President Lopez had an undoubted right to establish, and it was the duty of the citizens of the United States, resident in Paraguay, to obey them; which might have been done with but little trouble.

"It was known to Mr. Hopkins that the objection of the President was to himself and Morales, on account of their misconduct, and that no objection would be made to any other citizen of the United States. It is strange that decrees so easily complied with should have been made an excuse for abandoning the interests of the company now represented so valuable, and that the voluntary abandonment of such of the property as Hopkins could not conveniently take with him, or convert into money, should now be made the basis of heavy damages against Paraguay.

"It has also been urged that President Lopez offered to pay

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a large sum of money ($250,000), and that the amount of damages could not fall short of that sum. It appears from the statement of Commissioner Bowlin, already alluded to, that when the offer was made President Lopez declared *there was little or nothing due the company, and that the offer was made to buy his peace.*

"Propositions for a compromise of contests between contending parties are not and ought not to be considered as an admission of the liability of the party for anything, much less the amount offered and rejected, in any subsequent stage of the proceedings.

Concluding Observations.

"It should be a source of gratification to the Government of the United States, as well as its citizens, that Commissioner Bowlin, after having received prompt and full satisfaction for the insult offered the flag of the United States and the injury done to our citizens on board the *Water Witch*, consented to a reference of this pecuniary demand of the United States and Paraguay Navigation Company to arbitration, where justice would be more likely done to the parties, than by an attempt to coerce the payment of such a claim with musket and sword.

"It has been painful to observe, in the course of this examination, the ingenuity displayed in making so strong a case *prima facie* for the consideration of Congress and the executive government, founded upon *ex parte* representations of those most deeply interested in the claim, by a studied perversion of the laws and decrees of the republic of Paraguay, and by the enormous, if not criminal exaggeration of the demands of this company, constantly growing larger by the skillful preparation of their accounts, and the studied and malignant assaults upon the President and people of Paraguay, and that, too, for the mere purpose of putting money into the pockets of those claimants.

"It has always been the pride and glory of the government and citizens of the United States 'to submit to nothing wrong' from any government or people, but at the same time to demand of them 'nothing but what is right;' and the day is far distant, as I sincerely hope, when East India fortunes are to be accumulated, with their approbation and sanction, by the plunder of feeble states, extorted from them at the cannon's mouth.

"For the reasons above given, I am clearly of opinion that the award should be in favor of the republic of Paraguay, and against the claimants, who have not established any right to damages upon their claim.

"All of which is respectfully submitted.

"C. JOHNSON.

"WASHINGTON, *August 10, 1860.*"

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ANNEX No. 1.

TRANSLATION OF THE DECREE RELATIVE TO PATENTS, MONOPOLIES, AND EXCLUSIVE PRIVILEGES, REFERRED TO BY THE CLAIMANTS.

The supreme government, wishing to develop and encourage the industry and improvements of the republic, and considering that one of the modes best calculated for this object is to define, explain, and secure the conditions and rights of those who may come to cooperate in such useful purposes, decrees as follows:

ARTICLE 1. All and every discovery, or new invention, of every description of industry, is considered the property of its author; and the holder thereof is guaranteed by the forms and for the time herein specified.

ART. 2. Any improvement on any article made, shall be considered as a new invention.

ART. 3. Any person who may introduce into the country a foreign discovery, will enjoy the same advantages as though he were the inventor.

ART. 4. Whoever desires to obtain and secure the enjoyment of an industrial property [*propriedad industrial*] of the kind above mentioned, should, firstly, apply to the secretary of the supreme government, and declare, in writing, whether the thing he introduces is an invention of his own, an improvement, or only an article he wishes to introduce into the country; secondly, he must deliver, closed and sealed, a true description of the principles, the means, and process which constitute the invention, as also, plans, drawings, models, and everything in relation to the same, in order that the said sealed document may be opened at the moment the inventor receives his title of ownership.

ART. 5. The inventor will receive a patent, which will secure to him the ownership for the period of from five to ten years from the day of its date. The above time may be extended, and other advantages allowed, if the importance of the invention be of such a nature as to deserve an extraordinary protection on the part of the government.

ART. 6. The privilege allowed to a patent of an invention already introduced into a foreign country, can not be extended to more than six months over the time of patent allowed in that country to the patentee.

ART. 7. The owner of a patent shall enjoy the exclusive privilege of the same, and of the fruits of his discovery, invention, or improvement, for which it was given him. And he may, therefore, sue in law any person who may infringe on his privilege, and, if the same be convicted, will not only suffer confiscation of property, but will be compelled to pay to the inventor the losses he may have suffered, and damages, besides a fine amounting to twenty per cent on that sum, which will be applied to public expenditures.

ART. 8. But should it result that the suitor fails to prove his demand, after the act of sequestration has taken place, then, and in that event, the inventor shall be compelled to pay the defendant the losses and damages he may have occasioned, besides a fine of twenty per cent on said amount, which will, likewise, be applied to public expenditures.

ART. 9. Every owner of a patent will enjoy the right of opening establishments or stores in various parts of the republic, subject to such restrictions as may be previously communicated to him. He may, also, authorize others to apply and use his means, invention, or secret, and dispose generally of his patent, as he would of movable property.

ART. 10. Previous to the expiration of the patent, the description can only be communicated to any citizen who may wish to consult it: *provided*, that political or commercial reasons may not preclude the divulging of the secret: *provided, also*, that the inventor has not demanded and obtained, from the time of granting the patent, the guarantee of secrecy.

ART. 11. At the expiration of the patent, the discovery or invention will revert to the republic, and the supreme government will cause to have published a description of the same, and will permit the free use of such patent or invention, except in cases where political or commercial reasons may call for restriction.

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ART. 12. The above referred to descriptions will also be published, and the use of its workings declared free, when the proprietor of the patent may forfeit his rights, which can only take place in the following instances:

First. If it is proved that the inventor has omitted, or hidden, in said descriptions, any of its true means of working, or failed to explain them in a detailed, faithful, and circumstantial manner.

Second. If he should fail to communicate any new means of modification or improvement which he may discover at the time of soliciting the patent, or after obtaining the same; the said new means or improvement being guaranteed to him in the same manner as the invention.

Third. If it should be discovered that he obtained a patent for inventions already known and published, so as not to constitute his a new invention.

Fourth. If during the period of two years from the date of his patent, he should fail to work the same, except he may justify the cause of his inaction.

Fifth. If after obtaining a patent in the republic, it is proved that he has taken out a like privilege in another country for the same patent, without previous permission to do so.

Sixth. The patent will also be revoked, the discovery made public, and the use of the same declared public, if the person who obtains the right of privileges enunciated in a patent should violate any of the obligations imposed on the inventor, as he is bound to submit to them as though he were the inventor himself.

ART. 13. When the objects, or articles of discovery, besides being of public utility, are of simple construction and easy of imitation, instead of an exclusive privilege of a patent, the inventor may ask for a compensation which may repay him.

ART. 14. The same thing may be done when the inventor prefers the honor to cede to the nation his discovery, in which case compensation will be adjusted according to the merits of his discovery and its utility, as soon as its importance is made known.

ART. 15. Any person who may discover or invent an improvement on an invention already patented will be entitled to a patent for the primitive use of the same, provided he does not infringe upon the principal patent; nor will the inventor of the latter be allowed to use the improvement of the former, without previous permission of the improver, or an understanding between them both.

ART. 16. The right of invention (in case of a contest between parties claiming the same), will be given to the party who first made the application and deposits contemplated in article fourth.

That it may reach the knowledge of all, let it be published in the customary form and given to the National Repertory.

Asuncion, May 20, 1845.

CARLOS ANTONIO LOPEZ.

ANDRES GIL,
Secretary of Supreme Government.

It is a true copy:
NICOLAS VASQUEZ.

I, the undersigned, consul of the United States of America for the port of Asuncion, republic of Paraguay, do hereby certify that the foregoing is the true and genuine signature of his Excellency Señor Don Nicolas Vasquez, minister for foreign affairs for this republic, and as such is entitled to full faith and credit.

Given under my hand, and the seal of the consulate, at Asuncion, this, the fourth day of October, A. D. 1859, and in the year of the Independence of the United States the eighty-fourth.

[SEAL OF CONSULATE.]

LOUIS BAMBERGER,
United States Consul.

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ANNEX No. 2.

TRANSLATION OF THE LETTER OF MR. GELLY, REFERRED TO BY THE CLAIMANTS AS APPLYING THE DECREE TO THE COMPANY'S ENTERPRISE.

RIO DE JANEIRO, *December 15, 1848.*

MY DEAR SIR: Your letter written from Asuncion under date of September 1, and in which you make me some propositions in regard to the establishment of a school of practical agriculture in Paraguay, only came to my hand in this city, which will account for my not answering it before now. I have read attentively your project of establishing a school of practical agriculture in Paraguay, and the conditions under which you propose to make this establishment. I have no hesitation whatever in assuring you that the supreme government of the republic will see the realization of this design with much pleasure, and that it will grant you all the protection and favor requisite for its prosperity. President Lopez, without precipitating the improvements of his country, desires, evidently, to promote them. It is my opinion that he will concede, with much pleasure, the four leagues of land which you ask *in perpetuo*, and that he will exempt the establishment of the school from all taxes and imposts, such as the tithes. It appears to me that President Lopez will entirely abolish this impost as soon as the actual circumstances of the country are changed; the President knows that the impost of tithes is prejudicial and antieconomical as regards agriculturists and graziers, and only continues it temporarily. I presume that the school of agriculture which you propose to establish would receive the young scholars of the country under such a regulation as would give the government of the republic a voice with the director of the school. The proposition which you made to obtain an exclusive privilege or monopoly of some branches can not be admitted by President Lopez, because, having issued the decree of 20th May 1845 (a copy of which you have in regard to premiums and privileges to be granted to the inventors and introducers of machines, or even new means of bettering and facilitating production), it would neither be just nor possible to make an exception in your favor. In the said decree President Lopez has resolved all questions which could arise in regard to privileges and premiums.

If you introduce into the country machines or new means of industry which the country does not now possess, this decree gives you the monopoly for ten years, at least, and you do not require a special concession.

You have visited the country twice, the first time as an especial agent of the Government of the United States, the second time as an explorer. You have enjoyed the sympathy and the estimation of the generality of the inhabitants of the whole country. You know, personally, the most distinguished members of all classes; you have been able to observe and judge all persons, and the advantages which the different productions of the country offer. Nothing is lacking to you, therefore, to direct with certainty and good success any kind of enterprise and speculation in Paraguay. In this country living is easy, commodious, and cheap; the population is numerous, moral, submissive, and industrious; hands cost but little, and the means of communication are facile. Paraguay will attract many speculators and workingmen as soon as the country shall be better known.

I have regretted much that the timid and irresolute conduct of Mr. Buchanan has allowed the best opportunity of establishing good and close relations between the United States and Paraguay to pass away. I should be very content if I should see the Government of the United States forsake that timid policy which up to the present time it has pursued in regard to Paraguay. If the independence of Paraguay, which now counts thirty-six years, which is so justified by the nature of things and which has been recognized by all the Argentine governments anterior to that of Señor Rosas, should be recognized by the United States, they could not only establish important relations, but such an act would contribute much to the establishment of peace in this part of the world.

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The Government of Paraguay has not sent a diplomatic mission to the United States, firstly, because you know that in the actual condition of Paraguay we have nobody who could accept a diplomatic mission; and, secondly, because, even if we had such a man, we should not send a mission whilst we remained in doubt as to its ultimate success.

In regard to the questions you put to me, I have no difficulty in expressing frankly my opinions in writing. You ask me, first, if, in my opinion, it is convenient to establish at this time a manufacturing or commercial company in Paraguay? I doubt whether you could establish manufactories in Paraguay, in the extensive signification of that term, but we should expect, with good reason, great advantages from any kind of agricultural or commercial establishments. The country consumes much cotton goods, and even some woolen, but a manufactory to obtain these products would be very costly. However, the making of sugar on the banks of the Upper Parana, in the department of San Cosme, or on the Upper Paraguay, near the towns of Concepcion, Salvador, and San Carlos, or in the neighborhood of the capital, would be very productive. The distillation of rum or ardent spirits from sugar cane would be equally useful. The article of tobacco, of so much consumption now in Europe, could compete with and rival that of Havana. The cotton, which is very good, would be equally productive, as also the extraction of vegetable oils.

Secondly. What, in my opinion, is the best branch of manufactories? With respect to manufactories, I have already manifested my opinion. All the branches which I have mentioned in my previous reply promise advantages; without doubt, the working of the iron mines would, in my opinion, be the most advantageous.

Lastly, you ask me if, in the case of the formation of a company, I would take part in it, and with what amount? Without doubt, I would take part in whatever company you may form, but I can not say to exactly what amount. I am not rich, and the share which my fortune would allow me to take would be very small. I regard my countrymen in the same case as myself, but I am persuaded that they would all take such share as their fortunes would warrant.

If the Government of the United States should recognize the independence of Paraguay, and employ effectually its good offices to arrange amicably the questions pending between Paraguay and Buenos Ayres, the United States would not only acquire a great and entirely American influence, but would greatly neutralize all European influence. If the United States should continue to look with indifference upon these countries, the European powers, which have already commenced to meddle in American questions, will have time to form relations and establish their influence. If, with the new President to be elected, the policy of the United States in reference to Paraguay should be changed, I would have particular satisfaction in seeing you charged with a diplomatic mission to Paraguay.

I wish you a happy journey, and request that you will write to me, addressing your letters care of Mr. Carter, No. 65 Rue de Oruidor, in case I should be absent.

I am your sincere friend and servant,

JUAN A. GELLY.

To ED. A. HOPKINS, Esq.

P. S. I send you herewith a copy of the report of Mr. Joseph Graham.

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ANNEX No. 3.

A.—*Statement of expenditures on account of expedition to Paraguay by United States and Paraguay Navigation Company.*

Dr.

Cost of steamer *El Paraguay*, including expense of voyage	$90,031.05	
Disbursement account in South America, including passage to Asuncion	13,682.14	
Merchandise per *El Paraguay* and *Kate and Alice*	24,819.72	
Merchandise	891.18	
Duties in Paraguay	2,184.71	
Merchandise for schooner *E. T. Blodget*	2,564.43	
Expense on same at Buenos Ayres	56.83	
Cost of schooner *E. T. Blodget*	22,263.05	
Expended on same in South America	3,054.03	
Cost of steamer *Asuncion*	16,358.32	
Expended on same in South America	6,791.69	
Cost of steamer *C. R. Stevens*	5,963.77	
Cost of machinery, sawmill, etc	1,650.01	
House in Calle del Comercio (factory)	2,500.75	
Tobacco, materials, tools, wages, etc	7,435.59	
Freight and duties on cigars	572.61	
Wages and passages of employees	37,192.74	
Expenses at Asuncion and Buenos Ayres to April 1, 1855	8,241.12	
Rent at Asuncion	469.81	
Store fixtures	268.50	
Removal of employees and effects from Paraguay	4,400.00	
Salari , commissions, legal fees, etc., in the United States	15,791.26	
Profit and loss account in the United States	1,508.07	
Expense at San Antonio	8,142.02	
Insurance	757.56	
Interest and commissions	4,224.07	
Loss on sale of bonds, first issue	57,875.00	
		339,690.03
To balance	213,073.16	
Sundry expenses, as per second supplementary account on file	7,503.95	
Difference between estimated value of steamers and the price at which they were sold	22,000.00	
Estimated final expenses in South America	14,500.00	
		257,077.11
To balance	254,489.61	
Sundry expenses, as per third supplementary account on file	3,208.96	
Compound interest on account to August 7, 1858	88,626.61	
Compound interest to August 7, 1859	21,091.20	
Expenditures from August 7, 1858, to June 23, 1860, average due as cash August 7, 1859, as follows:		
Traveling expenses, legal fees, etc	5,774.89	
Office expenses	21.52	
Judgment in favor of Bank of Republic	1,408.66	
Balance of J. G. Thurber's account	500.00	
Loss on bonds, second issue	7,075.61	
Interest on above to date	20,323.31	
		402,250.37

Amount of claim as above, $402,250.37.

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ANNEX No. 3—Continued.

A.—*Statement of expenditures on account of expedition to Paraguay by United States and Paraguay Navigation Company*—Continued.

CR.

Sale of steamer *El Paraguay*	$6,285.86	
Passages per do	383.62	
Cash returned by W. H. Hale	62.40	
Sale of coal at Montevideo	444.13	
Insurance on *El Paraguay*	35,751.43	
Sale of merchandise at Asuncion	21,448.17	
Merchandise taken to Corrientes	872.65	
Do.....do Buenos Ayres	798.00	
Do.....remaining at Buenos Ayres	128.00	
Do.....per *E. T. Blodget*, sold at do	1,440.81	
Sale of schooner *E. T. Blodget*, wrecked at the Tigre	5,571.31	
Earnings of steamer *Asuncion*	4,210.30	
Estimated value of the *Asuncion* at Buenos Ayres..... $30,000		
Less amount pledge 2,500		
	27,500.00	
Estimated value of the *C. B. Stevens*	10,000.00	
Do.....machinery	412.50	
Cigars on hand	7,563.33	
Safes	160.00	
	3,407.85	
	176.51	
By balance	213,073.16	
		339,690.03
Difference between estimated value of machinery, etc., as above, and price at which it sold, to which is added amount of sale of steamer *Riachuelo*	2,587.50	
By balance	254,489.61	
		257,077 11

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B.—*Statement of the treasurer of the United States and Paraguay Navigation Company, of Providence, Rhode Island, March 16, 1855.*

LIABILITIES IN THE UNITED STATES.		
Capital stock, first issue, 100 shares of $1,000 each		$100,000.00
Do. second do. 58 do. do.		58,000.00
Do. third do. 100 do. do.		100,000.00
[NOTE.—The third issue of stock was all sent in June 1854 to South America for sale. Its disposition is as yet unknown to the company.]		
Company bonds, payable 3 years from November 1854, with interest from May 1855, all sold		100,000.00
Book accounts and admitted claims due in the United States		3,103.10
		361,103.10
ASSETS IN THE UNITED STATES.		
Due from stockholders in South America in the employment of the company, and all others, on subscription to first and second issue of capital stock	$6,785.00	
Of this sum, it is believed, there has been paid to the general agent in South America, in services or otherwise	5,510.00	
Leaving		1,275.00
Amount yet to be collected from sale of bonds		4,550.00
Merchandise at invoice value and expenses		360.00
Bills receivable, considered good		15,437.50
Cash and cash items		2,232.04
Suspended bills receivable from bankrupt insurance companies, resulting from the loss of steamer *El Paraguay*, considered worthless	$12,724.55	
		23,854.54

Nearly, if not quite, this sum will be required to pay the wages, passage home, and incidental expenses of the employees in South America, for which the company is liable by contract.

The last statement from the company's books in South America was to the 30th of June 1854. Soon after that date the general cashier left Paraguay for Buenos Ayres, where he remained at the last advices.

It is impossible to prepare a statement approximating to correctness from any data in possession of the company in the United States of the amount actually invested in Paraguay, or for which the company is liable in South America.

WM. M. BAILEY, *Treasurer.*

UNITED STATES OF AMERICA,
Rhode Island District, ss:

CLERK'S OFFICE CIRCUIT COURT AT PROVIDENCE, *March 19, 1855.*

There personally appeared before me William M. Bailey, subscriber to the aforegoing account, and made oath that it was in all respects just and true, according to the best of his knowledge and belief.

In testimony whereof, I have hereunto set the seal of said court, and my hand, on the day and year last written.

[L. S.] HENRY PITMAN,
Clerk Circuit Court of the United States for Rhode Island District.

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C.—*Expense account in Provi*

Dr.

1855.			
July 3.	H. A. L. Potter's salary, 3 months 10 days	$333.33	
	H. A. L. Potter's expenses from New York	13.00	
9.	Expense of W. E. Hines and A. S. Gallup to Washington	110.00	
12.	Whitney's bill of stationery	37.17	
			$493.50
Oct. 17.	W. E. Brown's board in Buenos Ayres, from June 13 to July 4	33.00	
Nov. 30.	Sundry expenses, not enumerated	26.92	
	Bailey & Gallup's commission on disbursements	204.26	
			264.18
1856.			
Jan. 1.	Sundry expenses, not enumerated	.92	
	Bailey & Gallup's commission on sales	8.32	
	Repairing chronometer	7.00	
			16.24
Feb. 29.	F. S. Rood	100.00	
	Notary fee for Mrs. Hines' deposition	1.00	
			101.00
Mch. 31.	Sundry expenses to date	1.76	
June 18.	Mrs. Carr's traveling expenses	5.00	
20.	A. S. Gallup's expenses to Washington	50.00	
	R. Greene's services and expenses in settling insurance on steamer *El Paraguay*	148.55	
			205.31
1857.			
June 11.	Postage to date	7.72	
	Wm. M. Hales' salary from Mar. 9, 1855, to Jan. 9, 1856	1,291.67	
	S. G. Mason's service as secretary, from Dec. 13, 1855, to Aug. 13, 1857	500.00	
	Bailey & Gallup's salary for one year ending January 2, 1856	2,500.00	
	Discount on 4 bonds, sold to S. G. Arnold, $10 to 13 for $2,000, at 80 per cent discount	1,600.00	
	Discount on 1 bond, sold to W. Greene, $86 for $1,125, at 50 per cent	562.50	
			6,461.89
			7,542.13
	To balance		7,503.95

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dence since the previous statement.

		Cr.
1855.		
Dec. 20.	Error in G. H. Whitney's account	$37.17
1856.		
	Error in cigar account	1.00
Mch. 3.	By balance	7,503.95
		7,542.12

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E.

"The cigar factory, when closed, employing 115 operatives who would make 300 per day each, or per month, twenty-four working days, 7,800, making the product of 115 operatives 897,000 cigars per month. The cost of these cigars in Paraguay was $2.50 to $3 per thousand, and sold at factory for even inferior descriptions at $10 per thousand, being a clear profit of $7 per thousand, equivalent to $6,279 per month and $74,548 per year, and for ten years $745,810.

"These cigars, made by their inexperienced operatives, sold in the United States at $20 and $30 per thousand of the highest grades and price. The whole was readily sold and a demand for more than we could supply, and even as high as $35 per thousand was offered. Say that these cigars cost in Paraguay $4 per thousand and $4 per thousand for freight and duties (ad valorem), they would yield our company in the United States a net profit of $22 per thousand; would have yielded $236,808 per annum; for ten years, $2,368,080."

F.

PROVIDENCE, *September 27, 1858.*

Hon. LEWIS CASS, *Secretary of State.*

DEAR SIR: Our gentlemen of the Paraguay company find themselves unable, "with a fair regard to their interests, in their judgment," "to moderate their demand." From the first they have not expected to be restored to a position pecuniarily equivalent to that from which Lopez displaced them, but they have trusted that their government would obtain for them that imperfect measure of justice for which they asked.

With the force detailed for the expedition, a simple demand will bring from the treasurer of Lopez the amount of our claim, and in the future American commerce and enterprise in South America will meet with no obstructions from the partial despotism of any of its governments.

* * * * * * *

C. S. BRADLEY.

G.

They had also a brick machine of the largest size, the product of which would be 10,000 bricks each day. "The cost (by prices in the United States) would be $4 per thousand; the value in Paraguay was $20 per thousand and upwards. This would leave a profit of $16 per thousand, or $160 per day for the single machine. Allow 200 working days per annum and we have $32,000 per annum, and for ten years $320,000.

President Buchanan's Position.

The award of the commission and the American commissioner's exposition of the grounds on which it proceeded, seem to have occasioned President Buchanan much chagrin. The expenses of the naval expedition to Paraguay had been considerable. It has been said that they amounted to as much as three million dollars. In a report of May 11, 1860, Mr. Toucey, Secretary of the Navy, said that it was impossible to give an exact statement of the total expense, but it appears that the cost of chartering and refitting steamers and supplying them with stores and coal alone amounted to $486,256.57.[1]

[1] H. Misc. Doc. 86, 36 Cong. 1 sess.; 11 Stats. at L. 405.

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It is true that the expedition was not sent out for the sole purpose of enforcing the claim in question. In the message of President Buchanan, recommending that he be authorized in certain contingencies to use force, more prominence was given to the case of the *Water Witch* than to that of the United States and Paraguay Navigation Company. Indeed the latter case was not expressly mentioned, but was referred to in the statement that citizens of the United States, who were established in business in Paraguay, had had their property seized and taken from them, and had otherwise been treated by the authorities in an insulting and arbitrary manner. But greater prominence was given to the claim in Mr. Bowlin's instructions, and the direction to accept not less than $500,000 on account of it was contrasted with Mr. Johnson's opinion, as well as with Mr. Marcy's cautious direction to Mr. Fitzpatrick to report to the Department of State before demanding any specified sum as indemnity.

Under the circumstances President Buchanan decided to submit the subject to the consideration of the Senate; but in so doing[1] he maintained that the commissioners were confined by the convention "to the assessment of damages which the company had sustained from the Government of Paraguay," and that, in deciding that the company had no claim, they had exceeded their jurisdiction. "The principle of the liability of Paraguay having," said Mr. Buchanan, "been established by the highest political acts of the United States and that republic in their sovereign capacity, the commissioners, who would seem to have misapprehended their powers, have investigated and undertaken to decide whether the Government of the United States was right or wrong in the authority which they gave to make war if necessary to secure this indemnity. Governments may be and doubtless often have been wrong in going to war to enforce claims; but after this has been done and the injury which led to the reclamations has been acknowledged by the government that inflicted it, it does not appear to me to be competent for commissioners authorized to ascertain the indemnity for the injury to go behind their authority and decide upon the original merits of the claim for which the war was made. If a commissioner were appointed under a convention to ascertain the

[1] February 12, 1861.

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damages sustained by an American citizen in consequence of the capture of a vessel admitted by the foreign government to be illegal, and he should go behind the original capture and decide it a lawful prize, it would certainly be regarded as an extraordinary assumption of authority."

The views of the commissioners, as expressed by Mr. Johnson, may, on the other hand, be summarized thus: The claim of the United States and Paraguay Navigation Company was composed, not of one item only, based upon a single allegation of wrong, but of various items, resting upon widely different grounds. The commissioners, in order to render on their oaths a just decision even as to the question of amount, were required to examine the foundations of each item. In the convention no particular ground of claim was specified as having been admitted, but Paraguay was to be responsible for whatever the commission should decree. Was it therefore to be assumed that all the claims of the company were to be allowed? And that damages were to be awarded for the loss of the steamer *El Paraguay* and the schooner *E. T. Blodget*, which were wrecked and never reached their destination? Was it intended to acknowledge the claims of the company for the profits which it might in the future have derived from patent rights which it might have secured? The convention mentioned none of these things, but left the commissioners to reach a result according to its provisions and the oath it prescribed to them, "fairly and impartially to investigate the said claims, and a just decision thereupon render, to the best of their judgment and ability." It therefore obliged the commissioners "to determine between 0 and the highest amount which figures could express, according to the exigencies of the proofs." Even assuming it to be true that the convention confined the commissioners to the question of amount, it did not, said Mr. Johnson, require them to assess damages if in their opinion none had been suffered.

Comments on the Award.

The award of the commission was naturally the subject of public comment, both favorable and unfavorable. Of the latter an example may be found in Mr. Charles A. Washburn's History of Paraguay,[1] where it is represented that "the Hon. Cave Johnson, of Kentucky," was so strongly prejudiced "against everything that originated in New England" that "it might have

[1] I. 385.

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been foreseen that, though he intended to act justly and honorably, his feelings would be adverse to the company;" and where it is also said:

"The American commissioner, not understanding the Spanish language, was dependent for all the information he had in regard to the laws of Paraguay, the customs of the country, and the operations of Lopez's government on the secretary of the board, who was the same Mr. Samuel Ward that had gone out as secretary and interpreter to Commissioner Bowlin, and of whom the company complained then, as they have ever since, that for some reason unknown to them he was too well affected toward Lopez to be impartial. The result of the arbitration was as might have been foreseen."

Though Mr. Johnson's honor is saved in these passages at the expense of his fairness, it is not superfluous to advert to the fact that President Buchanan, in his message to the Senate, said: "The American commissioner is as pure and honest a man as I have ever known; but I think he took a wrong view of his powers under the convention." Nor can Mr. Washburn's statement as to Mr. Johnson's dependence on Mr. Ward for a knowledge of the laws of Paraguay, the customs of the country, and the operations of President Lopez's government be regarded as anything else than an inadvertent repetition of groundless insinuations originally disseminated by interested parties. It would indeed have been most extraordinary if the claimants and their very intelligent representatives had obliged the commissioners to depend on their secretary for a knowledge of such things. In reality the commissioners were furnished by the representatives of the company with copious information in English as to all the circumstances and elements of the case. The pertinent laws of Paraguay translated into English, the dispatches of the United States naval officers, the instructions of the Government of the United States, and the testimony of witnesses and the arguments of counsel, all in English, were before the commission.

Of the same tenor as the statements in regard to Mr. Johnson are Mr. Washburn's allusions to Mr. Bowlin, who negotiated the convention, as "a gentleman who had served several terms in Congress, but whose experience as a stump orator in the West was not of the kind to render him a formidable antagonist to one brought up in the schools of the Jesuits."[1] As Mr. Bowlin's mission to Paraguay was not his first diplomatic experience, it might be fair to assume that his skill as a

[1] History of Paraguay, II. 379.

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stump orator was not the sole ground of his selection. From December 13, 1854, till he resigned September 12, 1857, Mr. Bowlin was minister of the United States to Colombia. During this time he was engaged in several important negotiations, and after a somewhat extensive perusal of his dispatches I am unable to say that they are characterized by any special complaisance toward those to whom they were addressed. But it is difficult to see on what ground his course in Paraguay should be criticised. The settlement which he effected was considered eminently satisfactory. President Buchanan in his annual message of 1859 declared that Mr. Bowlin had "in three weeks ably and successfully accomplished all the objects of his mission;" and the Senate promptly approved the treaties which were negotiated by him.

Suspension of the Claim.

President Buchanan's message to the Senate of February 12, 1861, was referred to the Committee on Foreign Relations; and on March 13, 1861, Mr. Sumner moved that the committee be discharged from the further consideration of it. Mr. Hale raised the point of order that as the message was not reported during the session at which it was received, it was not to be regarded as before the committee at the current session, but as on the files of the Senate. The point was sustained; and, on motion of Mr. Collamer, the secretary of the Senate was directed to lay a copy of the message before the President of the United States.[1] On July 8, 1861, President Lincoln nominated Mr. Charles A. Washburn as minister to Paraguay. Mr. Washburn had already received a temporary appointment to the post during the recess of the Senate, and his nomination was duly confirmed. Among the matters committed to his charge was the claim of the United States and Paraguay Navigation Company, which he was instructed to submit to the Government of Paraguay, with a view to its settlement by negotiation. He left the United States on the 27th of July 1861, and reached Asuncion in the United States man-of-war *Pulaski* on the 14th of the following November. President Lopez at first seemed inclined to discuss the claim, but afterward declined to reopen it. Here for a number of years the case rested. The Government of the United States became involved in the civil war, and President Lopez died and was succeeded by his son, Francisco Solano Lopez, who, in the

[1] Executive Journal, XI. 268, 271, 302–303.

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course of his strange career, plunged Paraguay into numerous difficulties. In 1870, while the allied forces were in possession of Paraguay, the company directed the attention of the United States to its claim, but on the 22d of July Mr. Fish, who was then Secretary of State, said that it would be hopeless to expect the Paraguayan Government to be willing to entertain the claim anew at that time. For more than fifteen years no further action appears to have been taken by the United States.[1]

Renewal in 1885.

In December 1885 a petition on behalf of the company was presented to the Department of State, and on the 26th of that month Mr. Bayard, who was then Secretary of State, instructed Mr. John E. Bacon, chargé d'affaires of the United States to Paraguay and Uruguay, among other things "to ask the Government of Paraguay to open the award, giving as a reason for the desired action the grave doubt felt by this government as to the regularity and validity of the arbitration." On receiving these instructions Mr. Bacon addressed a note to Don José S. Decoud, Paraguayan minister for foreign affairs, advising him of their purport. In reply Mr. Decoud intimated a desire to discuss

[1] Mr. Seward, in his general instructions to Mr. Washburn of July 9, 1861, stated that the President took the same view of the decision of the commission as his predecessor. February 13, 1862, he instructed Mr. Washburn that the Senate had not acted upon the matter, and that if nothing should be done at the session then pending the President would at once determine what action was "due to the republic of Paraguay, as well as to the claimants, under the treaty." July 22, 1862, he wrote to Mr. Washburn as follows: "As the Senate has adjourned without coming to any decision upon the message of the President in regard to the award of the commissioners, it may be presumed that, for the present, at least, it is not their intention to sanction a disturbance of that award. You will consequently address another note to the minister of foreign affairs, setting forth that unless the case shall appear to this government in aspects which can not now be foreseen, no further representations upon the subject will be made to the Paraguayan Government." Mr. Washburn communicated these instructions to the Paraguayan Government in a note of October 24, 1862, and on October 28 the minister for foreign affairs replied, expressing his government's good will toward the United States. Mr. Washburn communicated this correspondence to the Department of State in a dispatch of November 10, 1862, the receipt of which was duly acknowledged. (Mr. Seward to Mr. Washburn, February 6, 1863.) In an instruction of March 13, 1872, Mr. Stevens, then minister of the United States at Asuncion, was directed to examine or to make certain inquiries concerning the records of the negotiation and execution of the convention of 1859.

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the matter orally; and for that purpose Mr. Bacon in May 1866 went to Asuncion and had several interviews with Mr. Decoud, in which the whole subject was freely canvassed. After his return to Montevideo, however, Mr. Bacon received a note from Mr. Decoud, stating that his government declined to open the award, basing its decision partly upon the ground that the United States had never notified Paraguay of any objection to the arbitration, or of its determination not to abide by it. Mr. Bacon was able to show, by Mr. Washburn's dispatches, that this statement was erroneous. It subsequently appeared that Mr. Decoud was led into error by reason of the fact that the Paraguayan records were destroyed during the war with the allied powers, in the time of the younger Lopez, and that there was no connected history of the claim in the Paraguayan archives. Mr. Decoud, on being informed by Mr. Bacon of the representations made by Mr. Washburn, consented to open the award, and requested Mr. Bacon to advise him of the grounds for setting it aside. Soon afterward Mr. Decoud went out of office, and was succeeded as minister for foreign affairs by Dr. Don Benjamin Aceval. Dr. Aceval, in response to a note from Mr. Bacon, expressed a desire to discuss the matter in person, and in August 1887 Mr. Bacon again went to Asuncion. After several conferences he concluded with Dr. Aceval on August 12, 1887, a protocol by which it was agreed that Paraguay should pay to the United States and Paraguay Navigation Company $90,000 in gold, of which $20,000 should be paid during that month, $30,000 six months later, and $40,000 at the end of a year, all these sums to be paid without interest. The protocol recited that the chargé d'affaires of the United States concluded the transaction "with the previous consent and complete approval of Mr. Edward A. Hopkins, the legal agent and attorney, fully authorized by the said 'United States and Paraguay Navigation Company,' as proved by the power of attorney which was conferred upon him." It also recited that Mr. Hopkins, being present, declared in the name of the company that he accepted the sum in question, under the terms stipulated, in full payment and satisfaction of all claim or demand whatsoever, in evidence of which he signed the protocol.

The protocol passed the Paraguayan senate, but was rejected by the chamber of deputies by a majority of one vote. Dr. Aceval then resigned the office of minister for foreign affairs, and was succeeded by Mr. Decoud; and Mr. Bacon was, at his

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own suggestion, authorized to present the claim again[1] Instructions to this effect were sent on the 2d of March 1888. On receiving them Mr. Bacon again proceeded to Asuncion. On his first interview with Mr. Decoud, he understood the latter to agree to enter into another protocol. A few days later, however, Mr. Decoud informed him that, owing to difficulties in regard to the claim, he had resigned. Subsequently, at the request of the President of Paraguay, he withdrew his resignation and on the 21st of May 1888 he signed with Mr. Bacon another protocol to pay the sum of $90,000 in gold, in four installments, covering a period of eighteen months.[2] This protocol was sent to the senate of Paraguay on the 26th of May, and on the 29th a resolution was adopted asking the President for the correspondence between Mr. Decoud and Mr. Bacon. Meanwhile the case became the subject of an excited discussion in Asuncion. The press made strong attacks on Mr. Hopkins and on the claim in general, and published a letter written by someone in Washington to the effect that the claim had no foundation and that it had already been disposed of. The Senate, however, passed the protocol, but it was not considered in the House, and thus failed.[3]

The Case of the Paraguayan Jewels.

Among the subjects revived by the press of Asuncion was that of a claim of the Paraguayan Government for the return of money and jewelry owned by private persons, the majority of whom were Paraguayans, and left by them in 1868 at the residence of Mr. Washburn, then minister of the United States in Paraguay.[4] The circumstances of this case were peculiar. In February 1868 Lopez, the younger, then dictator of Paraguay, being at war with Brazil and the Argentine Republic, ordered all noncombatants to leave Asuncion. Many of the inhabitants, expecting that the city would soon be captured by the allies, sought from Mr. Washburn, preparatory to leaving, permission to deposit at his residence such of their valuables as they could not take with them. Such permission having been granted, with an express declaimer of any responsibility, a number of boxes and trunks, the contents of which were unknown to Mr. Washburn, were left at his house. Neither the owners of the property nor Mr. Washburn were able to

[1] For. Rel. 1888, part 2, pp. 1346–1354.

[2] For. Rel. 1888, part 2, p. 1355.

[3] Mr. Bacon to Mr. Bayard, No. 262, Nov. 30, 1888, MSS. Dept. of State.

[4] Mr. Bacon to Mr. Bayard, No. 81, Dec. 30, 1887, MSS. Dept. of State.

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make any inventory of the property. On September 10, 1868, Mr. Washburn himself was compelled to leave Asuncion. He took with him a part of the archives of his legation; the rest, together with some furniture and all the boxes and trunks, he left in the house, which he closed up, intrusting the key to the Italian consul, Mr. Chapperon. Mr. Chapperon subsequently stated that he restored some of the property that had been deposited in the house to the owners; but in December 1868, before the distribution was completed, he also was forced to depart from the city, leaving the remainder of the property under the control of the Paraguayan soldiery. The allied forces entered the city early in January 1869, and on or about the 4th of that month Brazilian officers took possession of Mr. Washburn's house. They then made a careful inventory of the property in question, consisting of money, silverware, and jewelry,[1] but in their reports made at the time to their own government it is stated that when they took possession of the house there was nothing on it to indicate that it had been the habitation of the minister of the United States.

On his return to the United States Mr. Washburn called the attention of the Department of State to the property in question, and the circumstance of its seizure by the Brazilian forces. The Department thereupon directed Mr. Wright, its chargé d'affaires at Rio de Janeiro, to communicate with the Brazilian Government on the subject, saying that the United States claimed no right to interfere for the recovery of the value of any part of the property that did not belong to itself or to citizens of the United States, but that, under the circumstances, the Brazilian Government might of its own accord make an account of it. The Brazilian Government, waiving all discussion as to the right of the United States to any part of the property, agreed as a matter of comity to restore it. This it subsequently did, delivering the property, which was identical with that inventoried by the Brazilian officers at Asuncion in 1861, to Mr. Partridge, then minister of the United States to Brazil, who stated that he would hold it subject to the orders of his government. The Government of the United States instructed its representative in Paraguay to assist Mr. Partridge in the search for the claimants. The Paraguayan Government, however, which had been informed by that of Brazil

[1] Translations of this inventory may be found in the Foreign Relations of the United States for 1871, pp. 61–63.

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of the turning over of the property to Mr. Partridge, asked that it be delivered into its custody. On receiving this request, which was made through Mr. Stevens, the minister of the United States at Asuncion, the Department of State addressed an inquiry to Mr. Washburn for information as to the original claimants. On April 22, 1872, Mr. Washburn replied that he had no definite knowledge on the subject, but that some of the property belonged to Bolivians, Englishmen, and Americans, as well as to Paraguayans. In this state of affairs the Department of State expressed its reluctance to authorize the delivery of all the property to the Paraguayan Government; and in this condition the matter remained for ten years.

On September 18, 1882, Mr. Williams, then minister of the United States to Paraguay, informed the Department of State that the Paraguayan minister for foreign affairs had again requested the return of the property. At that time Mr. Frelinghuysen was Secretary of State; and on receiving Mr. Williams's dispatch he instructed the representative of the United States at Rio de Janiero to forward the property to Mr. Williams. The chargé d'affaires of the United States at Rio, however, could find none of the property there. An inquiry, prosecuted by the Department of State, elicited the information that when Mr. Partridge received the property he sealed it up in a box or chest lent by the Brazilian Government and deposited it with the United States naval storekeeper at Rio. Subsequently, believing that the Brazilian Government desired the return of the chest, Mr. Partridge had a new box made, in which he put both the money and the jewelry. This new box was then sealed up and left for some time with the naval storekeeper, after which it was taken to the legation of the United States at Petropolis, near Rio. Mr. Partridge resigned his mission to Brazil in June 1877. A member of his family being ill, he seems to have left Rio hurriedly, leaving orders that his personal effects, which were packed in several trunks and boxes, should be sent after him to his residence in Baltimore. This was done in July or August 1877, and it appears that those who had charge of the matter sent the box containing, or supposed to contain, the money and jewels along with Mr. Partridge's personal effects, which were subsequently sent to his address in Washington and deposited in a private storehouse in that city. There the box was found in February 1884, and it was at once brought to the Department of State,

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where it was opened on the same day and its contents examined. Some jewelry and silver, or plated, ware were found, but no money. The contents of the box were carefully inventoried, and Mr. Frelinghuysen informed Mr. Williams that, under the circumstances, all the Department of State could do was to return the property found in its possession; but that in view of the unofficial responsibility in which the trust had originated, the Department would prefer that the property should be unofficially restored by him to its several owners, if they could be discovered; and it was inferred from the tenor of Mr. Williams's dispatches on the subject that such a course was feasible. This, however, proved not to be the case; and the box continued in the Department of State until 1888, when it was sent to Mr. Bacon, at Montevideo, unopened and in exactly the same condition in which it had been since 1884. In sending the box to Mr. Bacon the Department of State took the ground that the voluntary deposit in 1868 of their private property by the inhabitants of Asuncion with Mr. Washburn could not create any responsibility in the Government of the United States; that Mr. Washburn did not receive the property in his official character, but personally, from a benevolent desire to protect it, so far as he was able, from capture or destruction; that after he left Asuncion no portion of the property was afterward within the custody or control of any American official until the remainder was delivered by the Brazilian Government in September 1871 to Mr. Partridge; that what had in the meantime been subtracted it was utterly beyond the power of the United States to say, no proof on the subject being obtainable; and that without considering the question whether the United States incurred any responsibility toward the individual owners of such of the property as came into the hands of Mr. Partridge, it was plain that no responsibility arose toward the Paraguayan Government. Although sixteen years had elapsed since the property was delivered to Mr. Partridge, and although during that period no satisfactory proof of its ownership had been produced, the Department of State said it had been decided, as an act of comity toward the Paraguayan Government, and as a means of expressing its friendly sentiments, but with a distinct disclaimer of any responsibility, to deliver to the Paraguayan Government all the articles which came into the possession of the Department in 1884. On receiving the box, Mr. Bacon

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was instructed to inform the Paraguayan minister for foreign affairs that he was directed to deliver it to him, and to request him to authorize someone to represent him on the opening of it, and to make an inventory of its contents. At the same time he was instructed to enter into a frank and friendly discussion with the minister for foreign affairs, and to obtain from him a full statement of his views, as to whether he considered that any further responsibility rested upon the United States. The box was duly received by Mr. Bacon, but the Paraguayan minister for foreign affairs, on being informed of the facts, declined to receive it, and it remained deposited in a bank at Montevideo.

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CHAPTER XXXIII.

CLAIMS AGAINST COSTA RICA: CONVENTION BETWEEN THE UNITED STATES AND COSTA RICA OF JULY 2, 1860.

Provisions for Arbitration.

By a convention concluded at San José, July 2, 1860, it was agreed that "all claims of citizens of the United States, upon the Government of Costa Rica, arising from injuries to their persons, or damages to their property, under any form whatsover, through the action of the authorities of the Republic of Costa Rica, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State at Washington, or to the diplomatic agents of the said United States at San José, of Costa Rica," up to the date of the signature of the convention, should be referred to a board of two commissioners, one to be appointed by the Government of the United States and the other by the Government of Costa Rica. The terms of submission were, however, qualified by the proviso, "That no claim of any citizen of the United States, who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica, or the exercise of authority, by the latter, within the territory of the former, shall be considered as one proper for the action of the board of commissioners herein provided for."

The commissioners were required to meet in Washington within ninety days from the exchange of the ratifications of the convention, and before proceeding to business each to "exhibit a solemn oath, made and subscribed before a competent authority," that they would "carefully examine into, and impartially decide, according to the principles of justice and of equity, and to the stipulations of treaty, upon all claims laid before them, under the provisions of this convention, by the Government of the United States, and in accordance with such

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evidence as shall be submitted to them on the part of said United States and of the Republic of Costa Rica, respectively."

After having exhibited this oath, which was to be entered upon the record of their proceedings, the commissioners were directed to proceed to name an umpire, and in case they should be unable to agree on one the appointment was to be made by the Belgian minister in Washington.

The convention contained various other stipulations relating to the mode of procedure of the commissioners, the furnishing of papers by the two governments, and the payment of indemnities and expenses.

The duration of the commission was limited to nine months from and including the day of its organization, but a period of sixty days from the final adjournment of the commissioners was allowed to the umpire for the decision of any claims which might then be pending before him.[1]

Organization of the Commission.

The commissioners met in Washington on February 8, 1862, and after examining and exchanging their commissions, which were found to be in due form, ordered them, together with the oaths prescribed by the convention, to be entered upon the journal of their proceedings.[2]

[1] For correspondence in regard to the claims embraced in the convention, see Mr. Cass, Secretary of State, to Mr. Lamar, October 1, 1858, and Mr. Black, Secretary of State, to Mr. Dimitry, January 19, 1861; as to the ratification of the convention, note of Mr. Seward, Secretary of State, to Mr. Riotte, June 26, 1861; as to forwarding proofs under the convention, same to same, April 26, 1862: MSS. Dept. of State.

[2] The oath of Mr. Rexford was taken before James H. Causten, a notary public for the District of Columbia. Mr. Molina, who held the position of envoy extraordinary and minister plenipotentiary of the republic of Costa Rica to the Government of the United States, as well as the post of commissioner under the claims convention, seems to have sworn himself. His oath was as follows:

"En la ciudad de Washington, capital de los Estados Unidos á los siete dias del mes de Febrero de mil ochocientos sesenta y dos, el infrascrito Enviado Extraordinario y Ministro Plenipotenciario de la República de Costa Rica cerca del Gobierno de los Estados Unidos habiendo sido nombrado comisionado, por el Gobierno de aquella República en conformidad con lo dispuesto en la convencion de dos Julio de mil ochocientos sesenta, hace solemne juramento de examinar cuidadosamente y fallar con imparcialidad, en equidad y justicia, y con arreglo á las estipulaciones del Tratado y á las pruebas que se produzcan por los interesados todas las reclamaciones que fueren presentadas ante la Comision que al efecto se constituye en la ciudad y fecha antes mencionadas. En fé de lo cual firma por si y ante si.

"LUIS MOLINA."

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The commissioner on the part of the United States was Benjamin F. Rexford, of New York; on the part of Costa Rica, Luis Molina.

The commissioners appointed Charles W. Davis to act as secretary *pro tempore*, and directed him to inform Mr. Seward, Secretary of State, of the board's organization.

Having thus effected an organization, the commissioners adopted rules and ordered them to be printed, and then adjourned till the 12th of March.

Mr. James Mandeville Carlisle appeared as counsel for Costa Rica.

On a subsequent day Judge Peabody appeared for the Government of the United States in behalf of claimants not otherwise represented.

Session of March 12.

When the commissioners reassembled on the 12th of March, they heard and granted motions in several cases for an extension of time for filing memorials, for reasons stated in each case. In most cases the allowance of additional time was specific; but in that of Charles Mahoney, who was then absent, leave was granted to file a memorial and papers when he returned to the United States, subject to the condition that the documents should be filed within a certain period.

Papers were received from the Department of State in relation to thirteen claims.

The board made the following order:

"*Ordered*, That Charles W. Davis, at present secretary *pro tempore*, be and is hereby appointed secretary of this commission and custodian of the papers, with the salary of two thousand dollars for the nine months; and Hanson A. Risley, of Dunkirk, Chautauqua County, New York, be appointed clerk, at the rate of one hundred dollars per month; and Hampton West messenger, at thirty-five dollars per month."

Appointment of Umpire.

April 1, 1862, the commissioners addressed a joint note to the Chevalier Joseph Bertinatti, Italian minister at Washington, offering him the post of umpire. They then took a recess till 7 o'clock in the evening, when, on reassembling, they received a communication from the Chevalier Bertinatti accepting the trust. His commission, signed by the two commissioners, was immediately sent to him by the secretary, Mr. Davis, by the board's direction.

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On the 18th of October the secretary was directed to address a letter to the umpire, inviting him to attend the sessions of the commission and to be present at the discussions by counsel of the various questions involved in the cases pending before the board. This invitation was accepted; and on the 21st of October the umpire appeared, filed a solemn declaration in substantially the same terms as the oath of the commissioners, and took his seat at the board. It is subsequently noted in the journal of several days' sessions that the umpire was present.

Transaction of Business.

At its session on Monday, October 20, 1862, the board ordered that on the following Wednesday the calendar should be called peremptorily, and that all cases which should not then be ready for trial should be placed at the foot. On the 22d of October the calendar was called accordingly, and the cases in which counsel were not prepared were placed at the foot of the calendar, except where satisfactory explanations of the failure of preparation were offered.

On the 5th of November counsel for Costa Rica announced the reception of certain evidence from that country in a case pending before the board. Counsel for the claimant opposed its reception, and the board after consultation declined to receive it.

On the same day the board made an order allowing the umpire $2,500 for his services.

Adjournment.

The board held its last session November 6, 1862. The commisssioners filed their opinions in the cases in which they disagreed, and ordered the secretary to send to the umpire their opinions, the briefs of counsel, and all other papers relating to such cases.

The secretary was directed to facilitate the labors of the umpire in making his decisions; to keep open the office of the commission and retain the custody of such records as the umpire might suggest, and to pay the expenses of the commission from the funds at his disposition.

The secretary was authorized to allow claimants and counsel to examine the papers and the opinions of the commissioners in their respective cases.

The commissioners then adjourned *sine die*.

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Commissioners' Report.

On the day of their adjournment the commissioners signed a report to Mr. Seward, as Secretary of State of the United States. This report was as follows:

"OFFICE OF THE JOINT COMMISSION OF
"UNITED STATES AND COSTA RICA,
"*Washington, November 6, 1862.*

"SIR: The undersigned, commissioners appointed under the convention between the United States and Costa Rica, signed at San José, July 2, 1860, respectfully report that on this day our labors cease, in compliance with the fifth article of said convention, nine months having expired since our organization.

"The whole number of cases presented for our consideration is 34, of which we have rejected those entered in Schedule A, hereto annexed.

"We regret that in the cases entered in Schedule B we have not been able to agree. We have, in compliance with article 2 of the convention above referred to, directed our secretary to forward said cases, with all the papers, arguments of counsel, and opinions of the commissioners in relation thereto, to His Excellency Chevalier Joseph Bertinatti, umpire of the commission, for his decision.

"The undersigned have the honor to subscribe themselves, with high considerations of respect,

"Your obedient servants,

"LUIS MOLINA,
"*Costa Rican Commissioner.*

"BENJAMIN F. REXFORD,
"*United States Commissioner.*

"CHAS. W. DAVIS,
"*Secretary.*"

"SCHEDULE A.

"The following cases were rejected by the commissioners under the convention between the United States and Costa Rica:

George O. Lamson	$70,000.00
Wm. C. Hipp	30,000.00
Theron Wales	10,000,00
J. G. Kendrick	20,315.00
Wm. Lee	550.00
J. T. Molone	215.00
John C. McGuigan	1,459.50
Dr. Earl Flint	406.60
Wm. D. Emmons	5,181.90
John W. Bourn	12,000.00

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Claudio Curbelo	$10,000.00
Charles Davis	2,105.00
H. Zur, Lippe & Co.	382,000.00
	[1]544,233.00

"SCHEDULE B.

"Cases submitted to the umpire.

Isaac Harrington	$20,000.00
Donald McBean	20,000.00
Matthew L. Masten	20,000.00
Wm. W. Wise	20,000.00
Lyman A. Hoover	3,600.00
G. H. Bowley & Co.	72,199.48
John E. Hollenbeck	12,157.00
Thomas Townsend	20,950.00
Michael Mullone	43,538.13
Sam'l S. Wood & Son	2,079.25
Volney R. Bristol	20,000.00
Thomas Gilmore	25,000.00
E. W. High	5,000.00
Geo. M. Harras	215.00
Fuvel Belcher	66,540.00
Lester Bushnell	51,500.00
James Dunn	6,807.00
C. Medina & Sons	700,000.00
Accessory Transit Co	68,000.00
John Vredenburgh	20,000.00
Charles Mahoney	25,885.00
	1,222,870.86

[1] The commissioners did not concur in the allowance of any claim. From their journal the following information is gathered as to the grounds on which their disallowance of claims proceeded: The claims of W. C. Hipp, Theron Wales, and J. G. Kendrick were rejected October 29, 1862, for want of proof. November 4 the claim of John C. McGuigan was rejected for the same cause, while that of Claudio Curbelo was dismissed because the claimant was not a citizen of the United States. Other claims were rejected without statement of the reason. In the case of H. Zur, Lippe & Co., which claim was rejected for want of proof, Mr. Molina entered the following observations in the record:

"The claim of Herman Zur, Lippe & Co. against Costa Rica for the large amount of $382,000 on the pretended ground of denial of justice is an extraordinary one. It is rejected for the utter want of proof. There being no possibility of transforming it into a North American concern, it has no standing before this commission, but it presents a striking attempt at fraud, which must not pass unnoticed.

"The company, represented to have been formed by the above-mentioned and his cousin, Dr. Adolphus Lippe, is not only not proved, but the proofs of Costa Rica show that at the required time the claimants had for years known nothing of the whereabouts of each other and had had no correspondence whatever."

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The Umpire's Report.

December 31, 1862, the umpire, Mr. Bertinatti, transmitted a report to Mr. Seward. After recapitulating the claims submitted to him, as set forth in the foregoing Schedule B to the report of the commissioners, he said:

"After due consideration of the above cases, I have concluded that the nine following cases have not been proved as valid against the republic of Costa Rica, and have accordingly rejected them:

"Accessory Transit Company, D. Colden Murray, receiver; George H. Bowley & Co.; Lester Bushnell; Crisanto Medina & Sons; James Dunn; Lyman A. Hoover; Thomas Gilmore; E. W. High; George M. Harras.

"The following cases I have found to be valid, and awarded in each of them the sums indicated:

Donald McBean, administrator of David McBean	$1,000.00
David Ogden, administrator of Isaac Harrington	1,000.00
Matthew L. Masten	1,000.00
William W. Wise	1,000.00
Volney R. Bristol	800.00
John Vredenburgh	600.00
Charles Mahoney	1,296.80
Michael Mullone, for himself	500.00
Michael Mullone, administrator of Peter Mullone	5,000.00
John E. Hollenbeck	7,269.75
Thomas Townsend	5,359.66
Samuel S. Wood and A. M. C. Wood	627.93
Fuvel Belcher	250.00
Total	25,704.14

"I have filed written opinions in each of the cases submitted to me, and have had prepared proper certificates for the benefit of the claimants, all of which I have the honor to forward to you through the secretary of the late commission.

"I have the honor to be, sir, very respectfully, your obedient servant,

"JOSEPH BERTINATTI, *Umpire.*"

Records of the Commission.

By the act of February 20, 1861,[1] passed to carry the convention into effect, all the papers of the commission were at the close of its labors required to be deposited in the Department of State, except that the commissioner on the part of Costa Rica might deposit certified copies or duplicates of the papers filed on behalf of his government instead of the originals. Mr. Bates, attorney-general, held that translations, even though certified, were not copies or duplicates, in the sense of the act. This

[1] 12 Stats. at L. 145.

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opinion was given upon a note which Mr. Molina, after the close of the commission, wrote in his capacity as Costa Rican minister, a note in which he asked to withdraw all the original papers filed on behalf of Costa Rica before the commission, and after its termination deposited in the Department of State, leaving only the translations filed in her behalf. He said he had received instructions to return the papers to San José, where occasion would not be wanting to refer to them.[1]

The Belligerency Question.

We have seen that by Article I. of the convention it was provided that "no claim of any citizen of the United States, who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica, or the exercise of authority by the latter, within the territory of the former," should be "considered as one proper for the action of the board of commissioners." The meaning of the term "belligerent" was principally discussed in the case of David Colden, receiver of the Accessory Transit Company, a corporation composed of citizens of the United States, but chartered under the laws of Nicaragua, for the purpose of carrying passengers and merchandise across the Nicaraguan Isthmus, by means of steamers on the San Juan River and Lake Nicaragua, and by land carriage from the lake to the Pacific. On February 28, 1856, said the commissioner of the United States, Mr. Rexford, in his opinion, "the freebooter government of William Walker and his associates pretended to annul the charter of this company, seized upon all its property, and retained the possession of all of it that it did not destroy until about the 27th day of December 1856, when all the steamers and the other property which had not been destroyed were seized by the Costa Ricans and retained by them." October 9, 1856, Sylvanus M. Spencer, acting under a power of attorney from the company, proceeded to San José, Costa Rica, where he obtained forces from that government. With these troops, said Mr. Rexford, he proceeded to San Juan "and captured all the steamers in the river, there being fourteen in all," only twelve of which, however, belonged to the company. In this enterprise "Spencer was the agent of that company only and had no commission from Costa Rica, but the troops that were with him were under his control, the regularly commissioned officers of the expedition having re-

[1] 10 Op. 450.

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ceived orders from their government to obey his directions." Continuing, Mr. Rexford said:

"After the steamers were thus seized, the Costa Rican troops obtained possession of them for a time, the said Spencer still having control of both the officers and the forces, who used them in vanquishing the freebooters and in driving them from Nicaragua. June 5, 1857, Spencer, by the authority of the company, called upon the President of Costa Rica, presented his authority to him, and for the company demanded their steamers, which demand was refused, Mora, the said President, saying he thought it best for Costa Rica to retain possession of the steamers until some arrangement could be made with the company in regard to the route, and that he would send commissioners to New York to make such an arrangement, which he never did, and the steamers were never delivered to the company, but were, after the said demand, disposed of by Costa Rica as she saw fit.

"These facts, it is understood, are not in any particular denied by Costa Rica; but it is claimed by her that these steamers, being in the possession of these freebooters, and being used by them for warlike and hostile purposes, at the time of their capture, no one could make a claim against her for the property—that she has a right to hold it as her own, and that, although it has been seized by the freebooters, in a raid made by them into Nicaragua, yet that such piratical seizure divested the true owners of their title, although they might not have been belligerents in any manner, and, on the contrary, were friendly, or at least neutral, toward Costa Rica. This argument would allow the person who had captured property from the thief or pirate who had stolen it to retain it as his own, because he found it in the thief's or pirate's hands! * * * But, further, these steamers were seized by the Costa Ricans, acting in connection with and under the direction of the agent of the company; it must for this reason be held that she acted in the matter for the benefit of that company, so far as to wish to restore its property to it, and to take measures for that purpose, as well as for her own benefit, for in so assisting the company she was aiding herself, by depriving the freebooters of the use of the vessels not only, but also by having the use of them herself as instruments against the enemy."

The company also claimed for the loss of a wharf, burned by the Costa Ricans at Virgin Bay.

The Costa Rican commissioner opposed the claim on the following grounds:

"The company had lost the possession of the property to which the claim refers, and Costa Rica rightfully seized or destroyed the same while it was possessed by and under the

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absolute control of her enemy, who employed it in the operations of the war, and therefore was enemy's property in the strictest sense. The company and their property were Nicaraguan by nationality, according to the principles of international law. They were most active accomplices and employed in the service of the filibusters. And there is no proof or plausibility in the allegation of an agreement between Costa Rica and the company by which it is supposed the former undertook to rescue the property on behalf of the latter."

Commander Bertinatti rendered the following decision:

"In this case the original demand was for $68,000 and interest, damages arising from the burning of a wharf at Virgin Bay, in Nicaragua. Very lately an additional demand was presented to the commission for $305,000 and interest, damages derived from the capture of fourteen steamers on the river San Juan and on the Lake Nicaragua. The commissioner for Costa Rica rejected both demands, while the other commissioner thought of awarding the claimant, for damages and interest, the total of $493,542, declaring at the same time that he had been unable to discuss, as he had desired all the points, in consequence of the case having been submitted to the commission only thirty-six hours before its time expired. Called by the disagreement of the commissioners to decide this case, I have carefully examined all the documents, briefs, and observations which were presented; given opportunity to both parties for new observations, in order to make up for the shortness of time complained of by the commissioner for the United States, and read the new briefs presented to me by the parties, which were communicated to each other by me, as also to the commissioners, both of whom I have heard on the controverted points. The claimant is a citizen of the United States, but appears as a receiver of the 'Accessory Transit Company,' which was a corporation created by and under the law of the Government of Nicaragua by corporators who were qualified in the charter as 'all citizens of the United States.'

"It appears that many and serious difficulties existed between the said company and the Government of Nicaragua in 1854, and that the party then in power was 'distinguished for its hostility to the citizens of the United States.' That company saw with satisfaction a revolution which overthrew that government and established a new one by the aid of a small band of adventurers commonly called 'filibusters;' they were almost all citizens of the United States, led by a William Walker, he also a citizen of the United States.

"The Atlantic and Pacific mail and passenger steamers, in connection with the transit route of said company, continually carried aid of men, arms, and ammunition to the filibusters, contributing greatly to their success. The complicity of the 'Accessory Transit Company' with the filibusters from the beginning of their enterprise in Nicaragua, is satisfactorily proven in this case.

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The new government of Nicaragua, commonly called Rivas-Walker, was inaugurated in October 1855, and, though illegitimate and piratical in its origin, it was in fact and continued long to be the only government of that state. At the beginning of March 1856 Costa Rica declared war against that government, with a view to drive the filibusters out of Central America and save herself from impending danger.

"Whatever may have been the language adopted by Costa Rica in regard to Nicaragua, Rivas-Walker and the filibusters, the fact, which is more eloquent than words, shows that it was a *public war and a regular war*, fought as such on both sides according to the civilized usages of warfare, during about two years, which witnessed victories and reverses on both sides, as also the mutual recognition of all the rights of belligerents. In the mean time the United States recognized the Rivas-Walker government, not only as *belligerent*, but as the regular government of Nicaragua. To make new investigations, as was done in the two briefs last submitted to me, about the character of the war between Costa Rica and Nicaragua, in order to know if it was *public* or of other kind, and deduce from the knowledge this or that consequence in favor of the claimant, seems to me all lost work. It is enough to read the convention of July 2, 1860, and take it in connection with the rules of interpretation laid down by the best publicists, and forcibly applied by the learned and distinguished Crittenden in regard to the meaning of the phrases used in a public treaty (see official opinions of the Attorneys-General, vol. 5, p. 331 and seq.), in order to see that the question has there been resolved. The high contracting parties, before concluding the convention and when the matter was *de jure constituendo*, were at liberty to investigate the nature of that war, inquiring if it was public or if it was just, in order to give it an appropriate character; they could also have investigated the causes of that war, considered it from a political or military point of view, established the nationality of the combatants and showed the final object of the same war. This was the work for the negotiators of the said convention, and the matter for their discussions. What may have been the practical result of such investigations, what may have been the conclusions of the negotiators, in regard to the legal and international consequences of the same war, it can be inferred, now that the treaty has been concluded, forming a *jus constitutum*, only from the words used in that instrument. These words are quite clear: 'No claim,' says the proviso of the 1st article, 'of any citizen of the United States who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica *or the exercise of authority* by the latter within the territory of the former, shall be considered as one proper for the action of the board of commissioners herein provided for.' The expression 'belligerent,' with the consequences depending upon it; the expression 'occupation by forces'—*occupatio bellica*—with the rights belonging to the military occupant;

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the acknowledgment of the authority of Costa Rica in the territory of Nicaragua; the penalty against the belligerent consisting in depriving him of action for indemnity before this commission, all concur to show that the negotiators acknowledged the war between Costa Rica and Nicaragua as a *public war* and a *just war* on the part of Costa Rica, and thus acknowledged also the rights arising from the same. Consequently Costa Rica has no question of right to discuss with the *belligerent*, in accordance with said convention. For her the proof of the fact of belligerency is enough in order to oppose [i. e., set up] the want of any right of action, and say that the claimant has no *locum standi in judicio*.

"Now it being shown by Costa Rica that the burning of the wharf complained of was a necessary operation of war, and that such also was the capture of the steamers, I find it useless to discuss here the effects of the *domicil* in Nicaragua in regard to this claim; for either as a corporation existing only as a moral being assimilated to a natural person in the state of Nicaragua, or as an *actual belligerent* there against Costa Rica, said company has no standing before this commission. It is alleged, however, in behalf of claimant that the 'Accessory Transit Company,' as a Nicaraguan corporation, ceased to exist in Februay 1856, when the Rivas-Walker government of Nicaragua revoked its charter, seized its property and sold it for the benefit of the state to another company, which took out a new charter and continued the business on its own account. It was this new company that made itself liable to the charge of belligency during the occupation of Nicaragua by Costa Rica. It seems that Costa Rica ignored that mysterious transaction, by which the old company was dissolved and a new one formed by the members of the first, without any apparent change, except more determined efforts in favor of the filibusters. It was immaterial, however, for Costa Rica to know who were the owners of the wharf and steamers used in a war against her; she destroyed the first and captured the others *jure bellico*.

"Apart from other considerations, if it be true that the wharf when burnt and the steamers when captured did not belong to the 'Accessory Transit Company,' because this did not exist and they had been disposed of to another company, I can not see how an action for damages can be maintained in the name of the extinct company, if it is not against those members of the old company who formed the new one and bought the said property. Upon them would fall the responsibility, if the justice of the transaction could not be sustained before a competent tribunal. Costa Rica has nothing to do with that question. I can not see also how the theory of the things retaken by neutrals from a pirate can be applied to this case. First of all, the wharf was not retaken, but burnt, and the steamers also mostly perished in the continued struggle for their possession; what remained of them would hardly pay the expense of capture. Second, as I have observed before, the Rivas-Walker

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government was the only one existing at Nicaragua, and was recognized as a regular government. Third, the proceedings of that government against the 'Accessory Transit Company' were not acts of violence or open injustice; on the contrary they were marked by a show of strict legality, and accompanied by an exposé of motives making a strong case in favor of that goverment.

"In regard to the steamers, however, it is alleged by the claimant that President Mora, of Costa Rica, agreed to capture them with his own forces and then deliver them to Cornelius Vanderbilt, president of the 'Accessory Transit Company.' I deem it useless to investigate the effects which this unilateral convention might have had; for its existence is not proved. Vanderbilt says that he dispatched an agent to aid in the capture of said steamers, with the idea of coming to some arrangement afterward; and this agent says that when he requested President Mora to give up the captured steamers, he gave first an evasive answer and afterward declined, though showing an inclination to treat, probably, for their sale when the war should be over. Costa Rica had sufficient motive to capture those steamers even without the invitation of Vanderbilt, and perfect right to do so without his consent. Now, if Vanderbilt cooperated by his agent with Costa Rica, he may at all events be entitled to a compensation, which seems to have already been paid to his agent. It seems beyond probability that President Mora should have agreed to deliver those lawful prizes to Vanderbilt while the war continued to rage and the possession of those steamers was all important to obtain victory.

"Another obstacle to the admission of the demand relative to the steamers arises from the fact that it was presented too late. The jurisdiction of this commission has been limited to the claims which were duly presented before July 2d, 1860. In conclusion, my opinion is that the 'Accessory Transit Company,' by David Colden Murray, receiver, has no standing before this joint commission, and I hereby dismiss the demand in this case."

When the steamers of the company were captured by the forces of Costa Rica the captains who had "made themselves prominent in favoring the filibusters were pardoned by Costa Rica and allowed to leave the country." The crews and subordinate officers remained, and from among them Costa Rica chose new captains.[1] Some of these captains appeared before the commission as claimants for damages for being compelled to serve in the war against the filibusters. The typical case of this kind was that of Isaac Harrington, No. 2. It was alleged that he was compelled to accept the position of captain of one

[1] *Isaac Harrington* v. *Costa Rica*, No. 2, opinion of Commander Bertinatti.

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of the steamers and to receive a regular monthly salary during six months. Costa Rica denied the compulsion, but in the conflict of testimony the umpire said that the truth seemed to be "that the claimant willingly accepted the employment, under condition, however, that the steamer should not be used in war, which condition not having been observed he wanted to leave the service and was prevented from doing so." "I believe," continued the umpire, "that Costa Rica had no right thus to restrain the liberty of a citizen of a friendly power. Had he been an *actual belligerent* Costa Rica might have dealt with him according to the laws of war. But she does not pretend that he was compelled to serve as a punishment, and by promoting him and giving him an employment of great responsibility, which employment he might have easily abused had he been unfriendly, has in fact given up the right to consider him as an enemy, whatever his previous conduct might have been. There is no evidence, however, of the *belligerency* of the claimant, and he can not be said to have had a real *domicil* in Nicaragua. He did not go there to make war, or to trade, or to reside, but only for reason of his employment of aiding in the navigation of a steamer; and while thus serving he had but little occasion to know the relations of the owners and agents with the filibusters or with Costa Rica."

The objection of domicil was, however, very strongly and persistently urged on the part of Costa Rica, whose commissioner prepared a long opinion on the subject. It was urged that Harrington and various other claimants before the board must be considered as having had at least a belligerent domicil in Nicaragua, and in this relation special stress was placed on the note of Mr. Marcy, Secretary of State, to Count Sartiges, French minister, of February 27, 1857, denying any liability on the part of the United States for the destruction of the property of aliens in the bombardment of Greytown. With reference to these contentions, the Commander Bertinatti said:

"In all cases of claimants who were residents of Nicaragua, when the *actual belligerency* is not proved, *a constructive belligerency* arising from *domicil* or other like source has been opposed in behalf of Costa Rica as sufficient in order to exclude the claimants from the benefits of the 3d article of the convention of July 2d, 1860. I do not find the theory applicable to the cases to be decided under said convention. 'Neither the one nor the other of the parties interested in the contract having a right to interpret the deed or treaty according to his own

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fancy' (says Vattel, chap. 17, sec. 265), it becomes my duty to interpret said convention according to reason and in conformity with the principles *in subjecta materia*, with the same simplicity and candor shown by that great publicist in the research of the rules which regulate the intercourse of nations. 'It is not to be presumed,' says the Swiss publicist, 'that sensible persons in treating together, or transacting any other serious business, mean that the result of their proceedings should prove a mere nullity. The interpretation, therefore, which would render a treaty null and inefficient can not be admitted. It must be interpreted in a manner that it should not be vain and illusory.' (Vattel, chap. 17, sec. 283.) Admitting these principles, we need not inquire whether the Ministers Carazo, Dimitry, and Yglesias, who negotiated the said convention, meant to make a serious act or not; but we must inquire only if they knew beforehand the *hindrances* which could be opposed to the instrument which they signed, either in reference to the strict principles of public law—*summum jus*—or to the often quoted note of Mr. Marcy, well known to all the cabinets, in order to render vain and illusory the result of their negotiations.

"Combining the general expressions of the first article of said convention with the *proviso* which limits them, and with the second article where it is said 'they (the commissioners) will carefully examine into, and impartially decide, according to the principles of justice and equity, and to the stipulations of treaty upon all the claims laid before them,' and adding to all this the third article of the same convention contemplating the case in which the commissioners 'may agree to award an indemnity,' we must conclude that the negotiators, in regard to those claimants whose *actual belligerency* should not be proved, intended to create a special and particular right which was the result of the convention itself; otherwise all the claimants being excluded by a *constructive belligerency* according to the note of Mr. Marcy, quoted by Costa Rica, the said convention would have no serious object or result.

"Had Mr. Marcy been bound by any similar convention to those foreign governments whose subjects were made to suffer serious damages in consequence of the bombardment of Greytown, he certainly would not have been able to invoke the rigor of the absolute principles laid down in that elaborate note, in order to oppose a *hindrance* to the claimants. His note then would have been based upon other principles. That jurist, who was Secretary of State under President Pierce, would have easily perceived that it was necessary to modify the general right by the particular right; the absolute right by the relative right; the *summum jus*, laid down by the publicists when they treat of the terrible rights derived from the state of war, by the conventional right, such as established in the convention, which can not be regarded but as an act of reparation. Mr. Marcy consequently would have based his note not upon the theory of authors, and upon examples which

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history has judged, but he would have taken his inspirations from those generous and high-minded considerations which a government never puts aside, when it is the matter of alleviating the calamities resulting from war; and he would have mitigated, if I am allowed the expression, the unbending rigor of the *Decemviral* laws by the equity of the *edict* of the *Pretor*.

"This order of ideas in the interpretation of the convention of July 2d, 1860, is suggested by the impartial examination both of its letter and of its spirit. No other interpretation can be admitted if we will not render that convention vain and illusory. To make use of the *proviso* in order to derive from it the right to exclude the *actual belligerents* not only, but also those who are innocent, no belligerency being proved against them, is the same as to make use of the exception in order to overthrow the rule. To interpret the whole of the convention without paying attention to the proviso, is the same as to accept the general principle and overlook the limitation. It is in equity, then, that we must judge the cases of those claimants who are not proved to have been *actual belligerents;* and the amount of indemnity must be regulated by the same principle of equity.

"As for the general principles quoted in the briefs, their value can not be denied; but they are not applicable to the cases submitted to my decision. The Government of Costa Rica may invoke those principles against all the governments to which it is not bound by a special convention; and will also be able to assert the same principles even against the Government of the United States after that the convention of July 2, 1860, whose term expires with my office of umpire, shall have obtained its object. Such seems to me to have been the conciliative thought of the two governments in making the aforesaid international convention; and the interpretation which answers their thought and their duty is at the same time the only rational interpretation, without which the convention would be illusory, because null and without effect.

"For the reasons above explained, I find it just and equitable to give the claimant Isaac Harrington an indemnity. In measuring the damages to be awarded, the commission has been advised to take the stand on the high ground of national indignity, of violated treaty, of breach of trust, of the oppression of a citizen of a nation by the rulers of another. But the commissioner for the United States, who could not ignore that the republic of Costa Rica, placed in jeopardy of its existence and making war for its defense, had no interest or wish to provoke by outrages the great and powerful republic of the United States, has adopted for damages an equitable measure. And the commissioner for Costa Rica having invariably rejected all demands, I will be guided by said equitable measure in this as well as in all other cases in which I find that an indemnity is due. Consequently, I hereby award to said David Ogden,

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as administrator of Isaac Harrington, deceased, the sum of $1,000."[1]

Only one of the captains who were in command of the steamers when they were captured by the forces of Costa Rica appeared before the board as a claimant. This was Lyman A. Hoover, who demanded $3,000 for having been bound and kept a prisoner for three hours on board of a steamer, exposed to the wind and rain. The umpire dismissed the claim, saying:

"He [Hoover] was an *actual belligerent* in command of a steamer used in war against Costa Rica during the occupation of Nicaragua by her forces. In this case there does not occur any circumstance to show that the claimant may have ignored his position of hostility to Costa Rica, as in the case of Harrington. Nor did Costa Rica afterward take into her service the claimant Hoover, as she did with Harrington, showing she did not consider him an enemy."

Awards were made by the umpire in favor of three persons who were working as mechanics in the construction of the company's wharf at Virgin Bay, when it was destroyed by the forces of Costa Rica April 7, 1856. One of them was killed by a volley fired by the Costa Ricans on their first arrival, and in his case $5,000 was allowed. Another was slightly wounded and was imprisoned for a short time. He received an award of $200. The third was made a prisoner and held as such for a month, and for this was allowed $500. No charge of "actual belligerency" was, said the umpire, made against any of these three persons.

In the case of George H. Bowley, No. 8, the claimant demanded damages for the destruction of merchandise by Costa Rican forces at Rivas and elsewhere. Costa Rica, while admitting the destruction of a part of the merchandise, alleged that the claimant was a "belligerent." It appeared (1) that when the Costa Ricans approached San Juan del Sur, where

[1] The amount of Harrington's original demand was $160,000, but he afterwards reduced it to $20,000. On the principle applied in his case, the umpire also awarded $1,000 each to William W. Wise, Matthew L. Masten, and Donald McBean. To Volney R. Bristol, who was an assistant engineer, and who was compelled to serve only four months, the umpire allowed $800. To John Vredenburgh, who served as a captain, but for a shorter time than Harrington, an award was made for $600. Charles Mahoney, who was compelled to serve for a time as a captain, was allowed $400 for himself and $200 for his wife, who "also was detained during said time, and subjected to much inconvenience."

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claimant was engaged in business, he took the greater part of his merchandise for safety to Rivas, which city was then held by the filibusters; (2) that when the Costa Ricans approached Rivas he left his merchandise in care of a servant and went, as he alleged, "to travel in the interior," returning to Rivas when it was reoccupied by the filibusters; (3) that he had in the service of the filibusters a schooner, which was captured and held as a prize by the Costa Ricans; (4) that in November 1856, being then in San Juan del Sur, he fled on the reapproach of the Costa Ricans and took refuge on board of the *San José*, a vessel in the service of the filibusters. Referring to Bowley's denial that he was a "belligerent," the umpire, after reviewing the facts, said:

"The presumption is against him. The proofs by which he endeavored to corroborate his deposition are all of a negative character and not all of them free from bias. Costa Rica, on the contrary, has exhibited positive depositions of witnesses speaking of their own knowledge, and naming the time and place when and where they saw him with the filibusters. The objection that those witnesses were not native born, but only residents, I do not consider of much weight. Those depositions are also confirmed by others, and by the general conduct of the claimant from the beginning of the occupation of Nicaragua by the troops of Costa Rica. A thorough examination of the case has convinced me that the claimant was an actual belligerent according to the terms of the proviso of the first article of the convention July 2d, 1860."[1]

[1] A claim was made by a certain person for having been twice imprisoned without cause. It appeared that on one of the occasions in question he was merely directed to leave his abode and retire with other persons to a place of safety while an attack by the filibusters was expected. On the other occasion, being drunk at San Carlos, he was taken on board of a steamer and carried to his home, and afterwards "dreamed of having been a prisoner." The umpire dismissed the claim. (*James Dunn* v. *Costa Rica*, No. 26.)

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CHAPTER XXXIV.

ECUADORIAN CLAIMS COMMISSION: CONVENTION BETWEEN THE UNITED STATES AND ECUADOR OF NOVEMBER 25, 1862.

Provisions of the Convention.

By a convention concluded at Quito, November 25, 1862, it was provided that all claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Ecuador, or of corporations, companies, or individuals, citizens of Ecuador, upon the Government of the United States, should be referred to a board of commissioners consisting of two persons, one of whom should be appointed by the Government of the United States and the other by the Government of Ecuador.[1]

The commissioners so named were required to meet in the city of Guayaquil within ninety days from the exchange of the ratification of the convention, and before proceeding to business to make a solemn oath that they would "carefully examine and impartially decide according to justice, and in compliance with the provisions of this convention, all claims that shall be submitted to them."

The commissioners were required then to proceed to name an "arbitrator or umpire," to decide upon any case or cases concerning which they might disagree, or upon any point of difference which might arise in the course of their proceedings. If they could not agree in the selection, it was provided that the umpire should be appointed by the British chargé d'affaires, or by any other diplomatic agent in Quito whom the high contracting parties should invite to make the appointment, except the minister resident of the United States.

The umpire having been appointed, the commissioners were required at once to proceed to examine the claims which might be presented to them by either of the two governments; and

[1] The text of the convention was communicated to the House of Representatives March 14, 1864 (H. Ex. Doc. 55, 38 Cong. 1 sess.).

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it was provided that the commission should terminate its labors in twelve months from the date of its organization. In the event that, upon the termination of the labors of the commission, any case or cases should be pending before the umpire and awaiting his decision, he was authorized to render his decision in such case or cases within thirty days from the termination of the labors of the commission.

The commissioners were required to keep a record of their proceedings, and to that end were authorized to appoint a secretary versed in the English and Spanish languages.

It was stipulated that the commissioners should, if required, hear one person in behalf of each government on every separate claim, and that each government should furnish, upon the request of either commissioner, such papers in its possession as might be deemed important to the just determination of any claim or claims.

In cases in which the commissioners should agree to award an indemnity, it was stipulated that they should determine the amount to be paid. In cases in which they could not agree, it was provided that the points of difference should be referred to the umpire, before whom each of the commissioners might be heard, and whose decision should be final. The commissioners were required to issue certificates of the sums to be paid to the claimants respectively, whether by virtue of their own awards or of those of the umpire. All such sums were required to be paid in equal annual installments, to be completed within nine years from the date of the termination of the labors of the commission, the first payment to be made six months after the same date. To meet these payments both governments pledged the revenues of their respective nations.

It was left to each government to pay its own commissioner, but the compensation of the umpire and the incidental expenses of the commission were imposed on the two governments in equal moieties.

It was agreed that the proceedings of the commission should be final and conclusive with respect to all pending claims, and that claims which should not be presented to the commission within the twelve months of its existence would be disregarded by both governments and considered invalid.[1]

[1] For the prior instructions of the Department of State touching the claims against Ecuador, see Mr. Buchanan to Mr. Livingston, May 2, 1848; Mr. Clayton to Mr. Van Alen, July 10, 1849; Mr. Marcy to Mr. White, February 3 and October 31, 1854: MSS. Dept. of State.

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Constitution of the Commission.

The ratifications of the convention were exchanged at Quito July 27, 1864, almost two years after its conclusion. Its signers were Frederick Hassaurek, minister resident of the United States in Ecuador, and Juan José Flores, President of Eucador and general-in-chief of the armies of the republic. When the commission came to be created, each of these gentlemen was appointed as commissioner on the part of his government. Mr. Hassaurek was a native of Austria, having been born in Vienna on October 9, 1832. He served in the Student Legion in the German revolution in 1848, and was twice wounded. Coming to the United States in 1848, he settled in Cincinnati, where he engaged in journalism, politics, and the practice of law. He was minister of the United States to Ecuador from 1861 to 1865. After his return from Ecuador he published a book entitled Four Years Among Spanish Americans.[1] His opinions as a member of the Ecuadorian commission display a strong grasp of legal principles and an elevated conception of international morality. After the organization of the commission, Mr. Flores was succeeded as Ecuadorian commissioner by Mr. Francisco Ugenio Tamariz.

The commission was organized at Guayaquil on the 22d of August 1864. The commissioners chose as secretary Mr. Crisanto Medina, consul of Guatemala and agent of the Pacific Steam Navigation Company at Guayaquil. Mr. Medina was educated in the United States, and spoke both English and Spanish fluently.

The commissioners first chose as umpire Mr. Andres Bello, of Chile. His fame as a publicist and scholar made his appointment eminently a fit one. Besides being the author of a well-known treatise on international law, he was a philologist and the author of a Spanish grammar of high repute.[2] He was unable, however, to accept the position of umpire, and died in October 1865. The commissioners then chose as umpire Dr. Alcides Destruge, consul-general of Venezuela at Guayaquil. Mr. Hassaurek spoke of Dr. Destruge as "an accomplished scholar, a student, and a man of unquestionable integrity," who both spoke and read the English language.[3]

[1] Hurd & Houghton, New York, 1867.

[2] Mr. Hassaurek to Mr. Seward, August 22, 1864, MSS. Dept. of State.

[3] Mr. Hassaurek to Mr. Seward, May 26, 1865, MSS. Dept. of State.

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Results of the Commission.

The commission expired by limitation on the 17th of August 1865. All the business before it was disposed of. In two cases Mr. Hassaurek delivered elaborate opinions, in both of which his Ecuadorian colleague concurred. One of these opinions was delivered in respect of the claims of John Clark, Commodore Danels, and certain other persons on account of the seizure of the vessels *Medea* and *Good Return*, and their confiscation by the authorities of Colombia during the war of independence against Spain. The vessels in question, which were Spanish, were captured by the claimants, who, though citizens of the United States, were at the time cruising under commissions from Artigas, chief of the Banda Oriental, now known as Uruguay, against the commerce of Spain and Portugal. The vessels were forcibly taken from their possession by certain officers of the republic of Colombia, and were carried into a port of that country and condemned. Subsequently the republic of Colombia broke up into three parts, which respectively became known as Venezuela, Ecuador, and New Granada, afterward called the United States of Colombia and now the Republic of Colombia. In the dissolution of the original republic, New Granada, Venezuela, and Ecuador each assumed a proportionate part of the burdens of the parent state, and to that extent became answerable for claims against it. In due time claims were presented on behalf of Clark, Danels, and the other claimants, as American citizens, to the governments of New Granada, Venezuela, and Ecuador, and these claims were afterward laid before international commissions organized under treaties between the United States and those countries. The first decision upon them was rendered by the umpire of the commission under the convention between the United States and New Granada of September 10, 1857; the last was rendered by the commission under the treaty between the United States and Venezuela of December 5, 1885. While admitting that the claims, as they originally stood, must have been presented internationally by the Banda Oriental, Mr. Upham, the umpire under the treaty between the United States and New Granada of 1857, held that the claimants had a personal beneficial interest in the property captured, for their services and outlays under their contract with the government of the Banda Oriental; that, it appearing that

Cases of "Medea" and "Good Return."

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the government had disclaimed to Colombia, at the claimants' request, any intention to make a demand in their behalf, the exception taken by Colombia to the form in which the claim was presented was not entitled to favor; that the acquisition of the property by the Banda Oriental, under its power and flag, was rightful, though the parties in interest, the captors, were citizens of the United States; that, as the Banda Oriental had abandoned her right in the property to the claimants, the United States should not set up an objection to the manner in which the property was originally acquired; that for a long series of years the claimants had had the assistance of the United States in prosecuting their claims, and that, taking all things into consideration, the claims should be allowed. Owing, however, to an irregularity in the manner in which this decision was rendered, the claim against Colombia was reheard by the commission which sat at Washington under the convention between the United States and the United States of Colombia of February 10, 1864; but before the case was decided by this commission the claim against Ecuador for the discharge of her share of the alleged liability came before the commission at Guayaquil. Here Mr. Hassaurek, notwithstanding what had been held at Washington, decided, with the concurrence of the Ecuadorian commissioner, that the claimants had no standing before the commission as citizens of the United States, for the reason that their claims arose out of a transaction in which they violated the laws of the United States, disregarded solemn treaty stipulations, compromised the neutrality of their country, and rendered themselves liable to prosecution and punishment as pirates.[1] "I found myself," said Mr. Hassaurek, "obliged, however reluctantly, to dissent from the opinion of the umpire of the United States and New Granada Mixed Commission on Claims. Sworn to do impartial justice, I could not possibly allow myself to be guided by his opinion. My decision, on which I am willing to stake my reputation as an honest man and a lawyer, will be denounced by the numerous parties interested in those cases, but I am confident that it will be approved by you."[2]

When the claim against Colombia came to be finally decided by the new commission between the United States and that country under the convention of 1864, Sir Frederick Bruce,

[1] H. Rep. 609, 43 Cong. 1 sess.

[2] Mr. Hassaurek to Mr. Seward, August 18, 1865, MSS. Dept. of State.

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the umpire, referred to and followed Mr. Hassaurek's opinion. It was also followed by the commission between the United States and Venezuela, under the treaty of 1885, which unanimously concurred in rejecting the claims. They were therefore completely disallowed and rejected.

Question as to the Survival of Treaties.

The other important case in which Mr. Hassaurek delivered an opinion was that of the Atlantic and Hope insurance companies, of New York. The facts in this case were that in May 1824 the American schooner *Mechanic*, while on a voyage to Tampico, in Mexico, with a general cargo, was captured by the Colombian privateer *General Santander*, and carried into Puerto Cabello, where the entire cargo was condemned as Spanish property, Colombia being then at war with Spain. The cargo was insured by the companies above mentioned, and in due time they reimbursed the owner, to the extent of their respective obligations, for his loss. A question was raised before the commission as to whether the owner of the cargo was a subject of Spain or a citizen of Mexico. On this question, however, the case was not decided. By Article XV. of the treaty between the United States and Spain of 1795, the principle of free ships free goods was established between those countries. At that time Colombia was a part of the Spanish empire. It was contended, however, that by her subsequent declaration of independence she freed herself from the obligations which the treaty imposed on the Spanish nation. Mr. Hassaurek held that the United States had the right, under the circumstances, to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag. In this relation Mr. Hassaurek cited the instructions of Mr. Adams, Secretary of State, to Mr. Anderson, the first minister of the United States to Colombia, of May 27, 1823, in which it was maintained that Colombia, notwithstanding her declaration of independence, remained bound, in honor and justice, by the engagements of Spain with other nations affecting their rights and interests. The same principle, said Mr. Hassaurek, had constantly been invoked by the republics of Ecuador, New Granada, and Venezuela, which formerly constituted the original republic of Colombia, and which had claimed the rights granted by the treaties between Colombia and foreign nations, until they had substituted for such treaties treaties of their own. In support of this statement he gave several examples. Ecuador, having recognized and acted upon this prin-

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ciple whenever advantage was to be derived from it, could not, said Mr. Hassaurek, deny it when it imposed an obligation. He therefore held, with the concurrence of the Ecuadorian commissioner, that the condemnation of the *Mechanic's* cargo was a wrongful act for which Colombia was responsible.

Mr. Hassaurek's Report.

At the close of the labors of the commission Mr. Hassaurek made to Mr. Seward, who was then Secretary of State, the following report of its proceedings:

"MIXED COMMISSION OF THE
UNITED STATES AND ECUADOR,
"*Guayaquil, August 18, 1865.*

"SIR: The Mixed Commission of the United States and Ecuador, established by the convention of November 25, 1862 (ratified on the 13th February 1863 and proclaimed by the President of the United States on the 8th September 1864), having terminated its labors on the 17th August 1865, the last day of the year to which its duration was limited by said convention, the undersigned, commissioner of the United States, has the honor to report that the following claims were presented against the republic of Ecuador:

"1. Abraham Johnson, for balance due on shoes sold to the *de facto* government of General Franco in 1860.

"2. Mathew Howland, for damages to schooner *George Howland* by the Ecuadorian convicts on the Galapagos Islands.

"3. Representatives of Commodore Danels, deceased, for value of Uruguay prizes taken from him by the Venezuelan navy.

"4. The Atlantic and Hope insurance companies, of New York, for illegal condemnation of cargo of schooner *Mechanic* by the Colombian prize courts.

"5. Harmony & Lopez, for breach of contract by the Government of Ecuador for the purchase of a submarine cable.

"6. Peter Bonsquet, for illegal confiscation of schooner *Economy* at Maracaibo, Colombia.

"7. Representatives of John Clark, deceased, value of Uruguay captures taken from him by the Colombian navy.

"8. James H. Causten, attorney in fact of Robert W. Gibbes, for payment of a Colombian bond.

"9. H. & D. Cothcal, for illegal confiscation of schooner *Ben Allen* at Chagres, Colombia.

"10. Pond and others, value of Uruguay captures taken from them by the Colombian navy.

"11. Seth Driggs, illegal detention of a cargo of cocoa by the Colombian authorities.

"12. Harmony & Lopez, for payments illegally exacted by the municipality of Tulcan, Ecuador.

"13. J. Goodings, Colombian bonds.

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"14. W. Goodings, Colombian bonds.

"In respect to which the following decisions were made:

1. Abraham Johnson	$3,325.20
2. Mathew Howland	50,000.00
4. Atlantic and Hope insurance companies	15,467.69
6. Peter Bonsquet	6,127.50
8. James H. Causten	3,178.77
9. H. & D. Cothcal	11,713.20
11. Seth Driggs	3,336.41
13. J. Goodings	1,477.34
14. W. Goodings	173.45
Sum total	94,799.56

"Of the above awards the one numbered 8 was made by the umpire.

"The following claims were decided unfavorably, viz:

"3. Commodore Danels (not an American claim).

"5. Harmony & Lopez (individual claim against President of Ecuador).

"7. John Clark (not an American claim).

"10. Pond and others (same).

"No. 12, being but for a very small amount ($79), will be paid at once by the Ecuadorian Government.

"No claims were presented against the United States.

"The awards are payable in the currency of this country. In all cases in which American money should have been awarded 25 per cent were added to the amount found due, this being the normal rate of exchange between Ecuador and the United States.

"In the old Colombian cases, awards were made for 21½ per cent of the amount found due, this being the proportion for which Ecuador made herself liable on the dissolution of the old republic of Colombia.

"Interest was calculated at the rate of 5 per cent, and in some cases at the rate customary in this country, up to the 17th August 1865.

"The following compensations were allowed to the officers of the commission:

"$500 to the umpire and $3,000 to the secretary. The latter amount was unavoidable, as the task of the secretary was exceedingly arduous, and the services of no competent person could have been secured for less at an expensive place like Guayaquil. These compensations are to be paid in American coin, and Ecuador has already given orders for the payment of her half.

"The other disbursements of the commission, on the part of the United States, amounted to about $500 of American currency, exclusive of the charges for publishing notices to the claimants in the United States.

"I have the honor to remain, your most obedient servant,

"F. HASSAUREK.

"Hon. W. H. SEWARD,
"*Secretary of State, Washington.*"

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The first installment of the awards made by the commission fell due, under the terms of the convention, on the 17th of February 1866, but, owing to the state of affairs at that time on the west coast of South America, there was delay in its payment.[1] Before the second installment became due, however, the matter was satisfactorily arranged, and the subsequent installments were regularly paid.[2]

[1] H. Ex. Doc. 112, 39 Cong. 1 sess.

[2] Dip. Cor. 1867, part 2, pp. 282–287. For a full statement as to the payment of the awards, see Mr. Fish, Sec. of State, to Mr. Buffington, MS.

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CHAPTER XXXV.

THE SANTOS CASE: CONVENTION BETWEEN THE UNITED STATES AND ECUADOR OF FEBRUARY 28, 1893.

Arrest and Imprisonment of Mr. Santos.

Toward the end of December 1884 the Department of State of the United States heard through unofficial channels that Julio Romano Santos, a citizen of the United States, doing business at Bahia, Ecuador, as a member of the firm of Santos, Hevia Hermanos (Santos, Hevia & Brothers), had been arrested in Ecuador, and that he was then confined in prison at Guayaquil on a charge of complicity in a recent revolutionary movement in that country. The Department of State at once instructed Mr. Beach, the consul-general of the United States at Guayaquil, to investigate the facts and report upon them, and at the same time to "communicate with the proper Ecuadorian authorities on the subject, with a view to securing to Mr. Santos an early hearing in his own behalf, and his prompt liberation if the charge be not sustained."[1]

These instructions were promptly executed, in the absence of Mr. Beach, who was at Quito, by Mr. Reinberg, vice-consul-general of the United States at Guayaquil, who communicated the purport of them in writing to Mr. José A. Gomez, governor of the province of Guayas, and orally to the President of the republic, Mr. José Ma Placido Caamaño, in a personal interview. The President assured Mr. Reinberg that the trial of Mr. Santos would be conducted fairly and promptly, but made no definite statement as to the cause of his detention. Subsequently, however, Mr. Gomez, as governor of Guayas, wrote to Mr. Reinberg to the effect that he had been informed that Mr. Santos was "an Ecuadorian citizen according to the constitution of this republic," and that he should be obliged, till the

[1] Mr. John Davis, assistant secretary, to Mr. Beach, December 29, 1884; also telegram, same to same, December 30, 1884, H. Ex. Doc. 361, 49 Cong. 1 sess. 3.

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contrary was proved, to excuse himself from making an explanation of the government's reasons for ordering Mr. Santos's imprisonment.[1]

As the result of these communications Mr. Reinberg telegraphed to the Department of State that Mr. Santos was held a prisoner at Port Manta, and that the government claimed him as an Ecuadorian citizen and wanted proof of his American citizenship.[2] The Department of State replied that Mr. Santos was naturalized July 6, 1874, and that the Department had the record; and Mr. Reinberg was instructed so to inform the government and to request Mr. Santos's release.[3]

Request for Release.

Mr. Reinberg communicated the purport of this instruction to Governor Gomez, and also obtained another interview with the President. The latter replied that he was not acquainted with the progress of the trial, but that he was informed that it was being conducted in conformity with law; and he further stated that it was not within his power to liberate Mr. Santos.[4] The answer of Governor Gomez, which was made subsequently, was to the effect that as Mr. Santos was not arrested in the province under his jurisdiction, he possessed no knowledge of the reasons for which he was arrested, and that any further inquiries on the subject should be addressed either to the supreme government or to the government of the province in which the arrest was made.[5] Acting upon this response, Mr. Beach addressed a note to Mr. Espinosa, minister of foreign relations, demanding Mr. Santos's immediate release unless positive proof existed of his guilt, and asking the government's aid in the delivery of a letter which he had sent to Mr. Santos and in facilitating the return of the latter's reply.[6]

[1] Mr. Gomez to Mr. Reinberg, January 12, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 6.

[2] Telegram, Mr. Reinberg to Mr. Davis, January 13, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 4.

[3] Telegram, Mr. Davis to Mr. Reinberg, January 17, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 4.

[4] Mr. Reinberg to Mr. Davis, January 20, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 4.

[5] Governor Gomez to the "Consul-General of the United States of North America," January 20, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 7.

[6] Mr. Beach to Mr. Espinosa, January 28, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 10.

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Reply of Ecuador.

Mr. Espinosa answered that although the Government of Ecuador had doubted whether Mr. Santos had retained his "North American nationality," since he was born in Ecuador and had resided there for "six years, more or less," after his return from the United States, it would have been pleased to release him if he had not been "submitted to judgment for his immediate and direct complicity in the hated crime for which he is to be judged;" that the government would no doubt restore him to freedom if, in the course of the proceedings, the proof of his culpability should be dissipated; but that this would not be "easy," since it seemed that "he was taken *in flagrante* on board of a boat that carried arms to the rebels." As to Mr. Beach's request touching communication with Mr. Santos, Mr. Espinosa said that he had ordered the governor of Monabí, in which province Mr. Santos was confined, to facilitate the delivery of Mr. Beach's letter and of Mr. Santos's reply.[1]

Further Action.

Toward the end of January 1885 the U. S. S. *Wachusett*, Commander Mahan, was ordered to Guayaquil in connection with the case,[2] and

[1] Mr. Espinosa to Mr. Beach, January 29, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 10. On February 3, 1885, Mr. Reinberg in a dispatch to the Department of State said: "The Department will easily perceive the various causes which have so far prevented me from giving a specific report on Mr. Santos's case, namely: (1) The want of communication with the prisoner, who has been taken from one place to another since his arrest. (2) The distance, about 150 miles of bad roads, which separate me from the prisoner, and that no mails could be sent there for more than a month, by reason of the northern ports being closed. (3) The pretended ignorance of the local authorities of the charges of the government against Mr. Santos, as officially expressed in their answers to my various dispatches requesting information. (4) The marked desire of the President, who, in this South American republic, is the only judicial authority, and whose desires are always followed, to convict the prisoner, evidence of which is shown in the arbitrary confiscation of Mr. Santos's property."

[2] In an instruction to Mr. Beach of June 17, 1885, Mr. Bayard said: "You will understand that the mission of the *Wachusett* is one of peace and good will, to the end of exerting the moral influence of our flag toward a discreet and mutually honorable solution, and in the event of Mr. Santos being released, to afford him the means of returning to the country of his allegiance and domicil. The purpose of her presence is not to be deemed minatory; and resort to force is not competently within the scope of her commander's agency. If all form of redress, thus temperately but earnestly solicited, be unhappily denied, it is the constitutional prerogative of Congress to decide and declare what further action shall be taken." (H. Ex. Doc. 361, 49 Cong. 1 sess. 49, 53.)

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the consulate-general at Guayaquil was instructed, if necessary, to employ counsel for the protection of the prisoner, and also of his property, which had been seized by the government.[1] The *Wachusett* arrived at Guayaquil on the 9th of February, and on the 10th Commander Mahan called with Mr. Reinberg on President Caamaño and requested Mr. Santos's liberation. President Caamaño, according to Mr. Reinberg's report, "disclaimed on this occasion any executive power," saying that as the seat of government was at Quito, and as he was at Guayaquil "on a visit, the present head of the republic was the vice-president of the republic." President Caamaño, however, "confidentially stated" that Mr. Santos was "an Ecuadorian citizen in accordance with Article II. of the naturalization treaty of 1872 between the United States and Ecuador;" and in proof of this statement said that "Mr. Santos having returned to his native country and established a commercial house at Bahia, and having resided more than six years after his return without having visited the United States during that period, he had lost his rights as an American citizen and was again a citizen of Ecuador." Mr. Reinberg replied that his government considered Mr. Santos as a citizen of the United States, and that Commander Mahan would immediately proceed with the United States consular agent to the port of Bahia for the purpose of taking Mr. Santos's declaration with regard to the character of his residence in Ecuador. The *Wachusett* left Guayaquil on the 13th of February, but as Mr. Santos had then been removed from Bahia to Monte-Christi, proceeded to the latter port, where Mr. Santos's deposition was taken.

Mission of Mr. Flores.

Early in April 1885 Mr. Espinosa informed Mr. Beach that, as the government of the United States claimed to have proofs that Mr. Santos had retained his acquired citizenship, the Ecuadorian Government had accredited Señor Don Antonio Flores as envoy extraordinary and minister plenipotentiary to the United States with a view to arrange the matter in Washington.[2] On

[1] Two resolutions in relation to the case passed the House of Representatives, and one of them, requesting the President to use his efforts to secure a speedy and fair trial and to protect the life and property of the prisoner, also passed the Senate. (H. Ex. Doc. 361, 49 Cong. 1 sess. 12, 16.)

[2] Mr. Espinosa to Mr. Beach, April 9, 1885, H. Ex. Doc. 361, 49 Cong. 1 sess. 18.

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May 5, the day on which the report of this action reached the Department of State, Mr. Bayard, as Secretary of State, telegraphed to Mr. Beach that the United States held Mr. Santos's citizenship to be "fully established and not debatable," and expected "treatment accordingly;" and that the *Wachusett* would soon return to Guayaquil "bearing full instructions."[1] Mr. Flores reached New York on the 13th of May, and announcing his arrival by telegraph, asked that telegraphic instructions be sent to the agents of the United States in Ecuador "to stop any proceedings" in the matter till he should have had an opportunity to be heard. On the following day he solicited an interview with Mr. Bayard, who replied:

"I have the honor to invite you to visit the department tomorrow morning at whatever hour may suit your convenience, after 10 o'clock, here to inspect the instruction and accompanying documents which have been sent to the United States consul-general at Guayaquil.

"Your perusal of these papers will give you the opportunity to telegraph your government of your concurrence in the decision of this Department and to request the trial or release of Mr. Santos. This being done may avoid the presence of a man-of-war of the United States at Guayaquil, and so enable the prompt disposition of the matter, as befits the good relationship of the two countries."[2]

The instructions to the consul-general at Guayaquil, referred to in the foregoing note and in the telegram of May 5, were dated May 1, 1885, and were written and dispatched before it was known that Mr. Flores was coming to Washington.[3] They stated that the United States must hold the question of Mr. Santos's citizenship to be "no longer debatable;" that if charges were brought against him, he was entitled to immediate and full cognizance of them, and an open trial with every opportunity for defense, and if no charges were brought, to immediate release; and that the commander of the *Wachusett*, who had revisited the waters of Ecuador by direction of the Secretary of the Navy for the purpose of delivering the instructions, would remain within reach pending the prompt disposal of the case, and in the probable event of Mr. Santos's release would afford him an opportunity to return to the United States, by way of Panama, should he so desire.[4]

[1] H. Ex. Doc. 361, 49 Cong. 1 sess. 36.
[2] H. Ex. Doc. 361, 49 Cong. 1 sess. 37.
[3] Mr. Porter, assistant-secretary, to Mr. Beach, May 8, 1885, Id. 36.
[4] Id. 30.

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On May 15, 1885, Mr. Flores handed to Mr. Bayard a
of a telegram which, later in the day, was sent, by agree
between them, to President Caamaño. This telegram w
follows:

[Translation.]

"President CAAMAÑO, *Guayaquil:*

"Give permission, at my request, to Santos to come to U
States by next steamer, he binding himself not to conspir
giving written certificate that he has never conspired, wit
touching the question of nationality. Answer 'Agreed,
the question is settled.

"FLORES

Release of Mr. Santos.

The foregoing telegram was sent befor
Flores had inspected the correspondence
proofs in the Department of State, sinc
preferred to take that course. It was delivered to Pres
Caamaño, at Quito, on the 21st of May. It did not res
Mr. Santos's release; but on June 25, 1885, Mr. Flores exhi
to Mr. Bayard a telegram of the preceding day from the
ident of Ecuador, saying: "I have decided to ask from
gress pardon, in order to save Santos. Suspend everyt
and answer."[2] On July 11, 1885, the President of Ecu
"by virtue of a general amnesty, which Congress grant
the recommendation of the Executive," issued a proclam
to give freedom to certain persons, of whom Mr. Santos
one. It seems, however, that he was not released till Jul
when he had undergone an imprisonment of two hundred
twenty-six days, sometimes on shipboard and at other
on land. His arrest took place on December 9, 1884, whe
he alleged, instead of being engaged in the revolutio
movement, he was endeavoring to escape from the scene
disorders. It seems that from time to time an irregular
liminary inquiry was made in respect of the charges ag
him, the result of this inquiry being the collection of ce
papers of which the civil magistrate of Porto Viejo, to w
they were submitted on March 28, 1885, said: "They d

[1] The Spanish text of the telegram was as follows: "Presidente Caa
Guayaquil: Dé usted permiso á Santos por solicitud mia para venir E
Unidos por próximo vapor comprometièndose él á conspirar y da
certificado escrito de que nunca ha conspirado sin tocar cuestion na
lidad. Conteste 'Convenido,' y cuestion arreglada.—Flores."

[2] H. Ex. Doc. 361, 49 Cong. 1 sess. 53.

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deserve the name of papers connected with a preliminary examination, since they lack the legal requisites, either because they were drawn up by incompetent authorities or were mere copies of other documents." On these papers, however, he was held for trial, but no sentence of conviction or acquittal was ever pronounced. He and his family were personal friends of General Alfaro, in whose interest the revolution was begun.

Question of Citizenship.

The question of citizenship hung upon the the terms of the naturalization treaty between the United States and Ecuador of May 6, 1872. By this treaty (Article I.) each of the contracting parties is obliged to "recognize as naturalized citizens of the other those persons who shall have been therein duly naturalized, after having resided uninterruptedly in their adopted country as long as may be required by its constitution or laws." The treaty then provides as follows:

"ARTICLE II.

"If a naturalized citizen of either country shall renew his residence in that where he was born without an intention of returning to that where he was naturalized he shall be held to have reassumed the obligations of his original citizenship and to have renounced that which he had obtained by naturalization.

"ARTICLE III.

"A residence of more than two years in the native country of a naturalized citizen shall be construed as an intention on his part to stay there without returning to that where he was naturalized. This presumption, however, may be rebutted by evidence to the contrary."

It was upon these two articles (II. and III.) that Ecuador claimed Mr. Santos as a citizen. In support of this claim it was urged (1) that as Mr. Santos had since his naturalization in the United States "resided six years continuously in the country of his birth," which was "also that of his parents, of his whole family, and the domicil of them all," he must be regarded "as *prima facie* a citizen of Ecuador" until that presumption should be destroyed "by evidence to the contrary;" (2) that he had owned, and still owned, "together with other members of his family, landed property in Ecuador," without having given any evidence of an intention to alienate it; (3) that he had been "at the head of a commercial house in Bahia," and that although it was said he had since 1881 desired to

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found another in New York, the fact that he had for
years failed to do so indicated that the plan was either v
and uncertain or incapable of realization; (4) that his inte
to remain in Ecuador was shown by a letter of his bro
written in New York July 17, 1881, saying: "I have res
to settle here; Julio and Antonio will supply my pla
Bahia;" (5) that he possessed "a dwelling house or resid
in Bahia, a permanent abode;" (6) that he had accepted
the Government of Ecuador an office, though by the con
tion of the country only citizens could be "public func
aries;"[1] and finally (7) that he took an active part "i
last revolution, until he was arrested, with arms in his h
heading a party of rebels, as the official report of Co
Modesto Burbano declares."[2]

On the other hand, in support of Mr. Santos's retenti
his United States citizenship, it was stated that he was
in Ecuador in 1852; that in 1865, at the age of 13, he ca
the United States to be educated; that he remained he
a student at various schools, till 1871, when, on the dea
his father, he returned to Ecuador; that after a visit o
months, during which his father's estate was settled, he
back to the United States, and continued his studies a
University of Virginia, where in 1873 he took the degr
civil engineer; that in the following year he became a ci
of the United States, and won by competitive examinat
place in the Coast Survey, of which, however, he fail
avail himself, owing to his making a two months' visit t
mother in Ecuador; that after his return to the United S
he became an assistant professor in the University of Virg
remaining there till 1878, when he assumed the professo
of chemistry in the Medical College of Alabama, at Mo
that in 1879 he resigned and went to Ecuador, not with a
tention of abandoning the United States, but upon the u
entreaties of his mother, with the design of putting her a

[1] In support of this statement the following evidence was adduced
appears from the statement made by Julio R. Santos under oath on
July last, at Porto Viejo: (1) That he accepted the place of treasu
the funds of the Cis-Andine road, and (2) that in order to enter up
performance of the duties thereof he gave the bond with security re
by law. This security was accepted by the treasury board Octob
1884."

[2] Mr. Flores to Mr. Bayard, August 6, 1884, H. Ex. Doc. 361, 49 C
sess. 61.

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in order; that he subsequently entered into a partnership with his brothers in a commission house, one of the inducements being that he was to have charge of a branch house which it was their intention to establish in New York; that early in 1884 arrangements were actually made to establish the branch house in New York, but that owing to family considerations one of his brothers went out to open it; that during all this time he had "not a floating or indistinct intention but a fixed purpose" to return to the United States; that when he left Ecuador he was too young to know anything of its politics or revolutions; and that he never afterward "took any part whatever in any political matters in Ecuador, either municipal, national, or revolutionary," and, though General Alfaro had been a friend of his parents, and had been personally kind to him, never was a "partisan" of his, nor gave any aid or comfort to his revolutionary movement in 1884.[1]

Convention of Arbitration.

After various negotiations, which it is unnecessary here to detail,[2] a convention was concluded at Quito on February 28, 1893, for the submission to arbitration of "the claim presented by the Government of the United States against the republic of Ecuador, in behalf of Julio R. Santos, a native of Ecuador, and naturalized as a citizen of the United States in the year 1874, the said claim being for injuries to his person and property, growing out of his arrest and imprisonment by the authorities of Ecuador, and other acts of the said authorities in the years 1884 and 1885." Provision was made for the submission of cases and evidence; and it was stipulated that the decision of the arbitrator should embrace the following points:

"(*a*) Whether, according to the evidence adduced, Julio R. Santos, by his return to and residence in Ecuador, did or did not, under the provisions of the treaty of naturalization between the two governments, concluded May 6, 1872, forfeit his United States citizenship as to Ecuador, and resume the obligations of the latter country.

"(*b*) If he did not so forfeit his United States citizenship, whether or not it was shown by the evidence adduced that

[1] The foregoing allegations are taken from an affidavit made by Mr. Santos in 1895, but this affidavit merely summarizes the statements made by him in 1885, which were supported by the affidavits of various persons in the United States and in Ecuador.

[2] See Mr. Bayard to Mr. Walker, May 19, 1888; Mr. Rives to Mr. Walker, September 18, 1888; Mr. Foster to Mr. Mahany, December 19, 1892: MSS. Dept. of State.

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Julio R. Santos has been guilty of such acts of unfr
and hostility to the Government of Ecuador as, und
of nations, deprived him of the consideration and
due a neutral citizen of a friendly nation."

In case either of these points should be decided i
the contention of Ecuador, it was stipulated that th
ment should be free from all responsibility. If, on
hand, the arbitrator should decide both points against
he was required to make an award of such damag
Santos's injuries and losses as might be just and eq

Settlement of the Claim.

The convention was duly ratifie
case of the United States was prep
the decision of the legal points at
dispensed with.[2] In dispatches of April 9, 11, and

[1] H. Ex. Doc. 86, 53 Cong. 3 sess., contains the text of the
and a letter from the Acting Secretary of the Treasury of
1894, transmitting to the Speaker of the House of Repres
estimate of $5,000 for carrying the convention into effect.

[2] The case of the United States was signed by Messrs. Calde
and Samuel Maddox, counsel for Mr. Santos. A place was
signature of the agent of the United States, but, owing to th
the matter was terminated by an arrangement, no agent was
In discussing the construction of the provisions of the na
treaty between the United States and Ecuador, as above quo
tion to the loss of acquired and the resumption of original
counsel quoted from the instructions of Mr. Bayard to Mr. Bea
1885, the following passage: "It is part of the sovereignty of
to prescribe the terms on which the allegiance of its own citiz
acquired and preserved. In the treaty with Ecuador the U
waive a part of such right of decision by admitting that two
dence in Ecuador may create a presumption that their citize
remain there. By stipulating for the right of rebuttal evid
point of intention, the United States wholly and absolutely
right of deciding as to the status of their citizens in a given
right is not transferred in any part to Ecuador; it is to be res
sively by the United States as an attribute of their soverei
Ecuador can not meet that reserved right by any mere denial
ciency of the rebutting evidence which may be satisfactory to
States. The only privilege of surrebuttal which might rem
Ecuador would be to show that the party had done some act
overt, voluntary, and positive renunciation of his United Sta
ship of which the laws of Ecuador take cognizance or whic
prescribe as a condition to the acquisition or recovery of Ecu
izenship. In other words, no surrebuttal is admissible as to
must rest on the full ascertainment of legal fact." (H. Ex. Doc. 3
1 sess. 30.) The Government of Ecuador did not admit this c
of the treaty. On the contrary, it maintained its right to pa
the decision of the question of Mr. Santos's intent with re

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Mr. Tillman, minister of the United States at Quito, reported that an attempt was making to settle the claim. He stated that he had received from the minister of foreign affairs of Ecuador a copy of a telegram from General Alfaro, governor of Guayas, submitting terms of settlement suggested by the claimant. The telegram declared that the terms were subject to the ratification of the minister of the United States at Quito, and that the payments would be made to the Department of State at Washington. Mr. Tillman asked to be instructed whether he should approve any settlement which the claimant might make with the Government of Ecuador, provided that the payments were made to the Government of the United States.[1]

The terms of the proposed settlement were further explained by a letter which Mr. Tillman, after writing the foregoing dispatch, received from Mr. Santos. In this letter, which was dated at Guayaquil, April 6, 1896, Mr. Santos stated that he had been in communication with General Alfaro as to a basis of settlement, and had proposed the appointment of an impartial person to fix the amount of indemnity to be paid by the Government of Ecuador; that, in view of the exhausted condition of the treasury of the country, he had also proposed that the amount so fixed should, with interest at 6 per cent per annum, be paid in two, three, or four installments, as best suited Ecuador, the payments, beginning June 30, 1897, to be made to the United States by the representative of Ecuador in Washington; that General Alfaro had accepted these terms "in a general way," and had proposed Dr. Rafael Polit, a well-known lawyer of Guayaquil, as referee; that, as a "special deference to General Alfaro," he proposed to claim only $110,000, as stated in his "declaration," with interest at 6 per cent and lawyers' fees;[2] but that it was his intention to leave the matter in the hands of Mr. Tillman, and not to deprive it of its

residence in Ecuador, Mr. Flores in a note to Mr. Bayard of August 6, 1885, saying: "My government has thought that in the matter of a treaty to which Ecuador was a party, any doubt concerning its interpretation ought to be settled by common accord, and that if this were impossible, the honorable example set by the United States themselves ought to be followed, namely, of submitting the points to arbitration." (Id. 67.) This course the United States, as has been seen, finally took. Two copies of the case of the United States were sent to its diplomatic representative at Quito, October 29, 1895, for the legation files.

[1] For. Rel. 1896, 102.

[2] The "declaration" referred to by Mr. Santos was his sworn statement made in Washington, June 28, 1895, in which he estimated his "actual

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diplomatic character.[1] Mr. Tillman took the ground that wh
there could be no objection to an agreement between the Ec
dorian authorities and Mr. Santos as to the amount to be pa
subject to the approval of the United States, yet that the ter
of settlement should be submitted to the arbitrator and
bodied in his award.

Prior to receiving this correspondence, Mr. Olney, as Sec
tary of State, had instructed Mr. Tillman to ask for the forn
acceptance of the arbitrator by Ecuador and the prompt s
mission of the case, as provided by the convention.[2] This
struction referred to the delays which had taken place in
selection of an arbitrator. The convention provided that
diplomatic representative of Great Britain at Quito, or
successor, should, with the consent of his government, act
arbitrator, and that in case of his failure or that of his s
cessor to act, he or his successor should be requested to na
an arbitrator, who should not be a citizen either of the Uni
States or of Ecuador. When the designation of the arbitra
came to be considered, Mr. Mallet, the British representati
was expecting soon to leave Quito, and the time of the arri
of his successor was uncertain. Mr. Mallet therefore p
ceeded to name an arbitrator, but the person so designa
declined to act,[3] and when Mr. Mallet's successor, Mr. Jon
arrived, no arbitrator had been appointed. Mr. Tillman w
then instructed to urge the new British minister to make
immediate appointment, and on February 14, 1896, he repor
that Mr. Jones had nominated Mr. Alfred St. John, Brit
consul at Callao. Mr. Tillman then sought from the Ec
dorian Government a formal acceptance of Mr. St. John
arbitrator, which was at length accorded.[4]

losses in property," in consequence of his arrest and unlawful treatm
at $111,247.15, and said: "In view of the actual losses in property
above shown [in the statement in question] and of the destruction
valuable business and the reasonable profit to be expected therefro
do not consider that the sum of $250,000 would fairly compensate
without including therein any allowance whatever for the hardship
suffering inflicted on me during two hundred and twenty-six day
imprisonment."

[1] For. Rel. 1896. 103.

[2] Mr. Olney to Mr. Tillman, telegram, April 7, 1896, For. Rel. 1896, 10

[3] The convention made no provision for the payment of compensatio
the arbitrator. By the deficiency act of March 2, 1895, however, an ap
priation of $5,000 was made for the payment of the expenses of the a
tration. (28 Stats. at L. 844. See Mr. Tillman to Mr. Olney, Januar
1896, and Mr. Olney to Mr. Tillman, February 11, 1896, MS.)

[4] For. Rel. 1896, 104.

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Mr. Tillman's dispatches of April 9, 11, and 20, 1896, reporting the efforts of Mr. Santos to effect a settlement with the Ecuadorian authorities, were duly received by the Department of State, and on the 18th of May Mr. Olney replied that the department was disposed to accept the suggested arrangement, namely, (1) that the Government of Ecuador should formally accept Mr. St. John as arbitrator, and (2) that the facts and amount of indemnity agreed upon by the parties should be submitted to the arbitrator as the basis of his award. But he added: "The department does not anticipate objection on the part of the arbitrator to adopt the facts and amount of indemnity which are satisfactory to the contesting parties, but is of opinion that our government is not entitled to join with Ecuador in dictating to the arbitrator what his award should be. Should he demand evidence, in conformity with the provisions of the treaty, he would have the right to withhold the award until the evidence was produced."[1]

Meanwhile negotiations were proceeding for the settlement of the claim. General Alfaro, now become supreme chief of the republic, designated Dr. J. C. Roca, cashier of the Agricola Bank, of Guayaquil, to adjust the terms with Mr. Santos; and on June 5, 1896, Mr. Tillman received from the minister of foreign affairs a copy of an agreement between Dr. Roca and Mr. Santos, together with a letter from the minister of foreign affairs to Mr. St. John, stating that Ecuador deemed the amount agreed upon to be equitable. This letter, together with the agreement and a schedule of losses and injuries, Mr. Tillman, in compliance with the request of the minister of foreign affairs, transmitted to Mr. St. John through the minister of the United States at Lima, with a note stating that the United States was willing that the agreement should be made the basis of the award.

Arbitrator's Award.

On September 22, 1896, Mr. St. John inclosed to Mr. Tillman his award, which incorporated the terms of the agreement. The text of the award was as follows.[2]

"The undersigned, nominated arbitrator in conformity with section 2 of Article II. of the convention between the United States and the Republic of Ecuador, concluded in Quito on the 29th of February 1893, to decide the claim of Mr. Julio R. Santos against the Government of Ecuador on account of the

[1] For. Rel. 1896, 108.

[2] Id. 109.

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acts done by the authorities of the Republic of Ecuador
years 1884 and 1885, in view of the transaction which i
sented and that has intervened between Mr. Julio R. S
and the special agent of the Ecuadorian Government,
approved by said government and the representative
United States at Quito, and in which they solicit that
may be pronounced judgment in favor of the claimant f
sum of $40,000 gold, payable by installments semiann
without interest, decides that the government of Ecuador
pay to the government of the United States in four semia
installments of $10,000, the sum of $40,000 gold of the U
States without interest, the first dividend to be paid w
sixty days, counting from the first session of the Congr
Ecuador subsequent to the notification of this judgme
conformity with section 2 of Article V. of the above-ment
treaty of 1893."

"Section 2 of Article V." of the convention, referred
the arbitrator, provided: "Should a pecuniary indemni
awarded, it shall be specified in the gold coin of the U
States, and shall be paid to the government thereof w
sixty days after the beginning of the first session of the
gress of Ecuador, held subsequent to the rendition o
award, and the said award shall bear interest at 6 per ce
from the date of its rendition." It may be observed tha
agreement of the parties waived (1) the payment of the
of the indemnity at once, and (2) the payment of intere
the amount awarded.

The Congress of Ecuador, at its first session after the r
tion of the award, ratified it by a special act.[1]

[1] Mr. Tillman to the Department of State, March 25, 1897, MS

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CHAPTER XXXVI.

CASES OF THE "GEORGIANA" AND THE "LIZZIE THOMPSON": CONVENTION BETWEEN THE UNITED STATES AND PERU OF DECEMBER 20, 1862.

The Vivanco Insurrection.

The series of disorders with which Peru was afflicted after the establishment of her independence of Spain was formally ended April 20, 1845, when Gen. Ramon Castilla was elected constitutional president. Ten years of tranquil prosperity followed, interrupted only by the brief hostilities by means of which General Castilla, after having voluntarily resigned the presidency, overturned the unpopular government of his successor, General Echenique, and himself resumed the exercise of the executive power. For nearly two years after this event peace reigned again. But on the evening of October 31, 1856, a revolt occurred at Arequipa, a city in the southern part of Peru, about ninety miles from the coast. A few half-castes, it is said, led by two young men of good position, took possession of the city, and were joined by the local troops, who were for the most part natives of the place. Next day the insurgents declared General Vivanco, who had been an unsuccessful aspirant for political power, to be president. He arrived from Chile in December. Meanwhile the insurrection had made no progress on land, but it had secured essential aid in the revolt of the fleet, which consisted of the *Apurimac*, a frigate, and two small steamers called the *Loa* and the *Tumbes*. On November 16, 1856, the crew of the *Apurimac*, while the captain was at luncheon ashore, mutinied under the lead of one of the lieutenants named Montero, and proceeded to Islay,[1] where, being joined by the *Loa*, they took possession of the city.[2] On these two vessels and the *Tumbes*, which had joined them, Vivanco

[1] The seaport of Arequipa.

[2] Markham, History of Peru, 349.

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embarked his troops, about two thousand in number, took p
session of the Chincha Islands, for the purpose of availing h
self of the guano deposits there, and then proceeded to Call
He did not, however, at first attempt to land, but decided
make a voyage to the northward in the hope of gaining s
port. He proceeded to Huanchaco, about three hundred a
fifty miles from Callao, and occupied the neighboring town
Trujillo, seven miles away. He subsequently occupied in a
cession San Pedro, Lambayeque, and Piura, but he generall
met with a cold reception. In March 1857 General Castilla
Lima with about 1,000 men, and by the latter part of the mo
was near Trujillo. Vivanco retired first to San Pedro,
then to Lambayeque. He next abandoned Piura, and be
closely pressed, escaped to his ships and proceeded southwa
On April 22, 1857, he landed at Callao, expecting to take t
city and Lima, Castilla being with his troops about seven h
dred miles distant. The people of Callao, however, under
command of leading citizens, repulsed him with such loss t
he retreated to Islay, and then to Arequipa, where he remai
The *Tumbes* and *Loa* returned to obedience to the governm
in May 1857; but the *Apurimac*, under the command of G
aral Rivas, after landing Vivanco at Islay, ran from port
port in the south, wherever there were no government for
Rivas, assuming to be collector of customs, commandant-g
eral of marine, secretary of the treasury, superior chief of
south, etc., administered the affairs of whatever port he l
pened to be in and sold guano, protecting the purchasers in
loading of it. He finally established himself at Iquique.

In October 1857 the national convention of Peru, being t
in session and desiring to bring the revolt to a peaceful c
clusion, authorized the council of ministers to send comm
sioners to negotiate with Vivanco for the pacification of
country. The persons first chosen for the mission declined
accept it, but commissioners were subsequently appointed
Marshal San Roman on the part of the government, and
Vivanco on the part of the insurgents, and the good office
the Chilean minister were accepted as mediator. These p
ceedings, however, seemed to encourage Vivanco, and the g
ernment decided to bring the revolt to a close. Cast
proceeded south, landed at Arica, and cut off communica

[1] Mr. Barreda, Peruvian minister, to Mr. Seward, Sec. of State, Apr
1861. (MSS. Dept. of State.)

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between Arequipa and Islay. On March 7, 1858, he took Arequipa. Vivanco escaped in the guise of a friar, Castilla conniving at his departure. This brought the insurrection to an end. Mr. J. Randolph Clay, then minister of the United States at Lima, declared that Vivanco's conduct had from the beginning been weak and indecisive, and that his abandoning his partisans at Arequipa showed that he was wanting in firmness.[1]

The "Georgiana" and the "Lizzie Thompson."

On January 24, 1858, two American vessels, the ship *Lizzie Thompson*, of Kennebec, Maine, H. A. Wilson, master, and the bark *Georgiana*, of Boston, Stephen Reynolds, master, were respectively seized at Pabellon de Pica and Punta de Lobos, while engaged in loading guano, by the steamer *Tumbes*, which had, as we have seen, more than seven months previously returned to obedience to the government. It seems that the two vessels went to Iquique from different points in the regular course of trade, and that when they arrived there they found the port under the administration of General Rivas. After discharging their cargoes the *Lizzie Thompson* was chartered by the French consular agent at Iquique to load guano at Pabellon de Pica, and the *Georgiana* by a Mr. Ossa for account of Lequellec & Bordes, of Valparaiso, to load guano at Punta de Lobos. They received licenses and were cleared at the custom-house for that purpose. They commenced loading only a few days before their seizure. It was stated that there were officers and soldiers of the Vivanco party at both places; that a small armed steamer was generally at anchor there, and that the *Apurimac* paid an occasional visit. At the time of the seizure of the two American vessels there were three Chilean vessels engaged in taking guano either at Pabellon de Pica or at Punta de Lobos. They also were seized, and together with the American vessels were taken to Callao in charge of officers and men from the *Tumbes*. Arriving at Callao on the 29th of January, the masters and their vessels were ordered for trial before the collector, as judge of contraband and confiscations, by a decree of the council of ministers of January 3.[2]

Protest of Mr. Clay.

Against the proceedings in respect of the two American vessels, Mr. Clay at once protested. Mr. Zevallos, the Peruvian minister for foreign affairs, replied that "the arrest and imprisonment

[1] Mr. Clay to Mr. Cass, Sec. of State, March 26, 1858, MS.
[2] Mr. Clay to Mr. Cass, February 12, 1858, MS.

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of the aforesaid individuals and the capture and embarg
those vessels were caused by the vessels having been surpr
at Punta de Lobos and Pabellon de Pica in the criminal
scandalous contraband of guano, in contravention of the fi
laws, commercial regulations, and coasting ordinances wl
severally prohibit foreign vessels not only such illicit tr
but even access to the ports, landings, and guano depo
without a special permit from the government under the pe
ties there enacted—penalties which, in addition to the
part, extend to personal punishment against the perpetra
of such offenses."[1] Mr. Clay declined to admit this reply.
argued that the only valid ground of seizure under the reve
laws was jurisdiction, and that possession of the place wl
jurisdiction was exercised was essential. For nearly two y
Peru had, he said, been in a state of civil war. The part
opposition to the government at Lima had appropriated
tangible and available property of the nation as a mean
carrying on the war, had issued "vales," or bonds, and
seized upon the public moneys in the custom-houses. Th
had been alternate clearances at the custom-houses, first
one party and then by the other, whichever happened to b
possession. The revolutionary party had jurisdiction a
government *de facto* over the territory it held, the jurisdic
of the government at Lima being for the time and p
divested. The masters of the vessels had no right to ques
the authority of the local government.[2] In this relation
Clay contended that the Vivanco party had in fact been re
nized as belligerents by the government at Lima. Refer
to the efforts which had been made to negotiate with Viva
he said it was evident that the revolutionary leader and
adherents had been and still were recognized by the gov
ment at Lima as a belligerent party, entitled to all the ri
of war within the territory and jurisdiction of Peru, whe
as regarded the citizens of the country or those of for
nations. Indeed, Mr. Clay intimated that were he not
strained by motives of delicacy, he might go further
advert to the circumstance that both the government at L
and the opposition at Arequipa professed to be *provisiona*
to hold power till a direct appeal should be made to the pe
through a presidential election. This intimation was mad

[1] Note to Mr. Clay, February 3, 1858, MS.
[2] Mr. Clay to Mr. Zevallos, February 9, 1858, MS.

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Mr. Clay two days after Vivanco's flight from Arequipa, but before news of that event had reached Lima.[1]

In May 1858 the *Georgiana* and the *Lizzie Thompson* were both condemned by the lower courts. Mr. Clay reported that no appeal was taken because the attorney for the claimants had "positive information" that the decision of the supreme court would be adverse.[2] Mr. Clay made a demand upon the government for redress to the amount of $155,714.35, the sum of $109,632.82 being demanded on account of the *Lizzie Thompson*, and $46,353.53 on account of the *Georgiana*.[3] On the 6th of November both vessels were sold at public auction on the order of the collector of Callao, acting as judge of confiscations.[4]

Correspondence at Washington.

While these things were taking place at Lima a correspondence was in progress at Washington, in which the grounds of the Peruvian Government's action in seizing and condemning the vessels were more fully disclosed. In a note to Mr. Cass, of March 27, 1858, Mr. Osma, the Peruvian minister, set forth the case of his government.[5] The guano deposits at Punta de Lobos and Pabellon de Pica were, he said, the property of the republic of Peru. In the volume of Commercial Relations of the United States for 1856 there would be found an exact description of them, showing their locality and extent. By the same publication it appeared that the commercial regulations of Peru, promulgated in 1852, provided that vessels should take in guano for foreign ports only in the Chincha Islands (article 15); that the exportation of guano should be carried on only by vessels under contract with the government or its agents (article 114), and that vessels found at anchor on the coasts of other islands with guano on board should be confiscated and their captains and crews tried as for theft (article 113). By decrees of the government of Peru of January 14, March 21,[6] and May 10, 1842,[7] which were still in force and which, out of abundant caution, were reprinted in the official paper of February 27, 1857, it was provided that no guano

[1] Mr. Clay to Mr. Zevallos, March 9, 1858, MS.
[2] Mr. Clay to Mr. Cass, May 26, 1858, MS.
[3] Mr. Osma, Peruvian minister, to Mr. Cass, August 18, 1858, MS.
[4] Mr. Clay to Mr. Cass, November 11, 1858, MS.
[5] S. Ex. Doc. 69, 35 Cong. 1 sess.
[6] Br. and For. State Papers, XXXI. 1097.
[7] Id. 1101.

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should be taken for exportation to foreign ports except
the northern island of the Chincha group; that the cus
houses, except that at Callao, should refuse clearances to
sels intending to export guano; that Peruvian or foreign ve
at anchor at places where guano was found, without per
from the authorities empowered to grant them, should be li
to confiscation, and that vessels engaged in violating the
relating to the taking of guano should be seized and
masters and crews brought to trial for engaging in contra
trade. Lastly, on April 1, 1857, the national convention o
republic promulgated a decree, which was published in th
ficial paper of the following day, and which contained
following provision:

"That all the guano exported and thereafter to be expo
from the Chincha Islands or from any other deposit of Per
disturbers of the public order or by virtue of contracts n
with them or with their agents shall at all times be subje
be claimed back as stolen national property, and the pa
responsible therefor shall be civilly and criminally prosec
in conformity with law."

Having thus set forth the laws under which the vessels
seized, Mr. Osma next discussed the situation in Peru at
time of their seizure. The principle that a civil war mi
in certain cases, confer belligerent rights on the conten
parties and the rights of neutrals on those trading with th
was, he declared, inapplicable to the present case; and in
event the individual citizens of friendly nations could
determine those questions for themselves. It was neces
for the Government of the United States officially to recog
a state of civil war in Peru and declare their neutrality the
before their citizens could avail themselves in Peruvian t
tory of the rights of neutrals in a belligerent country. W
the United States had happily escaped domestic revolu
they must perceive how dangerous would be the doctrine
the bare fact that the chiefs of an insurrection had po
enough temporarily to hold possession of property of
nation within its territory, authorized the citizens of o
nations to deal with them at once as the owners of what
thus held. Vivanco, the leader of the insurrection, held at
time only the city of Arequipa. The *Apurimac* "went crui
about the coast * * * bombarding towns, depredat
stealing, and selling the guano belonging to the nation,
protecting the vessels then loading in its robbery." Nei

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Vivanco nor his government had by any public act pretended to repeal the decrees and regulations touching the guano trade; and at the time of the seizure all communication had in fact ceased between Vivanco, Iquique, and the *Apurimac* and its officers. They had no more than the shadow of a *de facto* government at Punta de Lobos and Pabellon de Pica. It was remarkable, continued Mr. Osma, that this fact had not impressed itself on Mr. Clay when a vessel of so small tonnage as the *Tumbes* could, without resistance, take possession of the vessels that were found there, and thus assert and maintain the jurisdiction of the lawful government. If possession *de facto* was the only criterion of jurisdiction, must not the act of the *Tumbes* be considered in that light?

To the note of Mr. Osma Mr. Cass replied on the 22nd of the following May, maintaining substantially the same positions as had been advanced by Mr. Clay. Mr. Cass argued that at the time of the seizures a civil war was raging in Peru, a condition "which conferred upon the *de facto* rulers the right to govern such portions of the country as they were able to reduce to their possession." "It is the duty of foreigners," said Mr. Cass, "to avoid all interference under such circumstances, and to submit to the power which exercises jurisdiction over the places where they resort, and while thus acting they have a right to claim protection, and also to be exempted from all vexatious interference when the ascendancy of the parties is temporarily changed by the events of the contest." The application of this principle was to be determined on the circumstances of each case, and it applied to the situation in Peru. The negotiations with the military and naval officers at Arica, belonging to the revolutionary party, by direction of the government at Lima, clearly indicated the opinions of both parties. The terms in which the negotiations were conducted, and the acceptance by the commissioners, which was ratified by the council of ministers, of the offer of submission made by the revolutionary chiefs, fully recognized a state of civil war.

The United States must, continued Mr. Cass, also dissent from the position of Mr. Osma that some act of recognition by a foreign government was requisite before its citizens could claim the protection due them in a state of civil war. Peru was already a member of the family of nations, duly recognized as such. Her intestine difficulties arose out of an effort to change the administration of the government, which was a

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matter of purely domestic concern, not touching foreign p
ers, unless in the progress of the contest their interests w
brought in question. The Government of the United Sta
"had permitted the diplomatic intercourse of the two co
tries to continue unchanged, as a measure demanded by th
mutual interests and not as an acknowledgment of the pret
sions of either of the rival parties." No question had arisen
to blockade, visitation and search, or the exercise of other l
ligerent powers, to call for the formal recognition of a state
civil war. In the United States no solemn proceeding, eitl
legislative or executive, had been adopted for the purpose
declaring the status of an insurrectionary movement abro
and of determining whether it was entitled to the attribu
of a civil war, unless, indeed, in the formal recognition o
portion of an empire seeking to establish its independen
which was not the case in Peru. Whether, in the pres
instance, a civil war was prevailing in Peru, was a question
fact to be determined by the proofs.

Mr. Cass further contended that it mattered not whether t
American captains were duly informed of the true state of thi
in Peru; ignorant or informed, their rights and duties were p
cisely the same. They had a right to enter any port of the rep
lic open to foreign commerce and not blockaded, for the pro
cution of their commercial enterprises; and it was their du
after such entrance to obey the authorities they might fi
established there. It also belonged to such authorities
determine "questions of internal administration touching t
public revenue." The views, therefore, which Mr. Osma p
sented as to the laws of Peru for the regulation of the tra
in guano, had no practical connection with the case of t
two American vessels. "The true construction of these reg
lations," said Mr. Cass, "their repeal or suspension, or mo
fication or application, are questions of administration to
determined by the existing administrative power, to wh
decision foreigners must submit. When the revenue offic
at Iquique, acting under the authority of the *de facto* gove
ment, gave the necessary permission for the purchase of gua
at the places indicated, then subject to the authority of th
government, the American captains had the right to rep
thither and to take that article on board their vessels
freight, in conformity with the provisions of their char
parties; and the transfer of the possession of these pla

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while the vessels were engaged in this employment could justly work no forfeiture for acts previously done under these circumstances, nor subject the officers or crew to punishment. The United States recognize no pretension for such interference, but hold on to the stipulations of the treaty with Peru, which guarantees protection to their citizens without regard to whatever changes, violent or peaceable, may take place in the government of that country."

In response to Mr. Osma's inquiry whether, if *de facto* possession was the criterion of jurisdiction, the possession established by the seizure of the vessels was not in point of law a just and lawful ground for the seizure, Mr. Cass said:

"This question admits of a satisfactory answer and a brief one. While contending parties are carrying on a civil war, those portions of the territory in the possession of either of them become subject to its jurisdiction, and persons residing there owe to it temporary obedience. But when such possession is changed by the events of the war, and the other party expels its opponents, the occupation it acquires carries with it legitimate authority and the right to assume and exercise the functions of the government. But it carries with it no right, so far, at any rate, as foreigners are concerned, to give a retroactive effect to its measures and expose them to penalties and punishments, and their property to forfeiture, for acts which were lawful and approved by the existing government when done. If the government at Lima had taken forcible possession of the places where the two American vessels were at anchor, and had established its authority, it would then have been entitled to demand that such authority should be recognized and obeyed, and to enforce it, if necessary, so far as might regard all transactions occurring during such occupation without, however, affecting existing rights. The principle is clear, but it does not appear that the circumstances called for its application. No possession of any portion of the territory in question seems to have been taken by the *Tumbes*. It is admitted, indeed, that the vessel exercised no jurisdiction 'on shore.' She sailed into the small ports 'garrisoned' by the other party, and in the absence of its two armed vessels, and made 'capture' and 'seizure' of the American vessels, and then, for aught that appears, abandoned the position and left the adverse jurisdiction as she found it. This is no rightful proceeding under any circumstances attending a civil war, and still less under the circumstances under which it took place. The cutting out of these vessels resembles a piratical enterprise rather than the exertion of a legitimate power against the property of a friendly nation under the authority of an established government."

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Opinion of Attorney-General Black.

With his note of May 22 Mr. Cass co
nicated to Mr. Osma an opinion of Atto
General Black[1] on the subject of the c
spondence. In stating as the foundation of his opinio
facts of the case, Judge Black said that the vessels in que
procured at Iquique "a regular clearance and license a
custom-house to load with guano at certain points on the
where that article is found;" that it was not alleged that
clearance and license" were "unlawful in form or substa
that the "whole objection" to the papers was founded o
fact that the authorities who issued them "held their o
not under the authority of the supreme government of
but by appointment from Vivanco, a revolutionary chie
had taken arms against it." But at the date of the li
"the so-called revolutionary party had," said Judge B
"full possession of the port of Iquique, of the guano dep
and the whole country southward to the Bolivian line,
"when the Americans went there they found a govern
organized and its officers performing the functions which
tained to the execution of the local laws."[2]

[1] May 15, 1858, 9 Op. 140.

[2] In this statement of facts certain allegations in Mr. Osma's not
to have been overlooked. Mr. Osma expressly argued that as the l
Peru restricted the loading of guano by foreigners to certain of the C
Islands, the vessels in question "were met at points interdicted, no
without permits from the lawful authorities of the republic, but in t
also of doing that which, under the laws, no authority of the govern
however legal it may be, can lawfully allow." He also contended th
charters of the vessels were unlawful, saying: "While the pretende
mits granted by the pseudocommander of the navy, Don Félipe
under which the captains would now take refuge, merely authorize
'to proceed south to take in guano,' neither of the charter parties
mention of any point south; but on the contrary the contract wi
Lizzie Thompson grants the privilege to the charterer of naming any
ports of Peru, provided that it be not one more to the north of C
and therefore embracing the Chincha Islands. Again, the contract
Georgiana gives to the freighters a free choice of any of the ports
whole coast of Peru, north as well as south. An irresistible conseq
from these facts is that neither the charterers nor the chartered vesse
any intention of confining themselves to the southern ports, where
there was the least shadow of an authority *de facto* standing in oppo
to the government of the nation, whilst it was evident that the ca
had lent themselves to the schemes of the insurrectionists and had
in accompliceship with them to defraud the treasury of the rep
ready as they were to carry out their project, wherever the most in
and least dangerous opportunity might offer."

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On this statement of facts Judge Black argued, first, that where one nation is at war with another the conquering party has the right to declare the law of the conquered territory so long as his occupation of it continues. Thus it was held that the island of Santa Cruz when held by the British was to be treated in prize cases as a British island.[1] Likewise, Castine was treated in respect of the revenue laws as foreign territory when held by the British during the war of 1812.[2]

These principles, said Judge Black, applied equally to the case of a civil war, even where "the rebellion is but partially successful * * * . A revolutionary party, like a foreign belligerent power, is supreme over the country it conquers as far and as long as its arms can carry and maintain it." The parties to a civil war were "to be regarded for the time as distinct political societies;"[3] they could each claim "the same rights of asylum, hospitality, and intercourse with other nations;"[4] captures by their lawfully commissioned ships were equally valid;[5] each was to be regarded as a belligerent nation possessing sovereign rights of war.[6] The existence of civil war in Peru was "admitted by the present government of that country," was "known to the whole world," and could "not be denied." The American vessels "did nothing to compromise their own neutrality or that of the flag under which they sailed. Keeping themselves within the limits of a trade lawful and fair in its character, they had a right to be protected when they obeyed the regulations which they found established and in force at the place. To give them this right it was not necessary that the government of their own country should have previously known and recognized the existence of the civil war." In one respect, however, Judge Black qualified his opinion as to the possession of full sovereign rights by a rebellious party, even where it was "but partially successful." "I am not required," he observed, "for any purpose of this case, to say how far a revolutionary party can carry on a war upon the ocean and vex the commerce of the world upon its common highway. It has been doubted whether a mere body of rebellious men can thrust itself among the family of nations and

[1] 9 Cranch, 191.
[2] 4 Wheaton, 246; 1 Gallison, 501.
[3] Vattel, Book III. ch. 18, sec. 293.
[4] 3 Wheaton, 643.
[5] 7 Wheaton, 337.
[6] Ibid.

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claim all the rights of a separate power *on the high seas* w
some sort of recognition from foreign governments; but
is no authority even for a doubt about the right of parti
civil war to conduct it, with all the incidents of lawfu
within the territory to which they both belong."

Having thus discussed the question before him, Judge
announced the following conclusions:

"1. At the time when the *Georgiana* and the *Lizzie Tho*
went to Iquique, a state of civil war existed in Peru.

"2. At that time one of the parties to that civil war, l
expelled the other, had possession, by conquest, of the
Iquique, and the points where the guano was deposited.

"3. Being so in possession, and having officered and
ized the local government of the port and the city an
guano deposits, the jurisdiction of the party headed by Vi
was perfect, and an American vessel trading to the po
bound to conform to its decrees.

"4. The *Georgiana* and the *Lizzie Thompson* having c
the laws of the place then established, and having ac
pursuance of licenses given by the officers in authority
guilty of nothing for which the other party to the civ
could punish or molest them afterward.

"5. The laws and jurisdiction of the Peruvian Gover
were superseded at Iquique during the time that place
possession of its domestic enemy, and its resumption o
session—supposing possession to have been resumed—g
no power to punish American citizens for a supposed vio
of its laws while they were suspended, nor to make an
law which would have a retroactive effect.

"The whole proceeding of the Peruvian Government a
the two vessels named was contrary to the law of nation
repugnant to the principles of natural justice."

Mr. Osma's Reply.

To the note of Mr. Cass, inclosing the o
of the Attorney-General, Mr. Osma r
August 4, 1858. While still maintaini
necessity of a formal recognition of a state of war by the n
government in order to give its citizens all the rig
neutrals,[1] Mr. Osma argued that, waiving the question of
nition, the authorities cited by the United States had no
cation to the case of a mere faction struggling for powe
the case of Santa Cruz and in that of Castine the occu
was by Great Britain, a recognized belligerent nation,
the case of Spain and her revolted colonies the recogni

[1] City of Berne v. Bank of England, 9 Vesey, 348.

[2] Rose v. Himely, 4 Cranch, 272; Kennett v. Chambers, 14 How
Wheaton's Elements, part 1, ch. 2, sec. 10.

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the latter's belligerency by the Government of the United States was required by the courts as a condition precedent to their concession of belligerent rights to the revolutionary authorities.[1]

Moreover, said Mr. Osma, the vessels did not simply obey the alleged *de facto* authorities; they proceeded to contract with them for the purpose of despoiling the national property, in spite of the laws of the republic as to guano. In entering the port of Iquique and in leaving it on a lawful voyage, they would have exercised a perfect right. When they went so far as to take possession of the national property, they appealed to a possible right of war, and took the incidental hazards, as participants in the violence committed by the revolutionists. They dealt with the revolutionists not as mere *de facto* authorities, but as the Government of Peru, possessing power to deal with guano in defiance of the national laws. Peru could justly reclaim the guano on the *jus postliminii*.[2]

Mr. Osma also stated that both Chile and France had recognized the rights of the Peruvian Government in the matter. The Chilean Government had refused to intervene in behalf of the three Chilean vessels which were seized at the same time

[1] Mr. Osma commented on the case of the *Dorcas C. Yeaton*, an American vessel, which had been hailed and brought to on the high seas by the *Tumbes*. Mr. Clay had protested against this act as "an attempt to visit a vessel of the United States in time of profound peace." Mr. Osma denied that there had been in fact any attempt by the *Tumbes* to exercise the belligerent right of visitation and search, but expressed surprise that Mr. Clay should have based his protest on that ground, when by his argument in the cases of the *Georgiana* and the *Lizzie Thompson* he had declared that Peru was in a state of civil war. "A nation could not," said Mr. Osma, "be in a state of peace as regarded its rights and in a state of war as regarded its obligations." Mr. Cass, in support of Mr. Clay's action, replied that, according to her own contention, Peru was, as to her intercourse with other powers, "in a state of peace." Neither party had claimed the rights of a belligerent. Mr. Cass observed, however, that in his own opinion a state of civil war did exist, and that either party was at liberty to exercise belligerent rights, should it claim to do so, in conformity with recognized principles. It appeared that the *Dorcas C. Yeaton*, under a contract with the commander of the *Tumbes*, which the authorities at Callao carried out, obtained a profitable cargo of guano; and on Mr. Osma's disclaimer that anything "offensive" was intended by Peru, and that any "force" was used, Mr. Cass declared that the United States had "no longer any cause of complaint against the Government of Peru for this detention of one of their vessels."

[2] Vattel, Book III. ch. 13, sec. 196.

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as the *Georgiana* and the *Lizzie Thompson*, and had notified of its decision. M. Frérant, the French consul at Iquique had chartered the *Lizzie Thompson*, had appealed to the F chargé at Lima for his official intervention; but the cl had informed the Peruvian Government that it had within its rights, and had, moreover, demanded of the c the surrender of his office.

Opinion of Mr. Reverdy Johnson.

With his note of August 4 Mr. Osma municated to Mr. Cass the opinion of Mr. erdy Johnson, in which the latter maintai

1. That the vessels at the time of their seizure were eng in loading guano from deposits which notoriously belong the Government of Peru, and had for years constitute principal source of its revenue.

2. The authority to load was not obtained from the Go ment of Peru, but from a usurping body of her subjects, mitting, by their very acts, treason against her, and to no belligerent recognition had been given by the United S which had lately negotiated a treaty with the governme Lima.

3. Until there is a recognized change in the condition government it has the rights and responsibility of governi and until governments have in the exercise of their right ognized an insurrection or rebellion, so marked and long tinued as likely to result in general or partial perma success, as an actual government, the original governme to be treated as the original government and is responsib the acts of the rebels.

Summary of Arguments.

There was one aspect of the Peruvian as presented by Mr. Osma which Mr. and Judge Black did not specifically dis namely, the right of the revolutionary forces, when in the porary occupation of a place, to dispose of the public pro there situate. Probably they did not deem it necessary t cuss this question. Indeed they seem to have considered disposed of by their definition of the rights of the revoluti occupant. In effect they did not recognize any limitati such rights. In one of his diplomatic papers Mr. Cass expr declared that when the place where the guano was depo "was conquered from its previous rulers, all authority and diction over it, legislative, executive, and judicial, so f

[1] S. Ex. Doc. 25, 35 Cong. 2 sess.

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foreigners were concerned with it, passed to and became vested in the conquerors." He further said:

"According to Mr. Osma's reasoning, there are two governments in southern Peru. Each stands in an attitude of deadly hostility to the other, but foreigners are bound by the laws of both. The one is supreme in the power to levy taxes on general commerce, but the trade in guano can be licensed only by the other. Guano is a usual and lawful article of commerce, but a dealer must refuse to take it from the parties who have it to sell; he must make his contracts with others who are out of possession and can not deliver it. The government at Lima has made one law on the subject, but is wholly unable to execute it or to protect any person who obeys it, while the revolutionary government has another law, backed by all the power which is necessary to enforce it. I am constrained to insist that an American is not punishable for failing to square his conduct by the requirements of the former law. The fact that the steamer *Tumbes* was able to arrest the American vessels in the act of taking in their cargoes does not prove to my satisfaction that the government at Lima had the power to make laws at the place of capture. A mere irruption by the forces of one belligerent into the territory of another does not create legislative supremacy. * * * Even if the *Tumbes* had been accompanied by force enough to subdue the country and keep possession of it, the government at Lima would not have been authorized to punish the peaceable citizens of neutral states for acts which were lawful at the time they were done."[1]

As the argument thus set forth assumed the absolute power of the revolutionary occupant as by right of conquest over the territory occupied by him, it was undoubtedly superfluous, on the assumption that that view was correct, to discuss the right of such an occupant to dispose, in whole or in part, of the national property, whether consisting of guano deposits or of anything else of value. And it is quite true that down to the middle of the eighteenth century the practice of belligerent nations was in accord with the theory that all kinds of property, coming into the hands of one of the parties to the war, vested in him as conqueror and were subject to his absolute disposal, so that he might even alienate or cede the occupied territory while the issue of hostilities remained undecided.[2] But since that period this rule has been either abandoned or subjected to very considerable limitations both in theory and in practice; and in view of this change the validity of the

[1] Mr. Cass to Mr. Clay, November 26, 1858.

[2] Hall, Int. Law, 4th ed. 482 *et seq.*

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seizure of the *Georgiana* and the *Lizzie Thompson* may be sai
some measure to have depended on the answer to be given
these questions: (1) To what extent does a recognized
ligerent possess the right to dispose of the public property
territory which he temporarily occupies? (2) Under what
cumstances must a revolutionary chief be recognized by
titular government as possessing that right? (3) Are gu
deposits belonging to the nation to be considered as prope
over which the belligerent occupant's right of disposal
unlimited? (4) If not, to what extent may he dispose of the

Rupture of Diplomatic Relations.

In the course of his discussions Mr. Os
offered in behalf of his government to sub
the controversy to arbitration. Subsequen
Mr. Cass informed Mr. Osma that it had been decided to adj
the case at Lima,[1] and still later he instructed Mr. Clay t
the proposition to arbitrate had been made known to
owners of the vessels, and that in scarcely a single insta
had it been unequivocally accepted. He added that, as
government was unwilling to assent to arbitration with
the consent of at least a majority in interest of the own
the proposition must be considered as at an end; and
directed Mr. Clay to demand of the Peruvian Government
immediate adjustment of the claim.[2] After dispatching th
instructions Mr. Cass had several interviews with Mr. Cipri
C. Zegarra, Mr. Osma's successor, but without accomplish
a satisfactory result.[3] He therefore directed Mr. Clay, in
instruction which was to be handed to him by a naval
cer, to seek an early interview with the minister for fore
affairs, and to inform him that he would await for five day
categorical answer to the propositions:

1. To acknowledge responsibility for the seizure and con
cation of the *Georgiana* and the *Lizzie Thompson*, leaving
amount of the indemnity for equitable assessment.

2. To enter into a convention for a joint commission to dec
upon the amount of the indemnity, and to investigate and
judicate all other claims of citizens of either republic agai
the other. If a clear and unequivocal offer should be m
by Peru to pay a gross sum, to be distributed by the Uni

[1] Note of November 29, 1858, MS.
[2] Mr. Cass to Mr. Clay, March 2, 1859, Id.
[3] Mr. Cass to Mr. Clay, September 14, 1859, Id.

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States, Mr. Clay was to refer it to his government and await further instructions; but if, without making such an offer, Peru should refuse the first proposition in regard to the two vessels in question, the second proposition was to fall with it. After the lapse of five days, if a satisfactory reply should not have been received, Mr. Clay was instructed to demand his passports and return on a man-of-war to the United States. And he was informed that, as soon as intelligence of his withdrawal was received, Mr. Zegarra's passports would be tendered to him and diplomatic relations broken off; and that the whole subject would then be submitted to Congress for its consideration. If, however, the Peruvian Government, while manifesting a disposition to make a satisfactory settlement, should desire a few more days for the purpose of arranging the details, Mr. Clay was instructed that he might remain a few days longer for that purpose, but not to exceed a fortnight, at the end of which he was to take his departure, if no adjustment had been consummated.[1]

Mr. Clay promptly submitted the propositions of his government to that of Peru,[2] but, owing to a sudden change in the ministry of foreign affairs, he felt obliged to waive the requirement of an immediate acceptance of them. Under the circumstances his action was approved, but he was informed that if, on the receipt of this approval, the propositions of the United States should still remain unaccepted he would be expected immediately to carry out his instructions.[3] Acting upon this

[1] Mr. Cass to Mr. Clay, April 25, 1860, MS.

[2] June 5, 1860, Id.

[3] Mr. Trescot, acting Secretary of State, to Mr. Clay, July 19, 1860. In this instruction Mr. Trescot, referring to the fact that Mr. Clay had solicited the commander of the Pacific squadron to send a man-of-war to Callao, said: "Should the *Lancaster* have arrived at Callao in answer to your invitation, I must remind you that the President has repeatedly applied to Congress for a general authority to use the naval forces of the United States for the purpose of enforcing by hostile measures the payment of the just claims of our citizens against foreign governments, but the authority has always been refused, and consequently neither the officer in command nor yourself would be warranted in employing any vessel of the United States for such a purpose. And I will add further that, in view of this fact, the department considers it inexpedient to ask from the Secretary of the Navy such orders for the cooperation of the Pacific squadron as you desire. Should the claims not be satisfactorily adjusted, the whole subject will be submitted to Congress at the commencement of the next session."

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direction, he held with the minister for foreign affairs Septe
ber 28, 1860, a conference in which he pressed the proposit
that the Government of Peru should agree to pay a gross s
in full of all claims of citizens of the United States, the amou
of such sum to be fixed by a mixed commission, which sho
also adjudicate the claims of citizens of Peru against
United States. This proposition, which was answered with
offer to submit all claims alike to arbitration, Mr. Clay on
2d of October renewed, giving the Peruvian Government ti
o'clock in the afternoon of Saturday, October 6, to mak
reply, and declaring that if by that time none of his prop
tions should be accepted he would demand his passports a
suspend diplomatic intercourse. On the afternoon of the
Mr. Clay received from Mr. Melgar, then minister for forei
affairs, an undated note politely declining his propositio
but renewing the offer to arbitrate all claims. On the 9th
October Mr. Clay demanded his passports. They were sent
him, but their reception was followed by further correspo
ence and conferences. The situation remaining, however,
spite of these efforts, substantially unchanged, Mr. Clay
October 20, 1860, notified the consuls of the United States
Peru, by a circular note, that diplomatic relations between
two countries had been suspended, and that the United Sta
would from that day be without a diplomatic agent in Pe
His delay in breaking off diplomatic relations was dis
proved.[1] Mr. Zegarra, on learning that diplomatic relati
had been suspended at Lima, asked for his passports, and th
were duly transmitted to him.

Agreement of Arbitration.

When Mr. Lincoln became President
restored diplomatic relations with Peru a
sent Mr. Christopher Robinson, of Conne
cut, as minister to Lima. Negotiations ensued, and a prop
tion of Peru to refer the claims of the *Georgiana* and the *Li*
Thompson to the head of some friendly state was accept
On December 20, 1862, a convention was signed at Lima,
which the King of Belgium was named as "arbiter, umpi
and friendly arbitrator," with "the most ample power to dec
and determine all the questions, both of law and fact,"
regard to the seizure and confiscation of the vessels. It v
agreed that the claims should be decided on the diploma
correspondence, but either party was to be at liberty to pres
to the arbiter other papers, such papers to be communica

[1] Mr. Cass to Mr. Clay, November 10, 1860, MS.

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to the other party within four months after the ratification of the convention. Both parties were required to submit their documents to the arbiter within six months after he should have signified his consent to act. The ratifications of the convention were exchanged at Lima, April 21, 1863.

Declination of the Arbitrator to Act.

On July 28, 1863, Mr. Seward, as Secretary of State, transmitted to Mr. Henry S. Sanford, then minister of the United States at Brussels, copies of the convention, together with "so much of the official correspondence upon the subject" as had been "printed," from which he said the points at issue might "easily be ascertained." He instructed Mr. Sanford to propose to the diplomatic representative of Peru at Brussels, if he had arrived there, to address a joint note to the Belgian minister for foreign affairs, requesting that the King might be pleased to accept the trust proposed to be conferred upon him. The Department of State, said Mr. Seward, had prepared complete copies of all the papers called for by the convention, but had deemed it advisable to delay sending them till the result of the application to the King should be known. Mr. Sanford and the Peruvian minister, at the request of the latter, prepared identic notes instead of a joint note, to the minister for foreign affairs, and delivered them to him at the same time in person. The notes bore date August, 27, 1863.[1] Mr. Rogier, the minister for foreign affairs, promised to communicate with the King, at the same time expressing confidence that the trust would be accepted. Under the circumstances the matter was considered by the United States as practically settled, and the remaining documents were sent to Mr. Sanford in order that they might be translated into French for submission to the arbitrator.[2] On January 14, 1864, however, Mr. Rogier, formally replying to Mr. Sanford's note of the 27th of the preceding August, stated that His Majesty, after examining what had been published on the controversy, perceived that the arbitration would be "of a very delicate nature by reason of the special circumstances" of the case, and that the question of fact as well as of equity was complicated by a question of law which it would be difficult to decide at a distance from the place at which it arose, and without having a perfect knowledge of local legislation, which it was not easy to obtain so far

[1] Mr. Sanford to Mr. Seward, August 27, 1863, MS.
[2] Mr. Seward to Mr. Sanford, September 12, 1863, Id.

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away. His Majesty was therefore compelled to decline t
rôle of arbitrator.[1] The pointed intimation in Mr. Rogie
note, that in the opinion of the King the decision of the ca
must depend on local legislation, was more fully conveyed
Mr. Sanford by His Majesty himself in an interview of Janua
29, 1864. In a confidential dispatch to Mr. Seward of that d
Mr. Sanford said:

"I have to report that His Majesty referred to his havi
declined the arbitration of our question with Chile,[2] tou
ing the seizure of the *Georgiana* and the *Lizzie Thompson*,
account of the delicate circumstances which were connect
with the case, and his want of sufficient data as to the lo
legislation of the two countries to enable him to come to a c
rect conclusion. He added that he had looked into the ca
and he must say that he did not think we had the strong
side of it; indeed he would have been constrained, had
accepted the position of arbiter, to decide it against us, a
that his desire not to make a decision unfavorable to us h
been a motive for declining to accept the trust which had be
in so flattering a manner, offered to him."

Abandonment of the Claims.

In view of the declination of the arbitrat
and especially of the reasons which he ga
for it, the Government of the United Stat
decided to accept his adverse opinion, and to treat the clai
as finally disposed of. Of this decision the Peruvian minis
at Washington was informed in the following note:

"DEPARTMENT OF STATE,
"*Washington, July 9, 1864*

"To Señor F. L. BARREDA,
"*Minister Resident of Peru,*
"*Washington, D. C.*

"SIR: You are aware that His Majesty, the King of the B
gians, has declined to act as the arbiter between your gove
ment and that of the United States in the controversy relati
to the capture of the *Lizzie Thompson* and *Georgiana*. T
circumstance, taken in connection with the reasons assign
by His Majesty for his refusal, has been taken into due c
sideration by this government, and I am directed by t
President to announce to you as the result that there is
intention on our part to refer the subject to the arbitrame
of any other power, or to pursue the subject further.

"I avail myself, etc.,

"WILLIAM H. SEWARD."

[1] Mr. Sanford to Mr. Seward, January 14, 1864, MS.

[2] Doubtless inadvertently written by Mr. Sanford for Peru.

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Replying to this note Mr. Barreda said: "My government will duly appreciate this spontaneous action of that of the United States, which, while it illustrates the moderation and justice of its principles, proves also the friendly sentiments it fosters toward the country I have the honor to represent."[1]

Another expression of appreciation was afterward made by direction of the Peruvian Government;[2] in answer to which Mr. Seward declared that the Government of the United States had been "guided by its sense of justice toward Peru, and its sincere desire to strengthen the friendly relations which now so happily subsist between them."[3]

Case of Raborg.

A claim somewhat similar in principle to those in the cases of the *Georgiana* and the *Lizzie Thompson*, since it involved the right of Vivanco and his partisans to deal with the guano under or claimed to be under their control, came before the mixed commission which sat at Lima in 1863 under the convention between the United States and Peru of the 12th of January of that year. It appeared that in March 1857 Henry W. Raborg, for himself and others, entered into a contract in the harbor of Callao with Admiral Vallue-Reistra, representing General Vivanco, by virtue of which he obtained permission to export 10,000 tons of guano from the Chincha Islands, which were

[1] Mr. Barreda to Mr. Seward, July 12, 1864, MS.

[2] Peruvian minister to Mr. Seward, September 20, 1864.

[3] Mr. Seward to the Peruvian minister, November 23, 1864. When the arbitrator declined to serve, the translation and printing of the papers of the United States had nearly been completed, and, as it was then supposed that a negotiation might be undertaken for a new convention, Mr. Sanford had the work finished. The papers when printed were bound in a volume, of which the title page reads: Correspondance Diplomatique | entre | les États-Unis et le Pérou | au sujet de la saisie et de la confiscation | des navires Américains | la Lizzie Thompson et la Georgiana, etc. | (1858–1859–1860.) Bruxelles, | Imprimerie de Ch. Lelong, | rue du Commerce, 25, | 1864. Appleton's Am. Cyclopædia, tit. Peru, states that the Peruvian Government "in 1873 paid with interest the amount claimed by the owners of the vessels for damages." The writer of this statement probably was misled by the payment of awards under the convention of December 4, 1868. On several occasions the Department of State of the United States has taken the ground that, apart from Mr. Seward's communication to Mr. Barreda, the claims were afterward barred by Article V. of the convention between the United States and Peru of December 4, 1868. (Mr. Fish, Sec. of State, to Mr. Byrnes, December 22, 1870, MS. Dom. Let. vol. 87, p. 344; Mr. Gresham, Sec. of State, to Mr. O'Neil, January 13, 1894. See also Mr. Seward to Mr. Byrnes, Dec 1, 1868, MS. Dom. Let. vol. 79, p. 555.)

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then under Vivanco's control. On this concession Mr. Rab paid Admiral Vallue-Reistra in advance $7,000, and he im diately chartered vessels and involved himself in heavy bilities for the purpose of carrying out his enterprise. before he had removed any guano the Government of P recovered possession of the islands and absolutely refused recognize Mr. Raborg's contract. In consequence he mad claim against Peru for more than $800,000. The commissi ers (Messrs. Mackie, Alvares, and Tárara), Mr. Squier senting, disallowed the claim, saying:

"There are no principles of public law more clearly l down than those which define the duties and obligations o foreigner resident in a country and engaged in commerce th Kent says (vol. 1, p. 74) that 'if a person goes into a fore country and engages in trade there, he is by the law of nati to be considered a merchant of that country and a subject all civil purposes.'

"The first article of the treaty between the United Sta and Peru of 26th July 1851 stipulates that there 'shall perfect and perpetual peace and friendship between the Uni States of America and the republic of Peru, and between th respective territories, people, and citizens, without distinct of persons and places.'

"And yet Henry W. Raborg, a citizen of the United Stat residing in Lima, engaged in trade there, and a subject of recognized government, made a contract with and advan money to an enemy of that government, by which acts violated his first and most solemn duty as a neutral and a citizen of the United States; and at the same time broke plighted faith of his government, and as an individual co mitted an act of war against the government which protec him and with which his own was at peace.

"In the opinion of the mixed commission the contract Henry W. Raborg is null and void, and they decide that claim is disallowed."

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CHAPTER XXXVII.

PERUVIAN CLAIMS COMMISSION: CONVENTION BETWEEN THE UNITED STATES AND PERU OF JANUARY 12, 1863.

Provisions of the Convention.

By the convention referred to in the title of the present chapter the contracting parties agreed to submit all claims of "citizens" of the one country against the government of the other which had not been embraced in any prior conventional or diplomatic agreement, and statements of which, soliciting the interposition of either government, had, previously to the exchange of the ratifications of the convention, been filed in the Department of State at Washington, or the department of foreign affairs at Lima, to a mixed commission of four persons, two of whom should be appointed by each government. The four commissioners so appointed were required to meet in Lima within three months after the exchange of the ratifications of the convention,[1] and to take, severally, an oath before the supreme court of Peru that they would "carefully examine and impartially decide, according to the principles of justice and equity, the principles of international law and treaty stipulations, upon all the claims laid before them under the provisions of this convention, and in accordance with the evidence submitted on the part of either government."

The commissioners were further required, immediately after their organization, and before proceeding to any other business, "to name a fifth person to act as an arbitrator or umpire in any case or cases in which they may themselves differ in opinion." The umpire thus chosen was obliged to take and subscribe an oath similar to that of the commissioners.

[1] The ratifications were exchanged at Lima, April 18, 1863.

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After the selection of the umpire, it was provided th commissioners should at once proceed to examine and the claims embraced in the convention, and that they s if required, hear "one person in behalf of each governm each separate claim." It was expressly stipulated th agreement of any three of the commissioners should be respects sufficient for a decision. Any sums awarded commission were to be paid by the government against they were awarded within one month after it should received from the commissioners the report, which the c tion required them to make, of the result of their proce and for any delay in payment after the expiration of the it was stipulated that interest should be allowed at the 6 per cent.

The commission was required to terminate its labors months from and including the day of its organization; further period of a month was allowed the umpire for t position of any cases which might then be pending befor

Each government was required to appoint a secret assist in the transaction of the business of the commissi to keep a record of its proceedings.

The commissioners were authorized to make all nec rules for the conduct of their business.

Appropriate provision was made in the convention payment of expenses.

Organization of the Commission.

The commissioners on the part of the States were E. George Squier, of New who was appointed by the President, with the advice and consent of the Senate, on March 11 and James S. Mackie, of Ohio, who was appointed on J 1863, and who was furnished with a commission to co till the end of the next session of the Senate, that bo being in session at the time of his appointment.

The commissioners on the part of Peru were Felipe B Alvarez and Santiago Tárara.

On July 11, 1863, the two United States commissi together with Henry R. de la Reintrie, American agen J. Huntington Lyman, American secretary, appeared legation of the United States at Lima, and before th Christopher Robinson, minister of the United States a post, severally took and subscribed the oath of loyal forth in the act of Congress of July 2, 1862.

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On the same day both the American and the Peruvian commissioners appeared before the supreme court of Peru and made and subscribed the oath prescribed by the convention.

The commissioners held their first formal meeting on the 17th of July. They then examined their credentials, which were found to be satisfactory, and effected an organization, electing Señor Tárara as president. It was, however, subsequently agreed that the chair should be occupied by the commissioners in regular rotation for a month each.

Selection of an Umpire.

On July 20, 1863, the commissioners assembled at the university, the place selected by the Government of Peru for their sessions, and, as directed in the second article of the convention, proceeded to the choice of an umpire. They agreed upon Gen. Pedro Alcantará Herran, a citizen of Colombia, then in Lima, and addressed him a joint letter, to which he responded on the following day, accepting the trust.

On the 22d of July it was ordered that the minister of foreign relations of Peru should be notified of the appointment and acceptance of General Herran, and requested to designate a day for his qualification before the supreme court, in accordance with the terms of the convention. At the same time the four commissioners drew up and signed a commission for the umpire.

On Monday, July 27, a letter was read from the minister of foreign relations, certifying that General Herran had appeared before the supreme court and taken and subscribed the oath prescribed by the convention.[1]

Secretaries and Agents.

On the same day Don Domingo Rada, secretary to the Peruvian commissioners, and Mr. J. H. Lyman, secretary to the United States commissioners, presented their credentials, which were found to be satisfactory.

Don Juan Oviedo, agent of the Government of Peru, and Henry R. de la Reintrie, agent of the United States, also presented their commissions, which were found to be satisfactory. Mr. de la Reintrie bore a commission from the President, issued by and with the advice and consent of the Senate, in which he was designated as "solicitor on the part of the United States."

[1] The commissioners subsequently fixed the compensation of the umpire at $4,000, in the current money of Peru, but General Herran refused to accept anything for his services.

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Mr. Lyman had a similar commission, designating him as
retary of the commission on the part of the United Stat

Proceedings of the Commission.

July 17, 1863, having been adopted b
commissioners as the day of their orga
tion, within six months from which they
obliged to terminate their labors, they caused a notice t
effect to be published for eight days in a daily journal at
They deemed this notice sufficient for all purposes, in vi
the extensive publication of the convention in both cour

On August 6 Mr. De la Reintrie presented a partia
embracing sixteen claims against Peru. One of these
was ordered to be taken up, and the minister of foreign
tions of Peru was requested to furnish to the commissio
papers specified in a memorandum submitted by the ag
the United States.

On August 13 the agent of Peru presented three c
against the United States.

At their session on August 26 the commissioners ordere
as the time of the commission was limited, the agents
two governments be requested to present within ten d
complete list of all the claims in their hands, and that a
cases be ready to be presented to the commission within f
days from the passage of the order.

On August 20 the commissioners promulgated rules f
government of their procedure; and they also adopted
time to time various orders as occasion arose.

They resolved that, if any subject should be brought
them which was, in their opinion, of more than ordinary i
tance, a day should be designated for a public hearing
case, at which time, the secretaries having read the pri
points, the parties interested should have leave to plead
cause, conformably to the provisions of the convention
accordance with this plan Mr. Hurtado, counsel for one
claimants, presented on October 11, 1863, the day previ
designated, an argument on an important question of ju
tion which had arisen in the case of his client, and the ag
the United States replied.

In some of the cases before the commission the time fix
the presentation of arguments was extended for cause sh

In order to insure the satisfactory transaction of bus
the secretaries were required to keep a docket book in
were entered the several cases presented to the commi
and their current history, such as the dates of hearing, of

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ponement or adjournment, and of final submission to the commissioners or the umpire, and such other memoranda as might facilitate action upon the claims; and in further execution of this design the secretaries were directed to make a list of the documents filed in each case, and to enter such list in the docket with the claim.

On August 27 the commissioners ordered that a certain person, a member of a commercial house at Lima,[1] be requested to attend on the following day and give evidence in a pending case. The person so requested appeared by arrangement on the 31st of August and presented certain papers, which were received in evidence by the commissioners.

On the 5th of September the commissioners ordered (1) that "the respective attorneys present their allegations upon the causes referred to them, together with the exceptions which they may deem proper;" (2) that the commissioners would "decide first upon the exceptions;" and (3) that, should they "deem these exceptions just, the commission will suspend proceedings," but that, in a contrary case, they would "continue them."

On the 7th of September it was ordered that "all papers referring to claims, whether of citizens of the United States or Peru, be submitted to the court, with or without argument, for the decision of the court, and with the object of finally disposing of all claims as contemplated by the first article of the convention of 12th January 1863."

November 27, all the claims having been finally disposed of, the presiding officer declared the commission to be dissolved.

Its proceedings had been characterized by a spirit of courtesy and harmony, and most of the claims were disposed of by the commissioners without the intervention of the umpire.

Final Report.

December 23, 1863, President Lincoln communicated to Congress the report made by the United States commissioners to Mr. Seward, as Secretary of State, of the result of the proceedings of the commission. This report, which was dated at Lima, November 27, 1863, disclosed the fact that two awards were made against the United States, aggregating about $25,300, on part of which interest was to be calculated and allowed. For the discharge of these obligations, the President requested an appropriation.[2]

[1] Mr. Bergmann, of the firm of Templeman & Bergmann.

[2] H. Ex. Doc. 18, 38 Cong. 1 sess.

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The report of the commissioners was as follows:

"MIXED COMMISSION OF THE UNITED STATES AND PER
"*Lima, November 27,*

"SIR: The mixed commission of the United States and P having discharged the duties imposed upon them by the vention of January 12, 1863, the undersigned, commissi of the United States, in compliance with the sixth arti that convention, have the honor to report that the follo claims were presented against the United States:

1. Value of cargo of ship *Alleghanian*..... $106,
2. Stephen G. Montano, loss of the *Eliza*..... 117,
3. Juan del Carmen Vergel..... Inde
4. José Francisco Lasarte..... 436,

"In respect to which the following decisions were made

"1. *Alleghanian* remitted to the two governments for la jurisdiction.

"2. Stephen G. Montano, award by umpire, $24,151.29, interest at the rate of 6 per cent per annum from Septe 2, 1851, to November 2, 1863, all payable in the current m of the United States.'

"3. Juan del Carmen Vergel, 'in the silver money o United States or its equivalent, $1,170.'

"4. José F. Lasarte, 'dismissed.'

"The following claims were presented on the part of cit of the United States against Peru, viz:

1. Josiah S. Monroe, owner of the *William Lee*..... $32,
2. Alsop & Co., first claim..... 7,
3. Francis G. Rumler.....
4. John R. Hyacinth..... Inde
5. Louis Brand..... 50,
6. Thomas R. Eldridge..... 7,
7. Samuel Churchman..... 11,
8. Dana & Co., ship *Michael Angelo*..... 3,
9. Joseph S. Allen.....
10. Matthew Crosby, ship *Washington*..... 57,
11. Charles Easton..... 42,
12. Edward W. Sarton..... 118,
13. Henry Baker..... 5,
14. Henry W. Raborg, et als (*Rollin Thome*)..... 800,
15. William Barney.....
16. James Cunningham.....
17. A. G. Benson..... Inde
18. Henry E. Kinney..... 8,
19. Alsop & Co., second claim..... 5,

"In respect to which the following decisions were mad

"*Allowed and awarded.*

1. Josiah S. Monroe, 'in the current money of Peru or its equivalent in the current money of the United States'.. $22,
6. Thomas R. Eldridge, 'in the current money of Peru'..... 15,
7. Samuel Churchman, 'in pesos fuertes'..... 3,
8. Dana & Co., 'in pesos fuertes'.....
9. Joseph S. Allen, 'in current money of Peru'.....

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11. Charles Easton, 'in current money, with interest at the rate of 6 per cent per annum, from April 30, 1854, to November 9, 1863' $19,000.00
12. Edward W. Sarton, 'in current money of the country, with interest at the rate of 6 per cent per annum, from September 29, 1857, to November 24, 1863' 5,000.00
15. William Barney, 'in current money of Peru'..... 1,536.85

"Of the preceding awards those numbered 6, 11, and 12 were made by the umpire.

"The following claims were decided unfavorably, viz:

2. Alsop & Co., no jurisdiction.
3. Francis G. Rumler, no jurisdiction.
4. John R. Hyacinth, dismissed, no proof.
5. Louis Brand, disallowed.
7. Part of Samuel Churchman's claim, being for freight of ship *Berlin*, disallowed by umpire.
10. Matthew Crosby, disallowed by umpire.
13. Henry Baker, disallowed.
14. Henry W. Raborg, *et als.*, disallowed.
16. James Cunningham, proof of payment of claim furnished by Peru.
17. A. G. Benson, disallowed, having transferred his claim to José F. Lasarte, a citizen of Peru, as against the United States.
18. Henry E. Kinney, disallowed by umpire.
19. Alsop & Co., second claim, disallowed by umpire.

"As the awards in each individual case specify the currency in which payment is to be made, and as it is impossible to establish in the extraordinary condition of financial values in the United States and Peru any fixed rate of exchange, the mixed commission has not deemed it expedient to establish any rule to govern the action of the two parties to the convention in this respect.

"The disbursements of the commission, on the part of the United States, have amounted to only about five hundred and fifty dollars. These disbursements were incurred, with the exception of a liberal gratituty to the porter in attendance at the public sessions, in behalf of the United States commissioners alone, and for necessary purposes. But the Government of Peru made the amplest provision for the comfort, convenience, and supplies of the commission, emphatically refusing to permit us to share the common expense, as provided in the convention, but courteously treating us in our official intercourse as the guests of the nation.

"We have the honor to be sir, your most obedient servants,

"JAMES S. MACKIE.
"E. GEO. SQUIER.

"Hon. WILLIAM H. SEWARD,
"*Secretary of State, Washington.*"

Case of the "Alleghanian."

The case of the *Alleghanian*, which was "remitted to the two governments for lack of jurisdiction," possessed elements of much interest. The *Alleghanian*, an American ship, laden with guano which was shipped at Baltimore for London, but which

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was the property of the Government of Peru, was attacke
the night of October 28, 1862, in the Chesapeake Bay, b
party of men belonging to the Confederate Navy, who w
under the command of two commissioned lieutenants in
service. These officers were at the time acting under spe
orders of the Confederate secretary of the navy, and the
who were with them were specially detailed from the Ja
River squadron. When the *Alleghanian* was boarded, she
lying off Wynn's Island, at anchor. The boarding party
her on fire, and she burned till she sank with her cargo.

For the loss of the cargo a claim was presented to the Un
States by Mr. Barreda, the Peruvian minister to the Un
States, whose government had never formally acknowled
the Confederacy as a belligerent power. On the 9th of Janu
1863 Mr. Seward, as Secretary of State, addressed a not
Mr. Barreda, reviewing the claim and rejecting it. The f
as stated above were fully admitted; and Mr. Seward decl
that he agreed with Mr. Barreda "in pronouncing the dest
tion of the guano in question a premeditated and unjustifi
act, which was committed with full knowledge of its na
and character by the party who effected its destruction."
Seward further admitted that the traffic between Peru
the United States was "carried on under the sanction of
general and municipal laws of both countries and of trea
which guarantee and protect it," and that the parties
"mutually plighted their national faith to respect and caus
be respected within their territories, respectively, the ri
and property of the governments and of the citizens of the
nations." He also agreed with Mr. Barreda that it was '
lawful to either government or its citizens to paralyze o
injure the trade [in question] without incurring the respo
bilities incident to a violation of the same laws and treat
and declared the United States "would acknowledge
responsibility which the unjustifiable acts of the destroye
the *Alleghanian* imposes upon it." But, having thus stated
case, Mr. Seward said:

"The only question that remains to be discussed is to de
mine what that responsibility is. Mr. Barreda is certa
distinct enough upon that subject, for he closes with sa
that he hopes the government of Peru will receive from
government of the United States full indemnity for the v
of the guano with which the *Alleghanian* was freighted.

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"In order, however, to ascertain what is the nature and extent of the responsibility which has been devolved upon this government, it will be necessary to bring into the case some facts additional to those which have been presented in the statement which Mr. Barreda has submitted.

"The first of these facts is that an insurrection broke out in the United States in the beginning of the year 1861; that the insurgents inaugurated a civil war which still is flagrant throughout a large portion of the United States; that several of the States of the Union have been overpowered by the insurgents, who have temporarily subverted the military and civil authority of the United States, and set up a revolutionary and pretended government in its place. The State of Virginia was among the States in which the laws and authorities of the United States have been thus subverted by armed and treasonable revolutionary forces. The insurgents have raised and hitherto maintained very considerable military and marine forces. They have occupied, and they still continue to occupy, that portion of Virginia from which the destroyers of the *Alleghanian* proceeded, and into which they returned for shelter and safety after having completed their act of unlawful violence, notwithstanding the most diligent efforts of the government to reclaim that territory and bring it back into subjection to the laws of the United States. The act which they committed is deemed by the laws of the United States as an act of treason and piracy. No sooner had the insurrection, which has been described, broken out than this government reinforced its civil authorities by increasing their naval and military forces upon the largest possible scale, and with the most lavish expenditure. These forces have been employed with all the diligence and all the energy which the government could exercise. Insomuch as these are historical transactions which have more prominently than any other political events engaged the attention of the civilized world during a period of nearly two years, the undersigned might, perhaps, express surprise that they have not found any mention in the statements which Mr. Barreda has submitted. Reports and papers which have been obtained from the Navy Department, and of which copies are herewith submitted, clearly show that the boarding, seizure, and destruction of the *Alleghanian* with her cargo was an act of civil war committed by the revolutionary insurgents, and under the pretended authority of their unlawful and treasonable leaders, not more in violation of the rights of Peru than in violation of their allegiance to the United States, and in defiance of their constitutional and legal authority. The same papers clearly show that this government was in no wise informed or cognizant of the crime before its commission, although it was extraordinarily vigilant and active in military and naval operations on the waters and shores of the Chesapeake; that its agents hastened to arrest

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and defeat the criminal enterprise as soon as it came to
knowledge, and that those agents adopted the most ener
and effective measures to prevent the destruction of the
and cargo, and to bring the offenders to punishment, a
compel them to make restitution to the parties aggrieved

"This government now disavows and condemns the t
action, and it is persistently engaged in the effort to arres
inflict upon the depredators the ample punishment whic
laws of the land award against those who commit piracy e
upon the open seas or on the waters of the United State

"This government regrets as sincerely as the Peruvian
ernment can that its efforts to accomplish these objects
been thus far unsuccessful. What has happened, howev
the case of the *Alleghanian* has occurred without any
whatever on the part of this government, has been comm
by disloyal citizens over whom, through the operations of
war, it has temporarily lost its control. The governm
moreover, has spared no reasonable effort to redress the inj
which have been committed and to repair the losses w
have been incurred. It will still prosecute these efforts
gently and in good faith. The President is impressed
deeply with the justice of the republic of Peru to doubt
this answer to Mr. Barreda's representations will be f
entirely satisfactory."

On January 30, 1863, Mr. Barreda replied to Mr. Sew
note; but while still maintaining the liability of the U
States, he intimated an intention to refer the correspond
to his government. Mr. Seward suggested in a note o
7th of February that it would be well to await the resu
that reference before carrying the discussion further.

When the claim came before the mixed commission at
the agent of the United States excepted to it on the gr
that as it was a claim of the government of Peru, and n
a "citizen" of that country, it was not embraced in the
vention. The commissioners unanimously sustained th
ception, and declared the commission "incompetent" to d
upon the claim, at the same time directing the *expediente*
returned to the agent of Peru.

It appears that subsequently to the correspondence bet
Mr. Seward and Mr. Barreda, the guano in question was r
ered in a damaged condition. Sales were made of it at
more on May 7, July 20, September 8, and November 10 an
1863, the proceeds of which amounted to $25,962.40. Of
sum the Peruvian Government received one-half, or $12,98
the rest going to the salvors.[1]

[1] MSS. Dept. of State.

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Case of Louis Brand.

In the report of Messrs. Mackie and Squier the claim of Louis Brand against Peru is referred to merely as having been "disallowed." Brand, who was a citizen of the United States, presented a claim for $50,000 for personal and permanent injuries inflicted on him by Peruvian soldiers in 1828. It appeared by claimant's representations that a boat belonging to the ship *Ganges*, lying in the harbor of Callao, crossed the bay at a prohibited hour of the night, disregarding the hail of a Peruvian frigate doing guard duty; that this boat was captured by a boat's crew from the frigate, but was rescued before reaching the latter by other boats from the *Ganges* and another ship; that subsequently a guard of marines boarded the *Ganges* and ordered the first mate to go into their boat for the purpose of being taken to the frigate; that he refused, and that a scuffle followed which brought the master of the *Ganges* and Mr. Brand on deck; that a general mêlée ensued, during which Mr. Brand, seeing a marine about to strike down the master, fired a pistol at the former; that this shot had no effect, but that Mr. Brand was then set upon by the marines, and was shot and otherwise injured in such manner as to be partially disabled for life. It did not appear, however, that Mr. Brand, either while he remained in Peru or at any subsequent time till the year 1854, invoked the interposition of the diplomatic agent of the United States in Peru, or of his government at home, for redress. That twenty-six years should have been permitted to elapse "without any record of remonstrance or claim for redress on his part," the commissioners declared "an unfortunate and unaccountable element in the claim. Accepting his own statement," they said, "it is evident that the authority of Peru in the harbor of Callao was wantonly and boldly defied by certain boats' crews belonging in part to the ship *Ganges;* that this defiance went to the extreme of recapturing by force a boat's crew, * * * and that Mr. Brand received his injuries in consequence of the violent armed opposition to legal authority by the resistance offered on the deck of the *Ganges.* Mr. Brand obeyed a generous impulse in trying to save the life of his friend, the master of that vessel, but if he had been shot dead by one of the soldiers under the circumstances the Government of Peru would not have been accountable. The commissioners of Peru and the United States commiserate the misfortunes of one who appears before them in the character

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of a worthy and honorable man who has doubtless suf serious injuries; but they can not find any just reason fo puting his misfortunes to any unwarrantable proceeding the part of the Peruvian authorities, who simply mainta their rights when they were assailed by force of arms." commissioners therefore unanimously disallowed the clai

A similar claim to that of Louis Brand, though much in origin, was that of Henry Baker, an American sea cap who claimed damages from Peru for injuries suffered by at the port of Iquique on October 25, 1858, while he engaged with another captain, at a late hour of the ni in "attempting to break open a door which was clo Precisely what were the circumstances of the attempt record does not state; but it appears that Baker had a sw and his companion a bar of iron. They were interrupte the police, and in resisting were injured. The commissio disallowed the claim, saying: "It being evident that C Henry Baker acted contrary to the police regulations, disobeyed and attacked the authorities, he has no right t indemnified."

Case of Henry E. Kinney.

The claim of Henry E. Kinney against P which is referred to in the commissioners' re as having been "disallowed by [the] ump was "for indemnity for personal and pecuniary injuries ca by his imprisonment from the 24th April 1851 to the 2d of the same year." It was twice before the umpire. On first occasion he rejected it for want of jurisdiction, on ground that it was not filed in the Department of Stat Washington prior to the exchange of the ratifications of convention. It appeared that in a dispatch to the Departm of State of May 26, 1851, written after Mr. Kinney's rel Mr. Clay, the minister of the United States at Lima, repo the case with the double object: (1) Of stating that he interposed to obtain the prisoner's release from the Peru Government, and (2) of seeking instructions as to his a should a similar case arise in the future. He neither st nor gave it to be understood that Mr. Kinney demande indemnity, or that his imprisonment was to be made an i national affair. No claim for indemnity was filed in the partment of State at Washington prior to the exchange of ratifications of the convention. "If," said the umpire, " communication from the American legation at Lima or

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any other source containing anything to this effect: 'Henry E. Kinney claims an indemnity from the Peruvian Government for injuries and damages sustained by him, caused by his imprisonment in 1851,' had been forwarded to the Department of State of the United States in due time, the condition would have been fulfilled; but as it can not be proved that such a step has been taken, neither can the joint commission nor the umpire give any decision on the subject."

In rendering this decision the umpire observed that he had been scrupulous in withholding his opinion on points not clearly submitted to him, and that in the communication which placed the case before him "no particular allusion was made to jurisdiction;" but that, as the case was submitted to him "in a general manner," he had considered that he would commit a grave abuse of authority if he should assume to pronounce sentence, when he perceived that he had no jurisdiction to do so. The commissioners, however, requested him to withdraw his decision, on the ground that it was made upon a point not submitted to him, and to render a decision upon the merits of the claim. In response to this request he "examined anew the papers accompanying the claim," and on the ground that he had "not found sufficient proof to justify it," declared that it was "not well founded."

The Alsop Claims.

Among the claims reported by the commissioners as dismissed were those of Alsop & Co. These claims were two in number. In the first it was alleged that Messrs. Alsop & Co., citizens of the United States trading in Tacna, Peru, were in 1857 creditors of a Peruvian merchant of the same place named Marcos Ortiz, to the amount of $7,592.87½, and that they, in common with other creditors, distrusting his solvency, took the preliminary steps before the proper tribunal, the "Diputacion de Comercie," to have him declared a bankrupt and his property appropriated to the payment of his debts. They had progressed so far as to have his shop or store closed by order of the court, and the effects therein put under seal, pending the decision of the question of his solvency, when a forcible political change took place in the government of the department, in virtue of which General Felipe Rivas became prefect and commandant. Needing money, Rivas requested the court to sell the property held under its authority and awaiting judgment, including that of Ortiz, promising on behalf of his

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superiors to pay the proceeds into the court at some f
day to meet whatever claims might be established ag
such property. The court, after consultation with the
sons claiming to be creditors, declined this proposition, w
upon General Rivas forcibly seized the effects of Ortiz,
them, and appropriated the proceeds. Another pol
change taking place soon afterward, General Rivas
supplanted and no account was ever made by him o
proceeds of Ortiz's property. On the other hand, it di
appear that the claim of Alsop & Co. on the property
ever judicially established. With the preliminary step
judicial proceeding ended, and Ortiz was never decla
bankrupt. Hence, the commissioners held that his r
of property were in no way affected by the judicial pro
ings; that it was his property that was in the custody o
court of commerce, and not the property of Alsop & Co
of the other alleged creditors. Nor was there any evi
to show that if the proceedings against him had been ca
out, his property was sufficient to meet the demands ag
him, or that Messrs. Alsop & Co. would have recovered
whole or any part of their claim. That Ortiz, through
court which was the custodian of his effects, was entitle
redress from some source, and that, against any am
which he might recover, his creditors had a legal
equitable claim, was, the commissioners declared, evi
But in the meantime Messrs. Alsop & Co. remained
creditors, on the same footing as before the proceedin
bankruptcy were commenced, and before the violent a
of General Rivas. On these grounds the commissioners
that their claim was not within the jurisdiction of the trib
and dismissed it[1].

The second claim of Alsop & Co., which was dismisse
the umpire, was for indemnity for losses alleged to have
caused by a decree of the superior court of Tacna, revok
certain decree of an inferior court. The umpire dismisse
case for want of proof. Among the documents lacking
the decrees in question, and the umpire, while stating
the commissioners had informed him that it was impossib
obtain them, declared that an examination of them was n
sary to a judgment on the merits of the claim.

[1] The claim of Francis G. Rumler, dismissed for want of jurisdi
was of precisely the same character as that of Alsop & Co., and
out of the same transaction.

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Case of Crosby.

Matthew Crosby, master of the American whale ship *Washington*, made a claim for the seizure of a part of his cargo in the port of Callao in 1848. The articles were subsequently returned, but it did not appear whether this was done in accordance with a judicial or an executive order. A week after this seizure the *Washington* obtained permission to leave the port, and they were returned by another vessel. The umpire found that the seizure was made in accordance with the laws of Peru, on account of Crosby's failure to comply with the customs regulations, and that the claimant consequently was not entitled to an indemnity.[1]

Claims of Easton, Barney, and Allen.

In the year 1854 Dr. Charles Easton, a citizen of the United States, was engaged in working a mine in the province of Andahuaylas, when on the night of the 29th of April 1854 his establishment was attacked and sacked by a body of partisans of a rebel chieftain then seeking to overthrow the constitutional government of Peru. His mills were burned, immense stones were rolled into his mine, his house was robbed of its contents, and Dr. Easton himself, besides being beaten, received two gunshot wounds from which he suffered a long and dangerous illness. While he was thus incapacitated for business, his mine filled with water, the supports gave way, and the whole was reduced to ruins. For the losses and injuries thus suffered by Dr. Easton in person and in property, a claim for indemnity was presented to the Peruvian Government by the minister of the United States at Lima. After a somewhat protracted diplomatic discussion of the case, the council of ministers of Peru admitted the principle of indemnity, and authorized the minister for foreign affairs to settle the question of the amount. In accordance with this resolution, the minister for foreign affairs offered the sum of $5,000, but the minister of the United States refused to accept it on the ground that it was inadequate as compensation for the personal injuries of the claimant alone. In due course the claim came before the present commission, and finally before the umpire, the commissioners having been unable to agree as to the amount of the indemnity to be allowed. The claimant asked for $42,010, with interest. The umpire allowed as principal the sum of $19,000 in current

[1] As to this case, see Mr. Marcy, Sec. of State, to Mr. Crosby, September 6, 1856, and October 31, 1856, MS. Dom. Let. XLVI. 14, 88.

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money, of which $5,000 were for personal ill treatment, a
as the commissioners reported, he allowed on the principal s
interest at the rate of 6 per cent.[1]

The award in favor of William Barney was for the valu
some goods deposited in the custom-house at Lambayequi,
stolen therefrom while in the custody of the authorities.

The award in favor of Joseph S. Allen was for a sun
money which the Government of Peru, by a decree of Ma
18, 1860, ordered to be paid to the claimant as indemnity
the injuries done to his ship, the *Maid of Orleans*, by an a
dental cannon shot from the fort at Callao in 1855. The mo
was not paid to him in consequence of his failure to pres
himself to receive it, and the commissioners, in making th
award, merely "recognized the unaccomplished order of
Peruvian Government."

The Montano Case. One of the most important claims presen
to the commission was that of E. G. Monta
a citizen of Peru, as owner of the Peruv
bark *Eliza*. This case had been the subject of much litigat
in the courts, and of a protracted diplomatic correspondei
On December 16, 1854, and April 16, 1855, the question whet
any valid claim existed against the United States was s
mitted by Mr. Marcy, then Secretary of State, to the Attorn
General, Mr. Cushing. Mr. Cushing rendered an extens
opinion on May 27, 1855.[2] The facts in the case are stated
the opinion as follows:

"It appears that on the 15th of January 1851 the Peruv
bark *Eliza*, being bound for San Francisco, took on boar
pilot, one David B. Morgan, by whose unskillfulness or carel
ness the bark was stranded on the Tonquin Shoal, in the I
of San Francisco.

"It also appears that Morgan was one of an associated b
of pilots, acting under the laws of the state of Califor
according to which such pilots are appointed by and subj
to the instructions of a board of commissioners constituted
this among other purposes, and entitled to receive a sta
amount of pilotage fees when employed, and to demand h
fees from all shipmasters who upon tender refuse their servi
substantially as in the pilotage system which has long exis
in other parts of the United States, and the legality of whi
as a question of constitutional power between the federal a
and state governments, has been sanctioned by the Supre
Court. (See Cooley *v.* Port Warden of Philadelphia, 12 H
229.)

[1] MSS. Dept. of State.
[2] 7 Op. 229.

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"It also appears that the owner of the *Eliza* brought suit in the district court of the United States for California against the associated pilots for the loss sustained by reason of the stranding of the *Eliza*, and on the 24th July 1851 recovered judgment for such damages as were in proper course of law ascertained to be due them [him] in the premises, amounting to $24,151 damages and $228 costs.

"It also appears that a writ of execution for the amount of the judgment and costs was duly issued by the court and placed in the hands of the marshal, to be satisfied out of any property of the defendants; that to this end levy was made on a pilot boat, but the same was not sold in satisfaction of the execution and the execution was returned unsatisfied, because of the judgment creditor refusing or neglecting to indemnify the marshal; and it does not appear that any further effort has been made to collect the execution from the judgment debtors.

"At this stage of the case Mr. Osma, the minister of the Peruvian republic in the United States, made application to the government, soliciting its aid to enable him to recover the amount of the judgment of the State of California, on the assumption of the liability of the State for the acts of the pilots established under its laws, and the Secretary of State (Mr. Webster) so far entertained this novel claim as to transmit Mr. Osma's note and the papers accompanying it to the governor of California, as a matter for the consideration of that State. The governor of California, by special message, communicated the documents to the legislature, which body utterly repelled the idea of any responsibility of the State in the premises; whereupon, the Peruvian Government now prefers the claim as against the United States."

Discussing the case as thus presented, Mr. Cushing said that a foreigner sojourning in a country was subject to the general laws of that country, and, in regard to such private rights as the policy of the country might permit him to enjoy, was entitled to the protection of the public authorities. Among European governments, and as between them and the United States, the supremacy of the local law was recognized, and such was the general rule among civilized nations. Exceptions to it (apart from special treaty stipulations) had grown up, chiefly in Spanish America, in consequence of the unsettled condition of the new American republics. Great Britain, France, and the United States had each occasionally assumed, in behalf of their subjects or citizens in those countries, rights of interference which neither of them would tolerate at home—in some cases from necessity, in others with questionable discretion or justification. In some cases such interference had

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greatly aggravated the evils of misgovernment.[1] Consid
tions of expediency concurred with all sound ideas of pu
law to indicate the propriety of a return to more reserv
this matter as between the Spanish American republics
the United States, and of abstaining from applying to t
any rule of public law which the United States would not a
in respect of itself.

On the strength of these premises Mr. Cushing proce
to inquire, in the first place, whether a citizen of the Un
States in the same situation as the owner of the *Eliza* w
have any claim for indemnity against the State of Califo
He declared that "such a thought is a *novus hospes* in our j
prudence." The law contained full provisions to insure kn
edge and skill on the part of professional persons, but
state no more guaranteed the skill of the pilot than tha
the lawyer or the physician. For injuries resulting from
fessional unskillfulness, the law gave a remedy against
unskillful person. It was too clear for argument, said
Cushing, that if the *Eliza* had belonged to a citizen of
United States he would have had no claim against the S
of California.

Mr. Cushing considered, in the second place, the ques
whether there was any claim against the United States. I
the ground of claim was that the marshal had not recov
of the judgment debtors the amount of the execution.
facts stated in the correspondence did not, said Mr. Cush
enable him to judge whether the marshal had done wron
not. If he had not, the fault, if any, was on the side of
judgment creditor; if he had, the judgment creditor ha
ample remedy at law by suit against the marshal. Ind
for aught that appeared in the case, the creditor might
take payment of his demand from the judgment debtors.
was urged, however, that as the marshal was appointed
commissioned by the President of the United States, the
ernment was pecuniarily responsible to any party aggri
by his acts. This hypothesis wholly misapprehended
nature of the institutions of modern society. The governm
provided courts of justice, and judges and other officers, a
public expense, in order that parties might have lawful m
to collect debts, recover damages for private injury, and ot
wise obtain adjudication of their private rights of perso

[1] Alaman, Historia de Mexico, V. 882.

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property; but the government did not insure to every suitor the successful prosecution of his suit, or become the surety for the good conduct of the officers of the law, whether such officers were appointed by the United States or by a State. Public officers were of two classes, one employed in the collection of revenue and the care of public property, who represented the proprietary interest of the government; the other, who were the agents of society itself, and were appointed only by the government in its capacity of *parens patriæ*. For the acts of the former the government held itself responsible in many cases, because their acts were performed for the immediate interest of the government. But for the acts of the latter no government held itself pecuniarily responsible. It discharged its duty by providing means to make them personally responsible, and to punish them for malfeasance in office.

There remained, said Mr. Cushing, only the question whether, in such a matter as that under consideration, a citizen of Peru had larger rights than a citizen of the United States. He could not consent that he had. Citizens of Peru were freely admitted into the United States to sojourn, to buy and sell, and to enjoy all the privileges and advantages of alien friends. But the government had not undertaken to conduct their suits for them, or to underwrite the engagements which citizens of the United States might make with them. Incidentally, Mr. Cushing observed that some argument was raised by the Peruvian minister upon the fact that Mr. Webster had communicated the claim to the governor of California. Mr. Webster had, said Mr. Cushing, acted upon an imperfect statement of facts. If the case were otherwise, it could not be admitted that a declaration, or even an act, of a head of department, not consummated in the forms of law, devolved pecuniary responsibility on the United States. An idea seemed to be making its way into the public mind to the effect that if the Department of State undertook to aid a citizen of the United States in the prosecution of a foreign claim and did not succeed, a claim for damages thereupon arose against the United States. No notion could be more erroneous.[1] Nor could any doctrine be more mischievous. For the same or greater reason, the government could not consent to be responsible in damages to the government of every foreigner in his controversies with citizens of the United States. It was true that foreign governments, as such,

[1] Baron de Bode *v.* Regina, Law and Equity Reports, XVI. 14.

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were to deal only with the federal government in a matt
political controversy with the United States; and it was
that the line between political and private controversie
not well defined; but in the present case the question inv
was one of mere private right, in the course of municipal
appertaining to the judicial tribunals of the country, v
were as fully open to citizens of Peru as to those of the U
States.

In conclusion, Mr. Cushing expressed the opinion th
responsibility in the premises attached to the United St
whether on account of any supposed liability of the Sta
California, or of any supposed omission of duty on the pa
the marshal, or of any supposed opinion or declaration o
Secretary of State, or of any other causes whatsoever.

When the claim came before the present commissio
commissioners differed upon it, and it was referred to Ge
Herran, the umpire, who rendered a decision on Novemb
1863. Among the papers before the commission there wer
accounts, by one of which the claim appeared to amou
$188,378.37, and by the other to $117,771.87. General H
accepted, however, as the proper amount of the clai
amount of the judgment of the district court, especially a
Peruvian Government had adopted that sum as the ba
its diplomatic demand. No copy of the judgment was b
the commission, but both parties agreed that it was pronou
and there was no controversy in regard to it.

General Herran expressed his concurrence in the view
the obligation of the United States to indemnify the cla
could not be deduced from the judgment of the court,
governments were not obliged to satisfy judgments ag
parties who might be insolvent or evade payment. But
ernments were, he declared, under a duty to "administe
tice to their own citizens or subjects, and to those of such
nations as may have acquired the same rights by mea
public treaties." Consequently, the denial of justice gav
right of diplomatic intervention, though such interve
ought to be granted only when it is evident "that just
refused, and that the claimants have exhausted all their
remedies before the authorities of the country." Pursuin
line of argument, General Herran said:

"Montano appeared before the district court of Cali
asking in accordance with a law of the country for inde

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cation for the loss he had suffered. The tribunal sentenced the pilot association to which Morgan belonged to pay to Montano $24,151.29 and directed the marshal of the district to execute the judgment. This officer undertook to levy upon the schooner *Rialto* as the property of said association, but upon being informed by some person that he was the owner of that vessel, that it no longer belonged to the pilot association, the marshal demanded of Montano a bond of indemnity. Montano did not give the bond, and the marshal, without making further efforts, returned the writ of execution with the indorsement of *nulla bona*.

"The marshal is under obligations to employ all necessary efforts to execute the writs placed in his hands by the court upon which he depends, and nothing is more important than the execution of a judgment. If the marshal had doubts whether the *Rialto* were, as was believed, the property of the pilot association, he ought to have demanded that the title to the property be shown to him, which was the easiest and surest way of solving the doubt. He had no right to put upon Montano the responsibility of his proceedings, imposing on him the burden of furnishing a bond of indemnity, he being, in the case foreseen by the law, under the necessity of exercising some particular judgment in the fulfilment of his duty. He was responsible to the party that might be injured and ought to have proceeded at his peril, and not at that of the other. Refusing to levy upon the schooner *Rialto*, which was known as the property of the licensed pilots' association, of which Morgan was a member, unless he should be certain that the title had not been transferred to another party, was on his part an actual resistance to the order of the court which he ought to have executed.

"Besides this, he neglected the means at his disposal in the sureties of the pilots to which he ought to have resorted; and to do so it was not necessary that the interested party should point them out to him, for the existence of those sureties was known by a public and official act, for they were furnished or ought to have been furnished in virtue of a law of the state, with the formalities established by the state government, to pay damages caused by the ignorance or carelessness of the pilots, and for that object precisely the court placed the writ in the hands of the marshal for execution. It is no justification to this officer that someone told him the pilots had not complied with the obligation to furnish sureties, for he ought to have proceeded under the idea that the provisions of the law were effective. If it had resulted that there were no sureties, the omission would have been discovered, and the responsibility of it; and thus alone he would have been in the way of ascertaining that there was no property upon which to levy in execution of the judgment of the court. The sentence of the court was not made effective through the fault of the public officer who was under obligation to execute it.

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"And in this case the denial of justice is the more pal
* * *, because it is not now a subject for examinatio
decision whether his claim be just, but that a writ decre
the sovereign name of the country be executed by whi
recognized and defined the rights of the aggrieved party
sought reparation. As he was not able to execute the d
himself, that being the duty of an officer acting under p
authority, the responsibility falls upon the officer upon v
the law imposes the duty of executing the judgment. C
quently Montano placed the case in the hands of his go
ment, who sought justice from the United States for the in
party. The Secretary of State of the United States acc
the diplomatic question and recommends the subject to the
ernment of California. It is pretended that the Secreta
State, Mr. Webster, recognized, by his reply to Mr. Osm
obligation claimed by Montano, but I am of the contrary op
that Mr. Webster exempted his government from responsib
but took means to have justice rendered to Montano—tha
say, that they should pay who ought to pay—in whic
from assuming the responsibility of the marshal of Calif
he enjoined measures for repairing the omission of the fe
officer.

"The government of California did not heed the recomm
tion of Mr. Webster, denounced the omission of the ma
and on its part did nothing to remedy it. The pilot servic
been regulated by the authority of the State. It did not c
captains of vessels entering the port to employ licensed p
but imposed on them the obligation to pay a tax to the as
tion. In compensation for this burden imposed on ve
the State enacted a law that damages caused through fa
the licensed pilots to those vessels whose captains had
ployed them should be indemnified at the cost of the p
for which object sureties were required. The obligations
government of the State could not be more solemn—not t
itself but to cause the payment by means of the sureties, v
ought to have been furnished to its satisfaction. Mr. We
had no power to order the government of California—he
only recommend; and that was sufficient for them to
effectual measures for remedying the omission of the ma
There was no discussion about a claim of doubtful justic
of the execution of an irrevocable sentence pronounced
competent tribunal of the country, which ought to have
discharged by the sureties of the licensed pilots furnish
them by the authority of the government of California—v
was not an indifferent matter for them, as might have bee
case with any other suit among private individuals, [sin
was a matter in which the good faith of the State was ple
It had offered vessels that might enter the port of San
cisco (and the offer was not gratuitous, but at the cost of
which they paid), the services of suitable pilots, and tha
damages caused by their unskillfulness or neglect wou

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indemnified at the cost of the licensed pilots. This regulation, which was the same or similar to those which are in force in almost all ports, gave confidence to captains of vessels, and justified marine insurance companies in imposing the condition that vessels which carried insured goods should take licensed pilots. An occasion arrived for practically complying with the regulations, and after the injured party had proved the injuries by judicial proceedings, to which no objection has been made, the government of California, far from facilitating by means at its command compliance with the regulation, employed those means in opposition.

"The denial of justice being reiterated, the case was returned to the federal government, and then Mr. Marcy, Secretary of State, and Mr. Cushing, Attorney-General, objected to the right of the Peruvian Government to intervene in behalf of Montano, because he had not exhausted his legal remedies which the laws of the country allowed him equally with its own citizens. But this argument was too late; diplomatic intervention had been accepted with the understanding that it was the only remedy left the claimant for obtaining justice. It was then that Mr. Marcy, approving the conduct of the marshal and that of the government of California, and refusing to take any measures for removing the obstacles which were in the way of the execution of an undoubtedly just sentence, assumed the responsibility in the name of the United States.

"The obligation of a stranger to exhaust the remedies which nations have for obtaining justice, before soliciting the protection of his government, ought to be understood in a rational manner, that such obligation does not make delusive the rights of the foreigner. After Montano had obtained a definite sentence that a sum of money should be paid him, which the court determined as a just indemnification for his damages and losses which he had suffered through the fault of a pilot accredited by the laws of California, who for the payment of that sum had furnished sureties in fulfillment of a law of the State, one ought to believe that the claimant had only to put the writ in execution to pay the cost. But such was not the case. What Montano gained by the sentence was the right to bring forward another complaint; and I believe that he then found himself obliged to seek from his government its interference in his behalf. This was at bottom the opinion of Mr. Webster, as shown in the act of admitting diplomatic intervention without making any objection. And General Cass, although he considered that his predecessor had terminated the controversy, gave it to be understood in his note to Mr. Clay, dated 17 October 1857, that his opinion was not adverse upon the point to which I allude, to that of Mr. Webster. In one place he says that the Department of State had manifested a disposition to give to the claimant every opportunity to secure his lost property, 'even making the Government of the United States responsible if the opinion of Mr. Cushing had taken that shape.' In

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another place, showing that it did not belong to the De
ment of State to advise as to the steps the claimant cou
ought to take, for that was the duty of his adviser, it
tioned as possible, among other things, a petition to Cong
It appears to me that only under the impression that the c
ant had exhausted the ordinary means of obtaining ju
could General Cass have believed that there was any prob
ity that that step would have resulted favorably to the i
ested party.

"I have not taken into consideration the unfortunate
cumstances of Montano, to which allusion is made in son
the documents, as they are not arguments that have
weight with the commission, which is also the case with
tain precedents which have been quoted. I have formed
opinion taking for guide and rule the principles of internat
law, and making the application of them in the manner w
my conscience has dictated.

"Therefore I decide that the claim of Stephen G. Mon
against the United States is valid for the sum of twenty
thousand one hundred and fifty-one dollars and twenty-
cents, with interest at the rate of six per cent per annum
September second A. D. 1851, all payable in the current m
of the United States."

This decision did not terminate the case, owing to a c
tion which arose as to the effect to be given to the words "
rent money" (*moneda corriente*). When Montano in July
applied to the Government of the United States for his mo
the nominal amount of the award was paid to him in Un
States currency, which was worth only about $15,000 in g
Montano protested, claiming that he was entitled to rec
gold; and the Senate Committee on Foreign Relations
ported a bill to pay him $27,800 in that coin. The bill f
to pass, and the question was referred to the commission w
history is narrated in the next chapter. By this commis
the claimant's contention was sustained, and an award
made to him in gold for the unpaid portion of the awar
General Herran.[1]

[1] Mr. Bates, At.-Gen., 11 Op. 52 (July 12, 1864), advised Mr. Seward
under the award of "current money" the debtor had "the option to
in treasury notes or in specie." In a letter to Mr. Montano of Feb
5, 1866, Mr. Seward argued at length that payment in United State
rency was good.

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CHAPTER XXXVIII.

PERUVIAN CLAIMS COMMISSION: CONVENTION BETWEEN THE UNITED STATES AND PERU OF DECEMBER 4, 1868.

New Claims Convention.

After the termination of the commission whose history is narrated in the preceding chapter, claims against Peru continued to arise, growing out of the unsettled condition of affairs in that country, a condition which, though primarily due to domestic strife, was in time aggravated by the war with Spain. For the purpose of bringing these claims to "a speedy and equitable settlement," the two governments entered into a new convention, which was signed at Lima, December 4, 1868. The ratifications were exchanged at the same place on the 4th of the following June. In its general provisions the new convention closely followed that between the United States and Great Britain of February 8, 1853, an instrument which, as we have more than once had occasion to observe, Mr. Seward, by reason of the happy results of the London commission, adopted as the model of his claims treaties. It provided for the appointment of two commissioners, one by the President of the United States, and the other by the President of Peru; and for the appointment of an umpire by the commissioners. Lima was adopted as the seat of the commission.

Jurisdiction of the Commission.

We have seen that the jurisdiction of the commission under the convention with Peru of 1863 did not extend to any claim which had not been presented to the Department of State at Washington, or the department of foreign affairs at Lima, as the case might be, prior to the exchange of the ratifications of that convention, which took place on April 18, 1863. By the new convention it was agreed that the commission organized thereunder should not have jurisdiction of claims "arising out of any

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transaction of a date prior to the 30th of November
The effect of this stipulation was to exclude from the ju
tion of the new commission claims which might have
during, or even several months before, the sessions
commission of 1863. This exclusion probably was due to
vertence; but it ran all through the convention, wh
another place limited the retrospective jurisdiction of th
commission to claims which had been "presented to
government for its interposition since the sittings of th
mixed commission," the commission of 1863. Such bein
retrospective operation of the new convention, its prosp
operation extended to any claims which should be pre
to the commissioners within two months from the day of
first meeting; but the commissioners were authoriz
extend this period for a month in any case in which re
for delay should be established to their satisfaction, or t
of the umpire.[1]

Organization of the Commission.

The commissioners were required to m
Lima "at their earliest convenience"
they had been respectively named, an
examine and decide upon every claim within six month
the day of their first meeting." They met at Lima Sept
4, 1869. The American commissioner was Mr. Michel
of Louisiana, who was appointed by President Grant Ju
1869.[2] The Peruvian commissioner was Mr. Luciano Ben
Cisneros, assistant attorney-general of Peru. The co
sioners jointly subscribed a declaration by which they
themselves, in the language of the convention, impartiall
carefully to examine and decide to the best of their jud
and according to justice and equity, without fear, fa
affection to their respective countries, all the matters re
to them for their decision.

Mr. Louis L. de Arze was appointed as clerk on the
the United States by the American commissioner, and Mr
Francisco Pastor as clerk on the part of Peru by the Pe

[1] By Article V. claims otherwise admissible, which were not pr
to the commission within the time prescribed, became barred. (M
Sec. of State, to Mr. Grace, April 18, 1870, MS. Dom. Let. vol. 84,

[2] Congress not having made an appropriation to meet the expense
commission, the Department of State was obliged temporarily to
the payment of such as fell upon the United States. (Mr. J. C. B.
acting secretary, to Mr. Vidal, Aug. 5, 1869, MS. Dom. Let. vol. 81,

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commissioner. They were directed to make up the records of the commission.

At subsequent sessions Mr. Francisco Garcia Calderon appeared with authority from the chargé d'affaires of the United States in Lima as agent of the United States, and Mr. José Simeon Tejeda appeared with a commission from the minister for foreign affairs in a similar capacity for Peru.

On and after October 11, 1869, the meetings of the commission were held at the Palace of Justice, Hall of the Lawyer's College.

Selection of Umpires.

It has been pointed out that the commissioners were required to name some third person to act as umpire. But it was also provided that if they should not be able to agree on the name of such third person they should each name a person of a third nation, and that in each and every case in which they might differ in opinion as to the decision which they ought to give it should be determined by lot which of the two persons so named should be the umpire in that particular case. Being unable to agree on one person, the commissioners resorted to the alternative provision. Mr. Vidal named as umpire Mr. Federico Augusto Elmore, a British subject, while Mr. Cisneros named Mr. Teodoro Valenzuela, the Colombian minister at Lima. They both accepted the trust, and appeared and subscribed the requisite declaration.

Proceedings of the Commission.

On the 8th of October 1869 the commissioners adopted rules and regulations, and took into consideration the mode of notifying claimants of their meetings and of the time within which claims must be presented. They finally decided severally to notify their governments of the time and place of the meeting of the commission, and directed the secretaries or clerks to publish a notice to claimants in the daily papers of Lima, in English and in Spanish.

The hours of meeting of the commission were from 1 to 4 o'clock p. m. till December 22, 1869, when they were changed to the hours of from 2 to 5 o'clock p. m.

On November 29, 1869, the commissioners received a letter from the United States legation appointing Dr. Ricardo Ortiz de Zeballos as assistant agent on the part of the United States for the purpose of advocating a particular claim—that of A. Rosenwig and others—pending before the commission.

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On a certain occasion the chargé d'affaires of the U States at Lima sent directly to the umpire some papers ting to a case which was then pending before him. umpire sent them to the agent of the United States, who them before the commission, and the commissioners ame their rules so as to require all documents relating to clai be presented in their office and filed by one of the secret

On February 1, 1870, nearly five months after the meeting of the commissioners, memorials were presente relation to the claims of Henry Curtis and John Gillis ag Peru. The commissioners ordered the memorials to be with the understanding that the commission reserved right to decide at the next meeting whether the claims be received and adjusted without violating the letter o convention. The commissioners subsequently decided they could not be, and they were dismissed.

At their session on February 3 the commissioners res that the notices of award which they had sent to respective governments were to be treated merely as no to the governments, and not as documents to be used b claimants or any other persons, entitling the owner or b to receive the whole or any part of the amount awarded. the same time they agreed upon a formal certificate of a to be given to each claimant, and resolved, with respect "that for every claimant to whom sums of money were o be accorded by the commissioners or one of the umpires o mixed commission, such a document as above described be drawn up, signed by both commissioners, sealed with seal of the commission, dated on the day on which the was decided upon, and deposited in the legation of the U States of America at Lima if the award is to be paid b Government of Peru, and in the legation of the Peruvian ernment at Washington if the award is to be paid b Government of the United States of America."

Appointment of a Special Commissioner.

On December 27, 1869, the commissio ceived a letter which Mr. Cisneros, the P vian commissioner, had addressed to Peruvian minister for foreign affairs, a which he stated that he could not act in certain cases, bec he had given an opinion upon them as counsel. Under th cumstances the President of Peru appointed Dr. Manuel as a special commissioner to act in those cases. Mr. Vidal a paper reserving any question as to the regularity of the ceeding. Dr. Pino presented his commission January 20, 1

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and subscribed the requisite declaration. A special order was made by the commission specifying the cases in which he was to act and the time of taking them up.

Principles of Decision.

On several occasions Mr. Vidal urged upon his colleagues the desirableness of departing in the decision of cases from strict rules of law, and of acting rather upon the principle of conciliation. Thus, on February 8, 1870, he took up with Dr. Pino the claims of Francis Lafontaine Grannan, Michael F. Eggart, and Alfred Lepoint, as to which they were unable to agree. They decided to refer the cases to one of the umpires, but after they had come to this decision they caused to be made in the record the following entry:

"They [the commissioners] came to an agreement, both resolving by common accord that in order that the spirit of harmony of the convention of the 4th of December 1868 should be realized, it be awarded to Francis Lafontaine Grannan as an equitable indemnity the sum of 7,000 Peruvian silver soles, which the Peruvian Government will pay; to Michael F. Eggart the sum of 11,000 Peruvian silver soles, and to Alfred Lepoint the sum of 3,900 Peruvian silver soles, which the Peruvian Government will also pay.

"Both the commissioners stating that they will respect and give force to the opinions which they may, respectively, have emitted in the votes which they have expressed in writing; they declare that this equitable decision will leave standing in all its provisions what has been agreed upon in the eighth article of the American and Peruvian convention, which says: 'The High Contracting Parties declare that this convention shall not be considered as a precedent obligatory upon them, and that they remain in perfect liberty to proceed in the manner that may be deemed most convenient regarding the diplomatic claims that may arise in the future.'"

On the 11th of February Messrs. Vidal and Pino took up the claim of H. Milligan against Peru for 327,000 soles, as damages for the alleged arbitrary revocation by the Peruvian Government of a contract granted to an American company, represented by the claimant, to build and own for a number of years a macadamized tramway between Callao and Lima and a horse railroad on several streets of the latter city. The Peruvian special commissioner contended that the primitive grantees, having transferred their rights to other parties, in violation of an article of the contract, before the road was constructed, lost their right to sue the government; also, that having, by one of the articles of the contract, bound themselves to refer all matters of difference between themselves

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and other parties to the courts of Peru, they had no rig
appeal to the mixed commission. The American commiss
contended that the article in regard to the transfer of the
did not affect the case of Milligan, who became a shareh
under a provision of the contract which authorized the g
ees to issue stock in order to raise funds; and also that, b
claring the contract null and void, the Peruvian Govern
had deprived itself of the benefit of the article by whicl
company was bound to refer all differences with other pa
to the Peruvian courts. Having thus failed to agree, the
missioners had resolved to refer the case to one of the um
when Mr. Vidal again urged upon Dr. Pinto the princi
conciliation, with the result that they made an award in
of the claimant for the sum of 75,000 Peruvian silver sol

In like manner Mr. Vidal wrestled with the regular Peru
commissioner, Mr. Cisneros, urging upon him the consi
tions that the commission "was not a severe tribun
justice," and that by the convention its decisions were n
be regarded as obligatory precedents. In this spirit it
agreed that the claims of S. Crosby & Co., A. Rosenwig
R. Hardy, which had been returned by the umpire to the
mission, and in respect of which new documents had beer
sented, should be disposed of by the commissioners. "I
tue of this agreement," as the record states, Messrs. Vida
Cisneros agreed upon awards in favor of the claimants i
cases of S. Crosby & Co., Adolphe Rosenwig (No. 1), Ric
Hardy, Frank Isaacs, Thomas J. Clark, Santiago C. Mor
Adolph Rosenwig (No. 2, ship *Tudor*), and Charles Weil

They agreed to dismiss the claims of Peter V. Hevner,
ham Wendell, Mrs. Fidelia C. Byers, Rollin Thorne, E
Curtis, John Gillis, and Mrs. Reyes de Cox.

Thus out of the thirty-six claims against the United S
the commissioners disposed of all but three. There wa
one claim against the United States, and it was referr
Mr. Elmore as umpire.

Rate of Exchange.

The commissioners on December 15,
made the following order in relation to th
of exchange to be applied to the awards
commission:

"ORDER OF COMMISSIONERS AS TO THE RATE OF EXCH
APPLICABLE TO THE AWARDS WHICH MAY BE MAD
THEM OR EITHER OF THE UMPIRES.

"The commissioners hereby resolve that in the awards
may be made by them or either of the umpires the word

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will mean the United States of America gold dollar, and the word *sol* the Peruvian silver sol, and no other kind of money will be mentioned in the decisions besides the American gold dollar and the Peruvian silver sol. They further establish the relative rate of payments of those same awards in the metallic currency of the respective countries of the United States of America and Peru at one sol and eight centavos to the United States gold dollar.

"Copies of the above resolution shall be transmitted by the secretaries to every one of the arbitrators and counsel, and to the governments of the United States and Peru."

Mr. Vidal's Report.

February 26, 1870, the commission adjourned *sine die*, all the business before it having been finally disposed of. On the same day Mr. Vidal made the following report of the results of its proceedings:

"MIXED COMMISSION OF THE
"UNITED STATES AND PERU,
"*Lima, February 26, 1870.*

"SIR: The mixed commission of the United States of America and Peru having discharged the duties imposed upon them by the convention of December 4, 1868, the undersigned, commissioner on the part of the United States of America, has the honor to report that the following claim was presented against the United States of America:

Esteban Guillermo Montano	$120,600.00

"In respect to which the commissioners being unable to agree, Umpire Elmore made the award of 57,040 American gold dollars,[1] to be paid by the United States of America to said Esteban Guillermo Montano.

Claims Against Peru.

"The following claims were presented on the part of citizens of the United States of America against Peru, viz:[2]

1.	Ruden & Co	$203,662.31
2.	George Hill	30,592.59
3.	Richard T. Johnson	21,725.92
4.	Francis L. Grannan	29,730.55
5.	Michael T. Eggart	55,000.00
6.	Alfred Lepoint	19,572.92
7.	Henry Milligan	302,777.77
8.	S. Crosby & Co	13,990.89
9.	Adolphe Rosenwig (No. 1)	13,272.86
10.	Richard Hardy	4,672.37
11.	Frank Isaacs	12,828.14
12.	Thomas J. Clark	22,129.81
13.	Santiago Cobb Montjoy	17,240.74

[1] 62,000 Peruvian silver soles.

[2] The amounts stated in the following list are in United States gold. The nominal amount of all the claims against Peru, in Peruvian silver, was 1,271,179.16 soles.

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14. Adolphe Rosenwig (No. 2)	$3
15. Charles Weile	4
16. Peter F. Hevner	
17. Abraham Wendall	7
18. Fidelia C. Byers	3
19. Rollin Thorne	23
20. Henry Curtis	
21. John Gillis	
22. Maria Reyes de Cox	

"Of the above claims the last seven were either disa
or dismissed by the commissioners for the following re

"Claims Nos. 20, 21, and 22 were dismissed for bein
sented to the commission beyond the time allowed by a
of the convention of December 4, 1868.

"Claim No. 19 was dismissed, the commission having
that the claimant, an American citizen, had substitute
self for a Peruvian citizen who was the true claimant, i
to enjoy the privilege of having the case, already lost
the courts of Peru, adjusted by the commission.

"Claim No. 18 was dismissed as arising out of a trans
of a date prior to the 30th of November 1863, and being,
fore, one of the cases which the commission could not
by virtue of article 2 of the convention.

"Claim No. 17 was disallowed by the commission for
prima facie a groundless one.

"Claim No. 16 was disallowed for being one of those
which, in the opinion of the commissioners, neither the U
States of America nor Peru would willingly allow an i
tional court to adjust.

Awards against Peru.

"Of the fifteen other claims, Nos. 1
were adjusted by Umpire Valenzuela, N
Umpire Elmore, and the other twelve
commissioners. The following awards were respectively

1. Ruden & Co	$7,
2. George Hill	5,
3. Richard T. Johnson	10,
4. Francis L. Grannan	6,
5. Michael T. Eggart	10,
6. Alfred Lepoint	3,
7. Henry Milligan	69,
8. S. Crosby & Co	9,
9. Adolphe Rosenwig (No. 1)	2,
10. Richard Hardy	2,
11. Frank Isaacs	2,
12. Thomas J. Clark	4,
13. Santiago Cobb Montjoy	10,
14. Adolphe Rosenwig (No. 2)	17,
15. Charles Weile	32,
Total	194,

[1] The awards in Peruvian silver soles were, in the order above st
follows: (1) 7,667.15; (2) 6,000; (3) 11,480; (4) 7,000; (5) 11,000; (6
(7) 75,000; (8) 10,000; (9) 2,500; (10) 2,500; (11) 3,000; (12) 4,5
11,000; (14) 19,424; (15) 35,000 = 209, 971.15 soles. (See S. Ex. Do
Cong. 2d sess.)

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"By virtue of article 4 of the convention of December 4, 1868, all those awards shall be paid within four months after the date of the decision. It is therefore important to state that—

"No. 1 claim was adjusted on the 18th of January.

"No. 2 claim was adjusted on the 20th of January.

"No. 3 claim was adjusted on the 22d of January.

"Nos. 4, 5, and 6 claims were adjusted on the 8th of February.

"No. 7 claim was adjusted on the 11th of February.

"Nos. 9 to 15 claims were adjusted on the 12th of February.

"Nos. 16 to 22 claims were dismissed and disallowed 14th of February.

"The award in favor of Estaban Guillermo Montano was made on the 25th of February.

Protests.

"The undersigned respectfully calls attention to two protests he made on the 20th of January last; one of those in relation to the appointment by the Peruvian Government of an assistant commissioner, which was regarded as being contrary to the letter and spirit of Article I. of the convention of December 4, 1868. The other protest originated from an irregularity in the proceedings of the court, which irregularity was, in the American commissioner's opinion, the cause that the award made to Ruden & Co. was, by more than one hundred thousand dollars, below the figure it would otherwise have reached.

Defects in Jurisdiction.

"In connection with the matter, the undersigned would take the liberty to point out an oversight which he noticed in article 2 of the convention of December 4, 1868, and in consequence of which the commission was debarred of the right to adjust the claim of a worthy lady, an American citizen by birth, Mrs. Fidelia C. Byers. By virtue of article 2 of the convention of 1868, no claim arising out of a transaction prior to the 30th of November 1863 was admissible. On the other hand, it was stated in the treaty of 1863 that no claim could be presented to the commission of 1863 arising from facts posterior to the 18th of April 1863.[1] The consequence is that none of the claims originating between the latter date and the 30th of November 1863 could be presented to either commission.

"Mrs. Byers's claim was one of those cases, for it arose out of a judgment rendered by a Lima court on the 25th of November 1863; that is to say, only two days before the mixed commission then sitting at Lima adjourned. Mrs. Byers was then at Arequipa, and with all possible diligence it would have taken her at least a month before she could have received the news of that decision and repaired at once to Lima. But had she been in that city on the 25th of November, yet she could not, by virtue of the convention of 1863, have presented her claim

[1] This statement is not quite accurate. See *supra*.

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to the then sitting commission. The undersigned beg
excused for expatiating on that subject, but really that
having nothing to support her family but what she can e
teaching, did not expect till the very last hour she wou
herself deprived of all hopes of ever having the means t
back to her native country in consequence of an error
convention.

The Bar of the Convention.

"Most, if not all, of the claimants and persons connected with the commissio reading article 5 of the convention o came to the erroneous conclusion that all claims arising any transaction of a date prior to the 4th of June 1869, w such claims were presented or not, whether they were g or dismissed, were to be considered and treated as finally s barred, and therefore inadmissible, not only by future c sions, but also by the courts of either country.

"It is evident that such can not be the meaning of th cle, for the high contracting parties had no authority to d claimants of their legal means of redress before the or courts of the country where the transactions took plac had they that right, they would not use it.

"The wrong inflicted by that article interpreted in tha would be so much the greater that, considering the di between Peru and the United States, the lack of good arrangements in Peru, and the very short period given to ants to present their papers to the commission, it was impossible for a few of them to file their memorials bef 4th of December 1869.

"One Captain Harriman, whose ship was attached in and who was out in Europe when he first heard of the c sion then sitting at Lima, is, with claimants Nos. 20, 21, a the victim of article 3, in which it is said that no claim under any circumstances be prosecuted after the 4th of ber 1869.

"Other persons there were whose claims, though with jurisdiction of the commission to which they were subm may nevertheless be founded in law as well as equity undersigned would therefore respectfully suggest th American legation at Lima be instructed to get from the vian Government the documents in support of claims dis or disallowed when the proper parties apply for them.

Sessions and Expenses.

"The first session of the commissio place on the 4th of September 1869, a last on the 26th of February 1870. B those two dates the commission held 79 sessions, and meantime its contingent expense for translations, copyi uments, publishing notices, and other items amounted t soles, or $1,268.51, which, in a city where men who kno to read and write are generally better remunerated tha where else, was considered as a very moderate figure.

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"The total expenses of the commission amount to 14,033 $\frac{13}{100}$ soles, or $12,993.63, and as the commission of 5 per cent on the awards will amount to but $12,572.88, the United States Government will have to contribute for their share $210.37 to defray these expenses, according to article 6 of the convention.

The Montano Claim.

"Montano's claim, which originated from a difference of opinion in regard to the true meaning of a special sentence in the decision of the umpire of the commission of 1863, seems to be doomed by a kind of fatality to beget new claims every time a commission has adjusted it. Umpire Elmore, to whom the claim was referred this last time, stated in his decision that his award to Montano was 62,000 soles, or 57,040 American gold dollars. Now, our dollar being worth 1 sol and eight cents, it follows that 62,000 soles are worth $57,407.40; but the commissioners, unwilling to open the door once more to that phœnix-like claim, decided to put the award at $57,040 only in their official docket and the certificate, and never mention the 62,000 soles. It is to be hoped that Mr. Montano will not peer out once more, ten to fifteen years hence, with a claim against our government for $367.40 with interest, compensation for deprivation of profits, indemnity for loss of time in prosecuting his claim, traveling expenses, etc.[1]

Acknowledgments of Courtesies.

"The report of the commissioner on the part of the United States would be incomplete without an acknowledgment of the many obligations he is under to the gentlemen of the United States legation at Lima, for ready assistance in the discharge of his duties, as well as to the Executive of Peru, and all the gentlemen connected with the commission, for numerous indications of the courteous hospitality extended to him and the unbounded admiration professed for his country.

"All of which is respectfully submitted.

"M. VIDAL,
"*Commissioner on the part of the United States of America, of the American and Peruvian Mixed Commission.*

"To the Hon. the SECRETARY OF STATE,
"*Washington, D. C.*"

Claim of Wendell.

In his report Mr. Vidal states that claim No. 17, of Abraham Wendell against Peru, "was disallowed by the commission for being *prima facie* a groundless one." It appeared that the Government of Peru, wishing to have a second bridge built at Lima, across the Rimæ, solicited in the *Peruano* sealed proposals for its

[1] As to the final payment of the money, see Mr. Adee, Second Assistant Secretary, to Mr. Hevner, December 4, 1891, MS. An appropriation for the payment of the final award was made by Congress July 15, 1870.

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construction. The claimant, replying to this invitation to build the bridge within twenty months for a price a according to his own statement, he would have mad profit of a hundred thousand soles. The governm not give him the contract, and he came to the com to obtain, through its action, the profits of which he that he was thus deprived. He did not, however, cl whole of the 100,000 soles; but, desirous of proving h eration, asked for only 75,000 soles for the loss of and added a demand for 3,000 soles for the cost of th accompanying his sealed proposal, in all 78,000 sole claim was ably argued on both sides; but when the sioners conferred upon it they agreed that it was not in equity, though at first the United States commissio unwilling to reject it altogether. It seemed that t ernment had promised to award the building of the b the lowest bidder; that Wendell was the lowest bidd that he was ready to give the security required by the ment for the faithful execution of the contract; why, th was not the work given to him? Subsequently, howe commissioners received from the claimant himself a the number of the *Peruano* (the official organ of the P Government) in which were published all the sealed p received for the building of the bridge. A perusal of th convinced the commissioners that the claimant was lowest bidder, and that his proposal was not in conform the requirements of the official invitation; and they ingly disallowed the claim.

Claim of Hevner.

In Mr. Vidal's report it is stated tha No. 16, of Peter F. Hevner against Pe disallowed as one "which, in the opinio commissioners, neither the United States of America n would willingly allow an international court to adjust claim and its final disposition were stated by the commi in the record of their proceedings as follows:

"Claim for work done for Peruvian war vessels in 186 was one of those Callao claims about which, in the ab sufficient evidence, it was so difficult for the commissi come to an agreement. A circumstance occurred in t of this claimant tending to render his claim still more than the others. The claimants, A. Rosenwig, S. Crosb R. Hardy, and T. J. Clark, had filed in their respecti some kind of evidence more or less satisfactory; for the

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vouchers signed by the person who bought from them
erial for the Peruvian war vessels or they filed copies
books certified by the United States consul at Callao.
house of Peter Hevner being destroyed by fire some
fore his claim was presented, he could not file any docu-
hatever in support of his case, and the commission was
npleasant dilemma either to disallow the claim, perhaps
, or to make an award on the mere assertion of a person
unknown to the commissioners.

uary 27. The agent of Peru filed on that day a mass of
e relative to all those Callao claims, tending to prove
ey were all of them considerably exaggerated. Among
nber of the papers presented on that occasion to the
sion there was a bill presented by Hevner with a
. That bill was for 395 pesos and 20 cents, and that is
commissioners could find to support a claim of 6,757
d 20 cents.

ruary 14. The commissioner on the part of the United
vas at first of opinion that this claim should be allowed
ll extent; but when it was proved that it was greatly
ated, he changed his mind and consented to have it
rably reduced. Lastly, when both commissioners exam-
e papers together, they found that the claimant had not
ything to the government, but that his bill was only
k done at his sawmill for the Peruvian war vessels. In
ience of the principle adopted by them, to adjust no
or work done for the Peruvian war vessels while Peru
war with a power at the time at peace with the United
they to-day disallow the claim."

Rosenwig others.

In the foregoing case reference is made to the claims of A. Rosenwig, S. Crosby & Co., R. Hardy, and T. J. Clark. The claims of ig, Crosby, and Hardy were discussed together in an by the United States commissioner. It appeared that the Government of Peru, in expectation of an attack ao by a Spanish squadron, ordered the construction of or called the *Victoria*, and of some torpedoes, and di- the ship *Loa*, of the Peruvian navy, to be turned into clad. The execution of these orders was committed to S. Backus, the state engineer, who bought large quan- f material from Callao merchants, among whom were imants in question. With this material the work was nd when the Spanish squadron made its attack the and torpedoes were used by the Peruvian forces. Sub- ly the claimants presented bills to the Peruvian Gov- t for the materials furnished by them. The orders for rk in which the materials were used were made by

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the government of General Pezet. In time this gove
was overthrown, and the succeeding government, that
Prado, refused to pay the bills. The Prado governme
in turn overthrown, and on June 19, 1867, its successor
a decree in which it was substantially declared that t
ernment was not responsible for Mr. Backus's purchase
it had already paid a large sum on them, and that it
pay nothing more. The commissioners finally compr
the claims.

The claim of Thomas J. Clark was for work done, as
for materials furnished, upon vessels of the Peruvian
The claim for work was disallowed, but an award wa
on account of the materials. The claim for work wa
lowed (1) because it was shown to have been unsatisf
and (2) because it was a matter within "the exclusiv
diction of the courts of the country."

Cases Nos. 4, 5, 6, 11, 13, 14, and 15.

The claims against Peru, referred to
margin, were as follows:

No. 4, F. L. Grannan, for ill treatme
losses during the riots at Batan Grande, Lambayeque, J
13, 1868, as described in Johnson's case, below.

No. 5, Michael F. Eggart, for injuries and losses in th
lutionary disturbances at Chiclayo, as described in the
Hill, below.

No. 6, Alfred Lepoint, for losses and injuries in a riot

No. 11, Frank Isaacs, for the plundering of two cigar
at Lima by a mob on the morning of November 6, 18
seems that the mob was attacking the presidential m
and that the shots fired by the soldiers who were def
that building did great damage to the stores. The sol
question were defeated, and the mob then broke into an
dered the stores.

No. 13, Santiago Cobb Montjoy, for losses suffered in
quence of the act of the local authorities at Lambaye
maliciously cutting off the water from his rice plan
Montjoy was at the time a United States consul.

No. 14, Adolphe Rosenwig (claim 2, ship *Tudor*), for d
growing out of the following transaction: The Engli
Tudor, laden with guano, the property of the Peruvia
ernment, having got on fire and sunk in the roads
Callao, Rosenwig purchased her hull at public auctio
government at first forbade him to appropriate or dest

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but afterward ordered him to remove the ship within days, as it endangered navigation. Rosenwig answered would raise the ship as soon as the government should way the cargo. The government replied that it would e cargo away as soon as the ship was afloat. The dis- proceeded for some time on this line, and neither ship go was raised.

15, Charles Weile, for wrongful arrest and imprison- Weile, while United States consul at Tumbes, inter- o aid or protect a Peruvian woman who was fighting r husband, and, as Peru alleged, dealt the husband a fatal blow with his cane. For this act Weile was d and imprisoned, but he escaped before his trial was l, and fled the country. It was alleged on the part of the States that the wound on the husband's head was in- by the wife; that Weile's arrest was illegal, and without nt, and that the consular office was broken into in order t it. The Peruvian commissioner was opposed to award- arge sum, though he was willing to allow something. ited States commissioner "insisted on the importance ng a decision which would, by the magnitude of the show the local authorities how wrong it is for them to hasty manner when the liberty and honor of the consul endly power are concerned."

cases enumerated and described in this section were, as en seen, disposed of by the commissioners on the prin- f conciliation. The amounts awarded appear by Mr. report.

Ruden & Co.

In October 1869 Alexander Ruden, a citizen of the United States and a partner in the firm of Ruden & Co., of Paita, presented to mmission, as a partner in and a representative of the claim for indemnity for the burning and destruction of ntation of Errepon, in the department of Lambayeque, armed mob, January 14, 1868. Upon the merits of the he commissioners differed. The United States commis- thought that the claim should be allowed in full. The an commissioner thought that it should be dismissed; t, if it should be held to be well founded, only so much ould be allowed as represented the interest of Alexan- den in the firm, the other members of which were not s of the United States. The case was referred to

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Umpire Valenzuela, who, January 18, 1870, rendered
sion. He considered the case under three heads:

1. Was the claim duly presented?
2. Was the Government of Peru responsible for the in
3. If so, what sum should be allowed?

On these points the umpire held—

1. That the claim was properly before the commissi
appeared that on February 14, 1868, Alexander Rud
sented a memorial to the executive power, making a cl
damages. On October 7, 1869, no decision upon the me
having been made, the government returned the pa
him, with a resolution in which it was declared that the
of the papers was not to be understood as an act by
the government submitted the case to the mixed comm
which was then in session. The umpire held, howeve
the jurisdiction of the commission was not dependent
will of either of the governments, and that the clai
properly presented.

But the umpire observed that Ruden presented
before the commission not as the representative of h
personal interest, but as a partner in and represents
the firm of Ruden & Co., which consisted of Alexander
a citizen of the United States, and José Pablo Esco
citizen of New Granada, as equal partners. The Am
commissioner had endeavored to show that Ruden could
and represent the company as an American company
umpire held otherwise. "If," he declared, "it may
that business firms have a nationalty, such nationality
of the country in whose territory they reside, under
laws they have been formed, and by which they are gov
The case might, indeed, be different in regard to a co
under a national charter; but the mere assumption of s
could not give a firm nationality. The umpire therefo
that only Ruden's individual interest in the firm was pr
before the commission.

2. As to the question of Peru's responsibility, the
observed that governments were bound to extend to for
the same measure of protection as they owed to the
citizens, and no more. But a government and its agent
not, without incurring responsibility, refuse to protect f
ers or omit to punish those who injured them. It was
that on January 14, 1868, the inhabitants of Motupe i

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plantation of Errepon, and burned the buildings and
; that on February 14, 1868, Ruden appealed to the ex-
ve power and demanded an indemnity, at the same time
ing guilty omission on the part of the authorities; that
xecutive power two weeks later asked the prefect of the
tment for a report, and that the prefect ordered the sub-
ct to make one; and that the latter on May 22, 1868,
ted that Errepon had been burned, but that he could not
go to the plantation and ascertain the value of the prop-
urned, as the roads were bad. No further steps were
by the authorities till, three months afterward, the pre-
urged on by Ruden, directed the subprefect to make an-
report; but in reply to this order, the first report, which
leficient and passionate, was merely repeated. In July
he executive power, without having come to any decision,
he papers to one of the government attorneys. A third
on of Ruden met the same fate, having been held without
for fourteen months. The facts were not investigated,
ere the guilty parties prosecuted. An order was indeed
for an investigation, but it was avoided. The judicial
rities, when appealed to for an investigation of Ruden's
refused to entertain it, on the ground that an executive
had forbidden the trial of suits against the treasury.
while justice was thus denied, it was charged that the
authorities were concerned in the attack on the planta-
A report of the consular body, drawn up at the place,
ed that the burning of estates, both native and foreign,
time and place in question, was committed by armed
under the command of officers. On all these grounds
mpire held Peru liable for the burning.

For the reasons above stated, the umpire decided that the
ission was not competent to decide on the claims of José
Escobar, as a partner in the firm of Ruden & Co., but
an indemnity should be paid to Ruden to the amount of
0.18.

f George Hill. George Hill, an American citizen, worked as a carpenter at Chiclayo, Peru, in the establishment of a Mr. Solf, by whom he was employed. cember 1867 the village, which had been seized by a revo-
ary party, was besieged by government forces. On the
of January 6, 1868, Hill, fearing the vengeance of those
harged him with being in sympathy with the besiegers,

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set out with a few friends to a neighboring village, when he fired on by a company of cavalry belonging to the revolu ary forces, and brought back as a prisoner to Chiclayo. he was thrown into prison for three days, without food or ical attendance. The house of Mr. Solf, in which there $2,000 in gold belonging to Hill, was robbed by the re tionary party, and then destroyed. The commissioners agreed as to the responsibility of the government of Per the acts of the revolutionary party, which subsequently be the ruling party. The umpire, Mr. Valenzuela, decided Peru was not responsible for the loss of the $2,000, awarded the claimant 6,000 Peruvian silver soles for per ill treatment and loss of health and work.

Case of R. T. Johnson.

Richard T. Johnson, a citizen of the U States, claimed 23,000 soles from Peru fo destruction of his property, an attempt to der him, and blows and ill treatment causing permanent inju The acts complained of were committed on January 13, in the province of Lambayeque. The commissioners dif as to liability of the Peruvian Government, and the case referred to the umpire, Mr. Elmore.

Mr. Elmore, in rendering his decision, said that the question in the case was whether Peru was responsibl what had occurred. The occurrences in Lambayeque notorious, and the supreme government had declared the be infamous. Mr. Johnson was one of the victims of "whirlwind of destruction." The constitution of Peru dec life and property inviolable, and Mr. Johnson reposed in guaranty. Yet his property was destroyed, and he was sonally and permanently injured by armed bands heade the governors of adjacent towns, instigated by the sup authorities of the province, who were dependent upon immediately represented the supreme government. Th preme government issued a decree to the effect that the ries should be redressed; but nothing substantial was nor were any of the malefactors punished. The Peru commissioner had contended that it was necessary that son should have had recourse to the courts and have denied justice. But it was known that the judges of province of Lambayeque were menaced and controlle the mob, and, if not in sympathy with them, in a panic; that it would have been useless to appeal to them. Mr. El

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lared, however, that there had been an actual denial of ice. By the circular of the minister of justice of Peru of tember 13, 1853, the judges were forbidden to receive *dientes* affecting the law of December 25, 1851, closing the solidation of the public debt. By that circular the courts e closed against the sufferers at Lambayeque. Mr. Elmore d two cases of the actual denial of petitions of persons red in Lambayeque on the ground of the circular referred One of these was the case of Ruden & Co., who applied il 2, 1868, to the judge of Lambayeque and were denied a edy on that ground. The claimants were thus without e. If they applied to the courts they were told they had emedy. If they applied to the commission they were told t they must apply to the courts. Mr. Elmore therefore rded the claimant the sum of 11,480 Peruvian silver soles.[1]

[1] The records of the commission were deposited in Lima. (Mr. Fish, Sec. State, to Mr. S. Hevner, April 21 and 27, 1870, MS. Dom. Let. vol. 84, pp. 345.)

As to the payment of the awards by Peru, see dispatches from Peru, Mr. Hevey to Department of State, June 21 and September 21, 1870, MSS. Dept. State.

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CHAPTER XXXIX.

MS AGAINST VENEZUELA: COMMISSIONS UNDER THE CONVENTIONS BETWEEN THE UNITED TES AND VENEZUELA OF APRIL 25, 1866, CEMBER 5, 1888, MARCH 15, 1888, AND OCTOBER 888.

nission of 7-1868.

In only one case have arbitral proceedings to which the United States was a party been impeached for alleged fraud on the part of the al. This case was that of the commission under the ntion between the United States and Venezuela of April 66, for the settlement of claims against the latter gov- nt. Many of the claims were of long standing and large ount, and some of them involved important principles of ational law. The negotiations for their settlement, culmi- in the convention of 1866, were protracted and diffi- The commission for which provision was thus made Caracas, August 30, 1867. Its last session was held t 3, 1868, all the claims submitted to it having been dis- of.[2] The American commissioner was David M. Tal- of New York, who was appointed by and with the and consent of the Senate, July 20, 1867. The first uelan commissioner was Gen. A. Guzman Blanco; but fter his first meeting with the American commissioner a s difference arose between them in regard to the appoint- of an umpire, and their last official conference seems to been held on September 13, 1867. At the next session, was held on the 7th of October, an entry was made in urnal to the effect that, "whereas, from motives of pub- cessity, Gen. Antonio Guzman Blanco had to absent

Cor. 1866, part 3, pp. 430, 435.

eedings of the mixed commission under the convention of April , between the United States and Venezuela: Washington, 1889.

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himself from the capital," the government had "appointed Francisco Conde to replace him in the mixed commiss Mr. Conde appeared and presented his credentials. On 7, 1868, Mr. J. G. Villafañe was appointed to succeed Mr. Villafañe took his seat at the board on the 12th of and served to the close of the commission.

The convention provided that the commissioners shoul point an umpire, but that in case they should be unabl agree the appointment should be made by the diplomatic resentative of either Switzerland or Russia in Washin The choice was eventually made by the Russian mini The umpire so designated was Mr. Juan N. Machad Venezuelan.

The commission decided forty-nine claims, the nor amount of which was $4,823,273.31. It made awards twenty-four claims, the awards amounting to $1,253,31 Twenty-five claims were rejected.[1]

Charges of Fraud.

On February 12, 1869, the Venezuelan ernment presented to the Department of S at Washington a protest against the awar the commission, alleging irregularity in the appointment o umpire and fraud in the proceedings and findings. This test was not favorably received,[2] and Mr. Wilkinson, fron Committee on Foreign Affairs of the House of Representat reported, after an examination of the evidence submitted the protest, that the testimony in question "was taken m to impeach the conduct of the American commissioner, a to him was wholly *ex parte*, with every facility existing the part of the foreign witnesses to distort and color mony;" that the case which it made out was "feeble an conclusive," and that "the gentleman in question, as we others implicated," had appeared and refuted the cha against them.[3] The committee therefore reported a resol to authorize and direct the President to demand of Vene the immediate payment of the awards, and, in case o neglect or refusal to comply, to use such force as might i

[1] H. Rep. 787, 44 Cong. 1 sess. 156–169; S. Ex. Doc. 14, 40 Cong. 3 s

[2] S. Ex. Doc. 541 Cong. 1 sess. See also H. Ex. Doc. 176, 41 Cong. 2 S. Mis. Doc. 162, 41 Cong. 2 sess.; H. Mis. Doc. 221, 42 Cong. 2 sess.

[3] An effort was made by some of the holders of awards to induce gress to advance the money on them. The Department of State de to recommend it. (Mr. Seward, Sec. of State, to Mr. Sumner, Janu 1869.)

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gment be necessary to secure the faithful performance of terms of the convention.[1] During the second session of the ty-second Congress, Mr. Packard, from the Committee on eign Affairs, reported a bill to provide for a new commission the purpose of revising the awards.[2] At the next session, vever, he reported another bill affirming the validity of the rds and authorizing their enforcement.[3] This bill passed House, but in the Senate the clause authorizing the use of e was stricken out. In this form the bill passed the Sen- was concurred in by the House, and on February 25, 1873, approved by the President. It was known in the subse- nt discussions as the "finality act," since it declared that the udication of claims by the commission under the convention 1866 was "recognized as final and conclusive, and to be held id and subsisting against the republic of Venezuela."[4]

Investigation.

In his annual message of December 1875 President Grant announced that Venezuela had, "upon further consideration, practically ndoned its objection to pay to the United States that share its revenue which some years since it allotted toward the inguishment of the claims of foreigners generally." The acks upon the commission, however, did not cease, and the that, owing to domestic strife, the Venezuelan Government been able to devote but little toward the extinguishment he awards, encouraged those whose claims had been rejected continue their efforts for a rehearing.[5]

n the first session of the Forty-fourth Congress a full inves- tion of the charges against the commission was at length d. It resulted in an elaborate report by Mr. Springer, from Committee on Foreign Affairs,[6] and in the adoption by the use, unanimously, of a resolution directing the Secretary of te to suspend the distribution of the sums paid by Vene- la on account of the awards.[7] Subsequently additional

I. Rep. 79, 41 Cong. 2 sess.
I. Rep. 29, 42 Cong. 2 sess.
I. Rep. 4, 42 Cong. 3 sess.
7 Stats. at L. 477.
I. Rep. 609, 43 Cong. 1 sess.
I. Rep. 787, 44 Cong. 1 sess.
For an account of the moneys in the Department of State May 22, 1876, licable to the awards, see S. Ex. Doc. 66, 44 Cong. 1 sess. Install- ts of 7 and 8 per cent had been distributed on the awards. (MS. Dom. vol. 113, p. 217.)

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testimony was taken and printed by order of the House; portant correspondence was communicated by the Pres to the same body,[2] and a report was made by Mr. Ham from the Committee on Foreign Affairs, recommendin creation of a new commission.[3]

The charges against the commission, as developed i investigation, were to the effect that before the meeting board a conspiracy was entered into by Talmage, the U States commissioner, Thomas N. Stilwell, the United S minister at Caracas, and William P. Murray, Stilwell's br in-law and the moving spirit in the matter, to defraud ants by exacting of them a large proportion of their a in the form of attorney's fees; that, in pursuance of this ment, Murray obtained contracts with claimants to repr them before the commission in consideration of from 40 per cent of whatever might be awarded; that the instal of Machado as umpire was brought about in an irre manner; that on the claims which Murray represented a were made to the amount of more than $850,000, while meritorious claims were rejected; that the certificates of were made in small amounts and payable to bearer, so pass without indorsement; that Talmage, as the joint ney of Murray and the claimants, withdrew the certif from the commission; and that after the claimants had rec the certificates representing their share of an award the representing the attorney's share, was divided between ray, Stilwell, Talmage, and Machado. Whether Villafañ in any measure a conscious party to the transaction wa sidered doubtful.[4] The charge of irregularity in rega the selection of the umpire was that Baron Stoeckl, the sian minister at Washington, having appointed as umpire Machado," notice to that effect was sent by the Departm State to the legation at Caracas; that Stilwell, as U States minister, though there was a Juan N. Machado, sr a Juan N. Machado, jr., notified the latter that he had appointed; that the suggestion of the name of Machado nally proceeded from the conspirators, and that the instal

[1] H. Mis. Doc. 11, 45 Cong. 2 sess.; H. Mis. Doc. 30, 45 Cong. 2 se
[2] H. Ex. Doc. 30, 45 Cong. 2 sess.
[3] H. Rep. 702, 45 Cong. 2 sess.
[4] H. Rep. 2610, 48 Cong. 2 sess.

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of Juan N. Machado, jr., as umpire, was the result of their contrivance.

Joint Resolution of 1883.

In spite of the findings of the committees of Congress in regard to the proceedings of the commission, no definite step toward a revision of the awards was taken till 1883.[1] In May 1882 the President sent to Congress a special message, in which he stated that if neither House took any action on the subject during the session then pending he should deem it his duty to recognize "the absolute validity of all the awards." In response to this "earnest invitation," the Committee on Foreign Affairs of the House of Representatives made a full report. The Secretary of State, in a report accompanying the President's message, had recommended the reference of certain of the awards, which had been specially impugned, to the Court of Claims for investigation. The Committee on Foreign Affairs did not coincide with this recommendation. The committee took the ground that the convention of 1866 provided for "a commission to consider the claims of American citizens against Venezuela;" that there had been "no valid commission as called for by the treaty." "The alleged commission," declared the committee, "was a conspiracy; its proceedings were tainted with fraud. That fraud affects its entire proceedings. It was diseased throughout, and there is no method known to the committee by which to separate the fraudulent part from the honest part and establish any portion in soundness and integrity. * * * Justice to Venezuela demands that these proceedings should be set aside speedily and without circuitous action. The Court of Claims is an American tribunal, in whose creation Venezuela has no voice, and to whose jurisdiction she has not submitted. She has agreed to submit these claims to a mixed commission, and as yet there has been no such tribunal whose action is binding and valid." In accordance with these views the committee reported a joint resolution which, after adoption by both

[1] March 29, 1880, the President, in response to a resolution of the Senate of the 29th of the preceding January, communicated to that body a report of the Secretary of State, Mr. Evarts, of the 25th of March, with a statement of the moneys paid by Venezuela under the convention of 1866, and copies of correspondence exchanged between the two governments in 1879 in relation to the awards under that convention. Mr. Evarts suggested the institution of a special domestic commission with authority to make a judicial investigation and to determine which of the awards should be maintained and which abandoned. (S. Ex. Doc. 121, 46 Cong. 2 sess.)

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Houses unanimously, was approved by the President I
1883. The text of this resolution was as follows:

"Joint Resolution Providing for a new mixed commission in a
with the treaty of April twenty-fifth, eighteen hundred and
with the United States of Venezuela.

"Whereas since the dissolution of the mixed con
appointed under the treaty of April twenty-fifth, e
hundred and sixty-six, with the United States of Ve
serious charges impeaching the validity and integri
proceedings have been made by the Government of the
States of Venezuela, and also charges of a like chara
divers citizens of the United States of America, who p
claims for adjudication before that tribunal; and

"Whereas the evidence to be found in the record of
ceedings of said commission and in the testimony take
committees of the House of Representatives in the
tends to show that such charges are not without fou
and

"Whereas it is desirable that the matter be finally
of in a manner that shall satisfy any just complaints
the validity and integrity of the first commission and
a tribunal under said treaty constructed and conduct
not to give cause for just suspicion; and

"Whereas all evidence before said late commission
sented in writing, and is now in the archives of th
Department; and

"Whereas the President of the United States has, in
communication to Congress, solicited its advisory actio
matter:

"Therefore—

"*Resolved by the Senate and House of Representativ
United States of America in Congress assembled*, That th
dent be, and he hereby is, requested to open diplom
respondence with the Government of the United S
Venezuela, with a view to the revival of the general
tions of the treaty of April 25, 1866, with said governm
the appointment thereunder of a new commission to s
city of Washington, which commission shall be auth
consider all the evidence presented before the former
sion in respect to claims brought before it, together w
other and further evidence as the claimants may of
from the awards that may be made to claimants, any
heretofore paid by the Department of State upon ce
issued to them, respectively, upon awards made by th
commission, shall be deducted, and such certificates
canceled; and the moneys now in the Department
received from the Government of Venezuela on accoun
awards, and all moneys that may hereafter be paid un
treaty, shall be distributed pro rata in payment of such
as may be made by the commission to be appointed in
ance with this resolution."

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The course proposed in this resolution was simple, direct, and logical. Starting out with the declaration that the evidence tended to show that the charges against the commission, "impeaching the validity and integrity of its proceedings," were "not without foundation," the resolution proposed that those proceedings should be set aside and that a new commission should be appointed for the purpose of rehearing all the claims presented to the old one.

Negotiations.

On March 26, 1883, Mr. Comacho, the Venezuelan minister at Washington, who was ill of a cancer, wrote to Mr. Frelinghuysen, then Secretary of State, saying that he had been ordered by his physician to cease work and return to his home for a time, and that he intended to do so as soon as the question of claims was disposed of; and he asked for the appointment of an early day for the purpose of giving "practical form to the public resolution of Congress." On the 18th of April Mr. Frelinghuysen, in reply, informed Mr. Comacho that the United States minister at Caracas had been officially notified that it was the intention of the Venezuelan Government to suspend payments on the awards under the convention of 1866, pending the negotiation of a new arrangement between the two countries. Mr. Frelinghuysen expressed his surprise that such a step had been taken without consulting the United States. He said that "many claimants whose awards have been recognized as just" by Venezuela had for years been deprived of what was due them by the action of that government "in impugning the good faith of certain other awards." He further said that the resolution of Congress had "not been officially communicated" to Venezuela; that until such time as the President should direct action under it, it would remain "a purely domestic act," and that it would "facilitate the action of the President, contemplated by the resolution," if Venezuela should resume payments on the existing awards.[1] On April 22, Mr. Comacho, in a note of that date, referred to an interview which he had had with Mr. Frelinghuysen on the 28th of March on the subject of the joint

[1] The awards amounted, as has been seen, to $1,253,310.30, but they bore interest at the rate of 5 per cent. Venezuela had paid on them $410,847.49. Out of this sum the Department of State had distributed two installments, respectively of 7 and 8 per cent, amounting to $177,360.27. There remained in the Department a balance to the credit of Venezuela of $233,487.22; but there was also an increment on this money, representing interest on and increase in the value of government bonds in which it had been invested.

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resolution as superseding, in his opinion, the necessi
other communication of it; and he inclosed a draft
vention to carry the resolution into effect. Mr. Freli
replied, on the 28th of April, that the resumption of
by Venezuela on the existing awards was "a necess
tion to the consideration of the subject."[1]

Early in May 1883 Mr. Comacho returned to V
where he died on the 19th of the following Septem
negotiations then remained in abeyance till January
when Mr. A. M. Soteldo, Mr. Comacho's successor,
a note to Mr. Frelinghuysen, offering "the cooperati
Government of Venezuela" in bringing about a "sp
exact execution" of the resolution of Congress. In
which was made on the 11th of June, Mr. Frelinghuy
ring again to the suspension of payments by Venezuela
that the Government of the United States "must co
but positively decline to consider or recognize any pr
by that of Venezuela admitting, or tending to admit in
the invalidity of the existing awards or of existing ob
contracted under a solemn treaty;" but that the Unit
might agree, "by treaty, to create a tribunal invested
petence to examine and pass upon the charges of fr
hear all the cases before the late commission and t
were proper to be presented before the former commi
decide them upon such evidence as may be submi
when that shall have been done, to substitute the new
whether favorable or adverse, for the old." With
Mr. Frelinghuysen inclosed a draft of a convention "
to execute the intent of the resolution of March 3, 18
while adverting to the fact that it expressly met the
of the suspended payments, said that upon the reply
zuela would "depend the President's decision in rega
posing the negotiation with Venezuela which the r
contemplates." "The President," said Mr. Frelin
"regards that resolution in the light of advice given
Congress at his own request. By that advice, and
regard to the circumstances under which it was a

[1] S. Ex. Doc. 52, 48 Cong. 2 sess. The payments referred
Frelinghuysen were certain monthly quotas which the United
agreed to accept instead of the ten equal annual installments
the convention of 1866. The monthly quotas had been paid by
under a law by which a certain proportion of the current re
distributed among the holders of her foreign debt.

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given, he proposes to be guided in due time. Under no circumstances does he regard that resolution as authorizing the Government of Venezuela to propose the recommended negotiation, still less to dictate its terms or to proceed arbitrarily to act upon its subject-matter in advance of any concurrent understanding between the two governments."

In the draft-convention accompanying Mr. Frelinghuysen's note, it was provided that the stipulations of the convention of 1866 should be revived "with such alterations as are required in conformity with the aforesaid joint resolution of the Congress of the United States, and with such further modifications as are deemed necessary for the certain and speedy accomplishment of the ends in view, and for the reciprocal protection of the interests of the high contracting parties." The principal stipulations proposed for the accomplishment of these ends were as follows:

1. That the new commission, which was to sit at Washington, should have jurisdiction of all claims of citizens of the United States against Venezuela, "which may have been presented to their government, or to its legation at Caracas, before the 1st day of August 1868, and which by the terms of the aforesaid convention of April 25, 1866, were proper to be presented to the mixed commission organized under said convention."

2. That the new commission should "consider all the evidence admissible under the aforesaid convention of April 25, 1866, in respect to claims adjudicable thereunder, together with such further evidence as the claimants may offer through their respective governments."

3. That payments on the awards under the convention of 1866 should cease on the exchange of the ratifications of the new convention, to be resumed should occasion arise.

4. That, in cases in which the Government of Venezuela should not, prior to the conclusion of the new convention, have "impugned" the awards of the former commission "for fraud," it should be the duty of the Secretary of State of the United States and the diplomatic representative of Venezuela at Washington to certify the fact to the new commission, which should then affirm the awards and issue new certificates to the holders for the amounts still unpaid.

5. That if the new commission should annul, in whole or in part, any money awards of the former commission, it should then "examine and decide" whether there were "any *bona*

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fide third parties" who had, with "the observance of
and diligence become possessed," prior to the exchang
ratifications of the new convention, "for a just and
consideration of any portion of the certificates of awa
tofore issued in said claims, and whether, under the c
tion or laws of either of the contracting parties, sai
parties have acquired vested rights * * * impos
duty on the Government of the United States to colle
Venezuela the amount or proportion of said certifi
award which may be held and owned by *bona fide* th
ties;" and that if the commission should decide tha
were such parties, it should ascertain the sums resp
paid by them for their interests and "fix the amount
said interest," issuing "for the sums so adjudged du
certificates, which should be paid by Venezuela.

It is obvious that of the stipulations just described th
and fifth were the most critical. Mr. Soteldo, on July
acknowledging the receipt of Mr. Frelinghuysen's com
tion, said: "I deeply regret that I, like my predecesso
tain views which differ from those of your excellency in
to the interpretation and execution of the text and i
the Congressional resolution." He added that he wo
mit the note and its inclosure to his government, and a
instructions. On the 14th of the following Noven
informed Mr. Frelinghuysen that he had received full
for the settlement of the claims, and asked for a con
Mr. Frelinghuysen, on the 21st of the same month, i
whether he was prepared to accept the draft convent
suggested that if he had any material amendments
they should be furnished in advance of the conferenc
note of January 20, 1885, Mr. Soteldo replied that the
tion of Congress disposed of "the question of the cer
made payable to bearer, issued by the prevaricating
sion" under the convention of 1866; that Venezuel
"encounter serious embarrassments" if she were to "re
any validity" in such certificates; that if the mode o
ment proposed in the resolution of Congress should be a
no obstacle would exist to the speedy formation of a n
mission; but that Venezuela, having sought a remedy
the frauds which she had denounced, could not "acc
mission to obligations more onerous than those whi
been the motive of her reclamations."

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Report to Congress.

Mr. Frelinghuysen, on the 22d of January, acknowledged the receipt of this note "with some surprise and more regret." On the 27th of the same month he submitted to the President a report, which the latter on the same day communicated to the Senate.[1] In this report, which was accompanied by the correspondence above referred to, Mr. Frelinghuysen took the following positions:

1. That the "proposal contemplated and authorized" by the joint resolution of Congress had been made to Venezuela, and that it had been "practically declined by the latter."

2. That under these circumstances "the legal status of the claimants and their relations to the Executive" were "governed solely by the convention of 1866, and the action of the commission under it."

3. That "the honor of the United States" called for "an investigation of the charges formulated by Venezuela against the seven awards to which exception has been taken;"[2] but that, on the other hand, the duty of the government to its citizens, whose "rights of property" were "questioned," demanded "that the inquiry should be limited to the point which Venezuela had a just right to assail."

4. That the holders of certificates "in the seventeen cases to which no exception has been taken should be paid, as such certificates must, under any circumstances, be recognized as absolutely valid."[3]

5. That in order that a just distribution might be made of the moneys on hand between the holders of certificates "in the seventeen undisputed cases" and the holders of certificates in any of the "seven disputed" cases which might be found to be valid, the matter should be referred to the Court of Claims with power to determine "whether any, and if so, which of the seven awards objected to by Venezuela was obtained by fraud," and the amount which any innocent holder for value might have paid for his interest in such award.

Mr. Rice's Report.

February 18, 1885, Mr. Rice, from the Committee on Foreign Affairs, presented to the House of Representatives a report in which the late negotiations, together with the President's message

[1] S. Ex. Doc. 52, 48 Cong. 2 sess.

[2] The seven awards referred to were those made by the umpire, Machado, with perhaps one exception.

[3] The seventeen awards here referred to were, with one exception, those made by the commissioners, Tallmadge and Villafañe.

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and Mr. Frelinghuysen's report, were examined and revi
In this report Mr. Rice said:

"The joint resolution of the Forty-seventh Congress ad
the revival of the general stipulations of the treaty of
and the appointment of a *new* commission to consider a
testimony introduced before the former commission and
new as should be offered, and make awards upon the
Why this has not been accomplished during the nearl
years which have elapsed since the approval by the Pres
of the resolution of March 3, 1883, may appear from the
tary's letter and the annexed correspondence. * * *
doubtedly the Secretary was correct in asserting tha
resolution was purely a legislative and domestic matter
part of the United States, and did not authorize indepe
and arbitrary proceedings on the part of Venezuela, b
may pardon much to Venezuela from the circumstances
case. She had alleged charges of fraud against the co
sion. Those charges had been repeatedly sustained by
gressional committees, and had finally been declared
'not without foundation' by both branches of Congres
the President, and a resolution adopted to form a new co
sion to consider all the evidence and make such awa
should be adjudged just and right.

"This resolution, although not officially made known to
ezuela, was known to her as one of the public laws o
United States; and it was not strange that she should
clude that the United States would no longer exact pay
of installments upon those awards which the legislativ
executive branches of her government had admitted bas
fraud.

"It is too late to discuss the testimony in regard to th
awards. The United States can never make itself the lau
stock of the world in seeking to enforce against a little
with a population of 2,000,000 and a revenue of $5,00
awards which Congress and the President have substan
admitted to be corrupt. * * * There is very good re
on this point to be found in the opinion of the Supreme
in Frelinghuysen *v.* Key (110 U. S. Rep. 72), relating t
retrial of claims proved against Mexico by false testimo
the part of the claimants. * * *

"Your committee does not recognize the distinction bet
the seventeen awards insisted upon by the Secretary.
zuela has from the beginning protested against them all a
judgments of a corrupt tribunal. In the first communic
from Venezuela respecting them, made to Mr. Seward by
Munos y Castro, February 8, 1869, Señor Castro said tha
was his duty to present the views of his government con
ing the conduct of the late claims commission, which had
mitted irregularities so gross that they annulled their aw

"Among the claims which he specifies as one in which
missioner Tallmadge was personally interested is the seco

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amount of the seventeen which the Secretary says have never been questioned, to wit, that to Ralph Rawdon, for $100,000. The largest of the seventeen, that to Seth Driggs, has always been specially designated as fraudulent. These two awards amounted to $250,000 of the $459,188.30 awards the Secretary claims to be undisputed. The Secretary relies upon a statement made by Señor Castro near the close of his communication, as follows: 'Of the twenty-four claims awarded I think only seven will require revision by the new commission, the rest remaining decided definitely.' This statement is inconsistent with his claim that the awards of the commission were annulled by its irregularities and with his statement in regard to the Ralph Rawdon claim, and the well ascertained facts relating to that of Seth Driggs.

"We must remember also that he was the representative of a feeble and distracted state, appealing to one whose will must be law, and in ignorance of very much of the testimony which has since been brought to light. It is now almost certain that almost, if not all, of the seventeen claims which the Secretary claims should be protected as unquestioned were shared by the conspirators. It does not matter that Villafañe concurred in them. If Talmage was interested in them they are invalid. No one can doubt that he was so interested when reading the statement of the parties to whom the certificates were delivered, and to whom the dividends were paid, contained in the Secretary's communication of June 30, 1884. Excepting the awards to Lorenzo H. Finn for $10,000, to Forrest, Beale & Delancy, for $5,655.18, and to Robert W. Gibbs, for $4,344.90, the certificates for all of these twenty-four awards were either divided between the owner and Murray or delivered wholly to him or Talmage. Of those delivered to Murray from the award to Amelia de Brissot, a portion eventually turned up in the estate of Stilwell, minister to Venezuela, who died insolvent, leaving $80,400 of Venezuelan certificates pledged to the bank of which he was president and which he had wrecked. Referring again to the list of names to whom the dividends were paid, the division is still manifest. The certificates were numbered so that it can be told to which award each one belonged; and we see the name of Walter S. Johnson, receiver of Stilwell's broken bank, of John A. Stein, the counsel sent here by the conspirators to defend the validity of the awards, and of W. H. Whiton, Tallmadge's representative all along the line. Whiton drew the dividends on the Ralph Rawdon claim, thus confirming the statement of Talmage's interest made by Castro in 1869.

"Your committee can not discriminate between the awards in which one judge was interested and those in which the interest was shared by two. This committee repeats the assertion made by the committee of the Forty-seventh Congress in regard to this commission, already quoted: 'It was diseased throughout, and there is no method known to your committee

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by which to separate the fraudulent part from the honest p
and establish any portion in soundness and integrity.'

"Nor can your committee agree with the Secretary in
position he takes as to the interest of third parties, bona
or alleged bona fide holders of these certificates.

"It must be remembered that Venezuela failed to make
early payments upon these awards, owing to a revolutio
two she then had in process, and protested against their v
ity before any payments were made. The contention of V
zuela was notorious throughout the country. Implicatio
the alleged frauds wrecked reputations, if it did not brin
least one life to a premature end.

"Under these circumstances the committee submits that
probability of there being third parties, holders of these ce
cates, unaffected by the equities between the original par
is too slender to be thrown in the way of settling a great i
national contention. Nor would there be any consider
difficulty in arranging that the rights of honest holders of
old certificates should be substantially protected in the
awards so far as the original claims were just. But if
remote chance there should be any innocent sufferers, these r
suffer their loss with the holders of forged notes, counte
bonds, and other fraudulent securities. They must suffe
reparation of a national wrong and in vindication of
national honor.

"As to referring these awards, or any of them, to the C
of Claims, as recommended by the Secretary, your commi
adopts the language and conclusions of the committee of
Forty-seventh Congress in reference to the same recomme
tion, then made by the Secretary, to the effect that Venez
is entitled to an honest commission, as provided by the tre
upon which she may have her representation, and should
be forced into a purely United States tribunal for action u
claims which she has a right to have passed upon by su
commission."

In conclusion, the committee reported a joint resolu
expressed in substantially the same terms as that previo
adopted.

Mr. W. R. Cox, on February 23, presented a minority re
in which it was declared that the report of the commi
"skillfully presented the side of the argument most favor
to its views;" that, in reality, with all her "advantages of
climate, and products," it was "hard to conceive" of a cou
"worse governed or more unsettled" than Venezuela; tha
her treatment of citizens of the United States she had b
guilty of great wrongs; that by her tactful and ingenious di
macy she had "succeeded in producing confusion" in the c
cils of the United States, and an apparent conflict between
ferent departments of the government, and "thus delaye

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not prevented, the payment of claims which at the outset she acknowledged to be due;" that the correspondence was characterized on the part of Venezuela by an "evasive diplomacy;" that by certain communications in 1869, besides the note of Mr. Munos y Costro to Mr. Seward of February 8 in that year, Venezuela admitted the validity of the seventeen awards of the commissioners, and that as late as December 1878 her minister at Washington undertook to furnish Mr. Evarts, then Secretary of State, with the name, number, and nature of each claim considered fraudulent or excessive; that her failure to take judicial proceedings to establish the umpire's guilt precluded her from being heard; that the insinuations, made by "some of the various and ever-changing incumbents of office in the Venezuelan Government," against Mr. Villafañe could have "no other effect than to deepen the conviction of the singular character of Venezuelan diplomacy in the minds of those persons who are aware that the Venezuelan Government has kept Señor Villafañe in positions of honor and trust since the adjournment of the Caracas Commission;"[1] that many of the most important allegations of fraud were "inconclusive and unsatisfactory;" that the theory of a "conspiracy" was "set afloat upon an incomplete and *ex parte* examination in August 1876;" that "an international arbitration should not be annulled upon an assumption of fraud or of a conspiracy;" and that "the alleged defrauders and conspirators," to say nothing of "innocent holders of certificates" whose property was to be put in jeopardy, were entitled "to a judicial inquiry into the truth of these criminal accusations." In conclusion, Mr. Cox recommended the adoption of a resolution to the effect that "the whole subject" should be "referred to the President for the exercise of executive duty and discretion in the premises."

Mr. Perry Belmont concurred in recommending the adoption of this resolution, mainly, as he stated, upon the ground that, as the government was on the eve of a change in administration, it would be the better course to afford the incoming Secretary of State an opportunity to act or communicate his

[1] Reference was here made to a statement by Mr. Russell, United States minister to Caracas, to Mr. Fish, of June 21, 1876, as follows: "Mr. Villafañe * * * has been almost all the time since the session of the commission in a position of honor and trust. He is at present charged with the construction of an important road in the mountainous region of Tachira, and with the expenditure of money therefor, holding this post by the appointment of President Guzman Blanco."

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views upon the subject before advising further legislation b
Congress.

Convention of December 5, 1885.

On December 5, 1885, a convention wa
signed by Mr. Bayard, Secretary of State, an
Mr. Soteldo, for the creation of a new commi
sion. In its provisions it was substantially the same as th
draft presented by Mr. Frelinghuysen to Mr. Soteldo, with th
omission of the clause requiring the certification to the new co
mission of any awards which should not have been impugne
for fraud prior to the conclusion of the convention. It stipu
lated that the ratifications should be exchanged within twelv
months from the day on which it was signed. This stipulatio
was not carried into effect, owing to the fact that the conve
tion was not approved by the Venezuelan Government. Fo
this failure of approval various reasons were, from time to tim
intimated, but it was not till November 12, 1887, that th
objections to the convention were officially communicated. O
that day Mr. Olavarria, then Venezuelan minister at Washin
ton, in a note to Mr. Bayard, stated that his government desire
(1) the addition to the convention of a list of the claims to b
examined, and (2) "the clearest and most precise determin
tion of the duties and rights which belong to the new mixe
commission with respect to the 'vested rights' which may b
alleged by third parties." On the first point Mr. Olavarr
placed little emphasis; the second he discussed at length, ur
ing the injustice of putting it in the power of the new commi
sion, while allowing the claims rejected by the old, to affirm, o
the ground of "vested rights," awards which might be show
to be fraudulent. He argued that under such an arrangemen
his country might, instead of obtaining relief, "find itself n
only obliged to pay what is just, but also a part, and perhaps
very great part, of what has been and is a scandalous fraud."[1]

Convention of March 15, 1888.

The addition to the convention of a list
claims Mr. Bayard declined to consider. H
declared that the suggestion was both "imm
terial and unusual;" that it belonged to the new commission t
determine what claims were proper to be examined an
decided, and that to enter into a diplomatic discussion of th
subject "could only operate as an obstruction to any effort
settlement." As to the stipulation touching certificates
award in the hands of third parties, he admitted that it migh

[1] MSS. Dept. of State.

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as construed by Venezuela, "work a result not anticipated by either of the contracting parties at the time of the signature of the convention." Recognizing "the propriety of removing any ambiguity in that regard," he stated that if Mr. Olavarria was "in a position to conclude a supplementary and explanatory article for that purpose and an additional article to provide for a prompt exchange of ratifications of the convention as thus explained," he should be glad to confer with him on the subject.[1]

A new convention, embodying the provisions thus indicated, was concluded March 15, 1888. It extended the time for the exchange of the ratifications of the convention of 1885, but its most important stipulation was that relating to the old certificates of award, which was as follows:

"It is understood and agreed that in the event of any of the awards of the mixed commission under the convention of April 25, 1866, being annulled in whole or in part by the commission authorized and created by Article II. of the treaty of December 5, 1885, no new award shall in any case be made by said commission, to the holders of certificates of any award or awards annulled as aforesaid, in excess of the sum which may be found to be justly due to the original claimant."[2]

[1] Mr. Bayard to Mr. Olavarria, January 24, 1888, MSS. Dept. of State.

[2] August 25, 1890, the commission organized under these conventions, referring to Article IX. of the convention of December 5, 1885, as modified by the stipulation above quoted, made the following order: "Article IX. of the treaty was originally intended to protect innocent holders of certificates issued by the old commission, without respect to the character of the claims on which they were based. Such holders, having paid full value for them, were to be paid by Venezuela in full, although the original claims might be found to be bad and disallowed in whole or in part.

"This was modified by the supplemental convention, which in effect so altered its meaning as to provide that such holders should not be paid unless the claims on which their certificates were respectively based should be allowed, and then only *pro rata* to the extent of the allowance where that was but partial. Awards may be made and certificates issued accordingly, the original certificates being surrendered or accounted for on the receipt of the new ones.

"In any case of conflict or doubt as to the persons entitled to the certificate or certificates we are of opinion, and so decide, that it will be in substantial compliance with the treaty to issue a certificate in such case to a particular person, or particular persons, to hold in trust for those concerned as their interests may appear or be lawfully determined."

In the case of W. H. Aspinwall, executor of G. G. Howland and others, *v.* The United States of Venezuela, No. 18, a certificate for the amount of the award was, by agreement of parties, issued to two persons as trustees

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By this stipulation a revision of the proceedings of the commission, in the broad sense and spirit of the resolutio Congress of March 3, 1883, was at length provided for. It tu out, however, that the time allowed for the exchange of ratifications of the conventions of December 5, 1885, and M 15, 1888, was insufficient; and on October 5, 1888, still ano convention was signed, by which it was provided that the fications of all three conventions should be exchanged wi ten months from August 15, 1888. The exchange was effe at Washington, June 3, 1889.

Organization of Commission.

The commission was organized Septemb 1889, and due notice of the organization given to the two governments. The com sioner on the part of the United States was Mr. John Li of Xenia, Ohio; on the part of Venezuela, Mr. José Andr They selected as third commissioner Mr. Samuel F. Phil Mr. Phillips participated in the organization of the com sion, but on October 2, 1889, resigned. He subsequently came counsel for the Government of Venezuela before commission. He was succeeded as third commissioner by John V. L. Findlay, of Baltimore, Maryland.[1] Mr. J. Hu Ashton appeared as counsel for the United States. The missioners chose as secretary Mr. Francisco de P. Suarez.

Mr. Little was chosen by his associates as chairman of commission, and as such presided over its deliberations.

"in trust for those concerned, as their interests may appear or be law determined." Proceedings in equity were afterward taken to deter the rights of the respective parties in the award. (Mackie *v.* How 3 App. Cas. Dist. of Columbia, 461.)

[1] Mr. Findlay's commission was as follows:

"OFFICE OF THE COMMISSION,
"*Washington, October 10, 18*

"Be it known that the undersigned, commissioners appointed re tively by the President of the United States of America and the Go ment of the United States of Venezuela, in pursuance of the conve between said countries for a reopening of the claims of citizens o United States against Venezuela under the treaty of April 25, 1866, cluded at Washington December 5, 1885, have this day chosen John Findlay, of Baltimore, Md., U. S. A., as *third commissioner*, under a compliance with article two of said convention, to fill the vacancy ca by the resignation of Samuel F. Phillips.

"JOHN LITTLE,
"*Commissioner on the part of the United States of Ameri*
"JOSÉ ANDRADE,
"*Commissioner on the part of the United States of Venezuel*

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General Questions.

The peculiar circumstances under which the commission was created gave rise to various questions as to its duties and powers. These questions, which were general in their nature, and affected the board's relation to the cases decided by the old commission, became the subject of argument and of a formal opinion. This opinion, which was delivered by Mr. Little, for the commission, was as follows:

"We will dispose of some of the questions discussed in the general argument applicable to all the cases.

"CHARACTER OF THE PROCEEDINGS UNDER THE TREATY.

"These hearings have been conformed, as far as practicable, to the methods ordinarily pursued in courts of justice.

"Following that course, we have deemed it fit, especially in view of the circumstances culminating in the present convention, to accompany the decisions required to be in writing with a statement of the reasons therefor. * * *

"The question is presented at the threshold whether the decisions of the old commission on claims must be taken as having evidential value in the adjudication of the same claims by this one. Counsel for certificate holders insist they should be, at least where they resulted in the issuance of certificates of award, and that our duty is 'to review' the former adjudications rather than to hear and pass upon the claims as *res novæ*.

"Finding ourselves not in accord with this view, we have deemed it proper, owing to the great interests involved, touching as they do the entire submission, to discuss their elaborate argument in some detail.

"They contend (Brief, p. 12) that—

"'Said treaties, under which you act, do not submit for your consideration and adjudication claims to be by you adjudicated as if such claims came to you as *res novæ*, but these claims, on the contrary, under said treaties, are submitted to you as claims which have been *once adjudicated*, and where that adjudication has been so attacked, by one party to the controversy, as to have induced the high contracting parties to order a "*review*" of the former adjudication. And in such review, in the nature of a new trial, you are bound to proceed *as a reviewing court*, for the purpose of determining whether the former awards should, upon principles of law, be "surcharged" or "abrogated;" and in determining this question the commission is bound to concede to the former awards and adjudications such force and legal effect, in favor of the validity of the awards, as the international law gives to final awards when a new law or treaty has brought them under review of international commissions.'

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"The argument in support of the proposition seems to
ceed, though as to its principal features not necessarily b
upon the assumption of ambiguity in the language o
treaty (the convention of 1885 and its supplements
regarded as one) defining the duties of the commission res
ing the adjudication of claims submitted to it. For, as a
liminary step, counsel invoke for the benefit of the certi
holders the aid of the principle interrogatively put by
Justice Story in Shanks *v.* Dupont (3 Peters, 249) cited, to
'If the treaty admits of *two constructions*—one limited,
the other liberal; one which will further, and the other exc
private rights—why should not the most liberal expositio
adopted?' And which is stated more broadly by Mr. Ju
Swayne in Hauenstein *v.* Lynham (100 U. S. 483), also
as follows: 'Where a treaty admits of *two constructions*
restrictive as to rights that may be claimed under it, and
other liberal, the latter is to be preferred.'

"No particular passage susceptible of 'two construct
to which this principle may or does attach itself, and tu
otherwise doubtful meaning to the support of 'private ri
has been pointed out, or by us discerned. We are left to
that counsel regard the treaty as a whole so far ambiguo
the respects indicated as to call for the application of the
named. But, if the requisite ambiguity be conceded, doe
occasion exist for the application of the doctrine in supp
their contention? It seems to us not.

"If there were no other objection, conflicting private i
ests stand in the way. It so happens that, of the forty
or fifty claims disposed of by the former commission, a
gating in amount nearly five million dollars, money awards
adjudged in only twenty-four of them, amounting to but a
over a million and a quarter dollars. The others were rej
or not considered. Those receiving certificates of awar
thus in the minority, both in number and amount, to say
ing of claims not passed upon by it, but pending here,
adopt a rule of construction that would aid these, and op
against the interests of the unsuccessful claimants, would
on the whole, 'further' private rights. * * * It woul
quire unmistakable terms, not observed in the treaty, to
that a discrimination among claimants, all citizens of the
country, was intended.

"Again, an international award, disconnected with the m
of ascertainment, is no more than any other expression o
ferences arrived at by other means with like opportunity,
and probity. It is what is behind it that bestows legal en
namely: The adjudication of a competent tribunal supp
by the plighted faith of the states concerned. The full
of such an award may be said to equal the credit which
sonably attaches to an adjustment of submitted differ
between disputants reached through the care, candor,
intelligence exercised in that behalf, *plus* the legal effects

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an adjudication imparts thereto. This addition, the seal of the public law upon the adjustment, gives the award or sentence, while undisturbed, its quality of verity. * * * The interested states may set them aside—may break the seal; then, in the absence of preservative provisions, the legal effects cease, leaving only the fact that such an adjustment had been made, valuable or not in itself, according to attendant circumstances. * * *

"Two principal citations from eminent authorities are relied upon by counsel as directly supporting their main proposition, one a passage from Vattel, book 2, chapter 18, section 329, and the other the case of the Choctaw Nation *v.* the United States (119 U. S. 1). The former is cited as 'thoroughly settled law' to show 'what the *prima facie* effect of such awards [those of the old commission] is when they, by new treaties or otherwise, are brought under "review."' It reads, with counsel's emphasis, as follows:

"'If, then, their sentence be confined within these precise points, the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced of a question which they themselves have rendered doubtful by the discordance of their claim, and which has been referred, as such, to the decision of the arbitrators. *Before they can pretend to evade such a sentence they should prove, by incontestable facts, that it was the offspring of corruption or flagrant partiality.*'

"Waiving the assumption here that the former awards are under 'review'—one of the things counsel set out to show—we have to remark that whatever may be fairly deduced from this passage touching the character or effects of an arbitration sentence would seem to arise from its condition *before* disturbance or 'evasion' by treaty and not after. The precept is addressed to *states* which have arbitrated their differences, and is advisory to *them*, in movements to disturb the results of arbitration. * * * Whatever course may be thought advisable for states to pursue in such matters, it will not be denied that they *can* by treaty evade arbitration sentences to which they are parties for any, or even without cause (if that be conceivable), if they choose to do so. They have the power, and its exertion rests potentially in their discretion. * * * The logic of counsel on this head appears to come to about this, namely: The commission is bound to assume the two states acted lawfully in making the treaty. The only lawful mode of 'evading' the old awards was to proceed in that behalf according to the 'thoroughly settled law,' to wit: Vattel's rule. As that rule was confessedly not complied with, the awards are not 'evaded' but continued in force, retaining their legal characteristics until ended by new adjudications. Taking their understanding of the author as correct (only for the argument) when they say (Brief, 25): 'Vattel declares to be *necessary* for the overthrow of international arbitration' the establishment

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of fraud in connection with its awards; and assuming, as must, entire legality of action in the states, it follows eit that the old awards are not 'evaded,' or that Vattel's rule not the law *for these cases*. We are constrained to accept latter conclusion. In the first place, as a matter of fact, two powers did *not* 'acquiesce' in the old 'sentences.' Th made provision to 'evade' them; while they did not claim, counsel show, the establishment, by 'incontestable facts,' eit of corruption or flagrant partiality. * * *

"If arbitration is to have the growth and beneficent resu predicted and hoped for by philanthropists as an agency the settlement of international controversies and for 'keep war at a distance,' it must have as a basis constant integri impartiality, and intelligence. * * * 'International ar tration,' said Chief Justice Waite (110 U. S. 63), 'must alwa proceed on the principles of national honor and integri These things are no less essential than that its results, l domestic judgments, should give promise of repose. * * Whatever rule, looking to the correction of arbitral wron will best subserve all these great ends—be most promotive justice and peace among the nations—would seem to be con nant with reason and, therefore, the public law. Individ interests, always to be guarded with watchful care, are nev theless, by common consent, secondary and subservient to higher general weal. If Vattel's precept make the devel ment of alleged wrongdoing too difficult, in any case, in opinion of those concerned—and cases may be easily conceiv where its plenary application would result in defeat of justic why should it not be relaxed? Parties may be morally s that fraud and flagrant partiality were practiced in the p curement of a given award, and yet may be unable to sh either by 'incontestable facts.' * * * The law upon subject, so far as these claims are concerned, as gathered fr the convention itself, may be formulated thus:

"Where serious charges impeaching the validity and int rity of proceedings under treaty for the arbitration of clai of citizens of one state upon the government of another ha been made by the debtor government and divers citizens the creditor state, supported by evidence tending to establ their truth, a rehearing before a new commission of the clai arbitrated, or intended to be arbitrated, may be authori by, and the awards annulled in pursuance of, a new conv tion entered into at the instance of the legislature of the cr itor state, without such charges being established by inc testable facts or otherwise.

"As to the decision of the Supreme Court of the Uni States:

"The United States Senate under a treaty (1855) betwe the United States and the Choctaw Nation, one of its Ind tribes, made an award of a large sum of money to the India

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The award was not paid, but the matter was referred to the Court of Claims by act of Congress (1881), which provided:

"'That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation, and to render judgment thereon. Power is hereby granted the said court to *review* the entire question of difference *de novo*, and it shall not be estopped by any action had or award made by the Senate of the United States in pursuance of the treaty of 1855.'

"The Court of Claims on the trial of the case held that this statute destroyed 'the sanctity of the award under the treaty of 1855.' The cause was appealed to the Supreme Court of the United States, which gave a different *construction* to the statute. It held:

"'The language of the act of March 3, 1881, in reference to the award made by the Senate under the treaty of 1855, does not abrogate it, and does not require, as a condition to the exercise of the jurisdiction conferred by the act, that the court should entirely disregard it, giving it no effect whatever. It merely says that the court shall not be estopped by any action had or award made by the Senate in pursuance of that treaty. The plain and literal meaning of this language is fully satisfied by holding that the award, considered as such, shall not upon its face be taken to be final and conclusive. There is nothing in the language to prevent the court from giving to that award effect as *prima facie* establishing the validity of the claim so far adjudged in favor of the Choctaw Nation.'

"Counsel claim, in effect, that the awards of 1868 are placed relatively in the same legal situation before this commission, by the treaty; that the Senate award was before the Court of Claims by said act, and that, under the doctrine of this decision, therefore, effect should be given them as evidence in the readjudications.

"While the decisions of the highest court of either country are not binding upon the commission as precedents, they are entitled at its hands to great respect as authority. Concurring decisions would, of course, be followed. But there are several things which distinguish the two cases:

"1. The question here was as to the meaning of particular language, the like or the similarity of which does not appear in the treaty. The power granted the Court of Claims was '*to review*' 'the entire question of difference *de novo*,' etc. The treaty gives no authority by its terms 'to review' any question or matter. The word 'review,' or an equivalent in term or phrase, is not found in it.

"2. The United States, the debtor party to the Senate award, without consent, so far as appears, of the Indians, passed the act 'to review' the question arbitrated; whereas the United States and Venezuela *agreed*, not to review, but to have a 'rehearing' (art. 8) of the claims arbitrated. The rule of construction in the two cases, it is believed, would be different. In the

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former the language would be taken most strongly against the United States and in favor of the Indians. In the latter no preference would be shown.

"3. The parties were not on an equal footing in the Choctaw case. They are here. The decision of the court seems to be rested upon this ground of inequality, and of the fiduciary character of the relation between the suitors; for by way of inducement to the conclusion reached, the court say:

"'The Choctaw Nation falls within the description, not of an independent state or sovereign nation, but of an Indian tribe. * * * The Indian tribes are the wards of the nation; they are communities dependent upon the United States; dependent largely for their daily food; dependent for their political rights. * * * From their weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty and with it the power of protection. * * * The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extensive meaning than their plain import as connected with the tenor of the treaty, they should be considered only in the latter sense. * * * The recognized relation between the parties to this controversy, therefore, is that between a superior and inferior, whereby the latter is placed under the care and control of the former. The parties are not on an equal footing.'

"With these considerations as a basis, and expressly because of them, a divided court held as stated with respect to the Senate award, the Chief Justice dissenting.

"It is as plainly apparent as if expressly stated that the court did not intend to announce a rule of construction applicable to a contract freely entered into by parties occupying a common ground of equality and independence. It is true the late able jurist, Mr. Justice Matthews, who delivered the opinion, indulged in the *dictum* that the rules applied were those which govern public treaties. But what he meant by the remark follows the statement, namely: That treaties 'in case of controversies between nations equally independent are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the laws of nations.'

"This principle, stated with the usual indefiniteness in the concluding paragraph, requires, we apprehend, nothing different from this, to wit: That treaties, like other contracts, should be read in the light of surrounding circumstances, applying to the terms employed their ordinary meaning in like relation, with a view of ascertaining the intention of the parties. In treaty interpretation, we should say, that is not the 'larger reason' which is not such for both sides. We see nothing in this case to support the proposition of counsel.

"Has their contention justification in the language of the treaty? Certain phrases are pointed out to show it has. It

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will suffice, perhaps, to notice two or three claims under this head. On page 24 of the brief is this conclusion:

"'*Thus it is made plain that the object of the new trial was to remove the grounds of "suspicion" and "complaints" against the first commission.* This necessarily involves action, investigation, construction, and adjudication in the nature of a "review" of the action of the first commission; for it would be impossible to "satisfy any just complaints against the validity and integrity of the first commission," if the action of such first commission were not designed to be the subject-matter of review. It was not the object of the new treaties to condemn the former commission in such sense and way as to pronounce it guilty of fraud and abolish its work, but to create a tribunal, which, by a reexamination of the evidence on which the Caracas awards were founded, should "satisfy any just complaints against the validity and integrity of the first commission."'

"If this excerpt embodies 'the design of the new treaty,' as is argued, its importance is manifest. But here again we are constrained to differ with counsel. It would be remarkable for the two governments to provide a new trial to exonerate the old commissioners, when, judging from current history, neither of them asked for or desired or supposed himself to need the vindication suggested.

"It would be still more remarkable to order a new trial for such purpose and withhold from the triers all suitable means of inquiring into the grounds of the 'suspicion' and 'complaints' to be removed, as appears to be done here. Under the treaty no evidence pertaining to these specific things can be received or considered, nor can any expression upon them be made. If it be said the vindication is to come through affirmances, the awards having their due weight in securing them, it may be answered: Different conclusions are not incompatible with integrity, as between several tribunals passing on the same things. If they were, few would be found willing to undertake the task of 'review.' In case of differences here, if vindication be involved, who is to say whether our judgments impeach theirs or theirs ours? Again, we do not hear the claims necessarily upon the same testimony heard before. Additional evidence in every instance is authorized. What vindication or condemnation then, in any view, can result? None, we think.

"Still, if the language of the treaty reveals this purpose, we are bound to accept and act upon it, however remarkable it may seem or inadequate the means of accomplishment. The first three clauses of the preamble to the joint resolution of Congress embodied in the prefatory part, and claimed to be 'part and parcel' of the treaty, are these:

"'Whereas, since the dissolution of the mixed commission appointed under the treaty of April twenty-fifth, eighteen hundred and sixty-six, with the United States of Venezuela, serious charges, impeaching the validity and integrity of its proceedings, have been made by the Government of the United States

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of Venezuela, and also charges of a like character by divers citizens of the United States of America, who presented claims for adjudication before that tribunal; and

"'Whereas, the evidence to be found in the record of the proceedings of said commission, and in the testimony taken before committees of the House of Representatives in the matter, tends to show that such charges are not without foundation; and

"'Whereas, it is desirable that the matter be finally disposed of in a manner *that shall satisfy any just complaints against the validity and integrity of the first commission*, and provide a tribunal under said treaty constructed and conducted so as not to give cause for just suspicion,' etc.

"The last clause, it is argued, discloses the purpose stated.

"Passing the questions as to when and how far the preamble to an instrument may be consulted in determining its meaning, and as to what extent said joint resolution forms a part of the articles of convention, we say at once the language referred to does not, in our opinion, bear the construction given it. A 'review' of the former adjudications, if such were our task, could tend to remove 'the grounds of "suspicion" and "complaints" against the first commission' only by affirmances of its action. Certainly, to differ could not have that tendency. But how is it possible to satisfy any '*just* complaints against the validity and integrity of the first commission' by such affirmances? It is conceivable how *un*just complaints might be regarded as thus 'satisfied.' If the complaints are '*just*,' it would seem the way to satisfy them would be to right the injustice—to do justice respecting the matters as to which injustice was done. If the former commission wrongfully rejected A's claim, would not a complaint on that score be 'satisfied' by allowing it now? On the other hand, if the complaint were for wrongful allowance, would not a rightful rejection now 'satisfy' it? Mark, it is the 'satisfaction' of '*just complaints*' (if there be any), and not the vindication or condemnation of those complained of, that is signified in the clause. In this sense the language comports with the terms and manifest spirit of the treaty, as will be seen.

"We are not left to inference as to 'the design of the new treaty.' That is expressly stated in the instrument itself. The resolution provides:

"'That the President be, and he hereby is, requested to open diplomatic correspondence with the Government of the United States of Venezuela, with a view to the revival of the general stipulations of the treaty of April 25, 1866, with said government, and the appointment *thereunder* of a new commission, to sit in the city of Washington, which commission shall be authorized to consider all the evidence presented before the former commission in respect to claims brought before it, together with such other and further evidence as the claimants may offer, and from the awards that may be made to claimants,

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any moneys heretofore paid by the Department of State, upon certificates issued to them, respectively, upon awards made by the former commission, shall be deducted, and such certificates *deemed canceled.*'

"There follows a provision about the distribution of certain Venezuelan funds in the Department of State.

"The treaty recites that the proposal thus 'authorized' by this joint resolution was duly made to and accepted by the Government of Venezuela, and continues:

"'The Government of the United States of America and the Government of the United States of Venezuela, *to the end of effecting, by means of a convention, arrangements for the execution of the accord thus reached between the two governments*, have named their plenipotentiaries to confer and agree thereupon as follows,' etc.

"It thus appears to have been the design of Congress, and to be 'the end' of the present convention, to relegate original claimants and the parties substantially, *mutatis mutandis*, to the situation respecting these claims in which they were placed by the treaty of 1866—'*thereunder*' being the term used—except there were to be 'a new commission' and an enlarged field of evidence. 'The design of the new treaty' is therefore essentially that of the old, and of course can not pertain to matters extrinsic and subsequent in origin.

"Again, something confirmatory of the contention that we constitute 'a reviewing court,' etc., is drawn from this alleged circumstance (p. 40 of brief), namely:

"'No matters can come before "you" *except matters which have been once adjudicated* by an international commission created by an international treaty, such commission having the same dignity, authority, and jurisdiction of private rights under the treaty as have you.'

"This, in our view, is a mistake. The treaty does not limit adjudications before us to 'matters which have been once adjudicated.' Article 2 confers the jurisdiction of the commission. It provides:

"'All claims on the part of corporations, companies, or individuals, citizens of the United States, upon the Government of Venezuela, *which may have been presented to their government or to its legation at Caracas, before the first day of August*, 1868, and which by the terms of the aforesaid convention of April 25, 1866, *were proper to be presented* to the mixed commission organized under said convention shall be submitted to a new commission, consisting of three commissioners,' etc.

"The language of the treaty of 1866, in this respect, is identical with this down to and including the name 'Caracas;' then follow the words, 'shall be submitted to a mixed commission,' etc. So it is that not only the claims actually adjudicated by the old commission fall within our jurisdiction, but those also which were proper to be presented to it.

"It is true the officer in charge of the American legation at

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Caracas advised the old commission by letter, included in its minutes two days before its final adjournment, August 5, 1868, that all 'unliquidated claims,' etc., theretofore filed with the legation had been sent the commission, and that the legation had no 'official knowledge' of others. If at liberty to regard this letter, our conclusion would not be changed. There may have been claims filed at Washington, liquidated claims at Caracas, and still others sent the commission and not considered, for aught that appears. And what if the officer was mistaken? But we can not look beyond the treaty itself in determining jurisdiction.

"Again, it is urged that the awards are under 'review' because the commission is to deal with them. Clauses from article 9 and the supplementary treaty are instanced in support. Article 9 speaks of what shall happen if 'the commission * * * shall, in whole or in part, annul any money awards,' and one supplement treats of the understanding, etc., 'in the event of any of the awards * * * being annulled in whole or in part' by this commission. These expressions are to be considered and construed in connection with article 6, which provides, among other things, that: 'All certificates of award issued by the said former mixed commission *shall be deemed canceled* from the date of the decision of the present commission in *the case* in which they were issued.' While, therefore, awards stand until the adjudication of the claims out of which they arose, their cancellation then *is effected by operation of the treaty.* The adjudication is not with respect to the awards, but the basal claims. The annulment of the former is a *consequence* of the 'decision' of the latter. For this reason, and in this sense, the commission is spoken of in the passages cited, by permissible use perhaps of terms, as itself 'annulling' the awards. This view is in harmony with the joint resolution of Congress referred to, which contemplated that the awards should be '*deemed* canceled' in a similar contingency therein specified.

"Turning now to what may be styled the jurisdictional parts of the treaties to ascertain our duties in respect to adjudication, we find (see articles 1, 2, 3, 5, and 6 of the new treaty, and articles 1 and 2 of the old):

"1. Exactly the same things, namely, certain '*claims*'—nothing but 'claims'—are submitted to us that were submitted to the old commission, and in substantially the same terms.

"2. The same things are to be done with them by us as by them. These are described in identical terms in their 'solemn oath' and in our 'solemn declaration,' to wit: To 'carefully examine and impartially decide according to justice, and in compliance with the provisions of this convention [both conventions being the same in this respect] all claims submitted.' We are commanded in the very terms of the direction to them, thus: 'The commissioners shall make such decision as they shall deem, in reference to such claims, conformable to justice.'

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"3. We are commanded to proceed in the same way in the hearing of the claims as were they, the only substantial difference being—and that is not of method—that 'other and further evidence' may be considered by us than that before them.

"4. The evidence we may consider is prescribed, as it was with them, being the same that was 'admissible' before them, and the 'further evidence' named in article 5; and there is not included in it former awards or adjudications.

"5. After decision the present commissioners are, as were the former ones, required to issue certificates of award for the sums to be paid claimants 'by virtue of their decisions.'

"6. The new, like the old, decisions are made 'final and conclusive' as to the claims submitted.

"All things considered, we are led to the conclusion that the original claims submitted stand before us with respect to the hearing and determination thereof substantially as they stood before the former commission, with the difference indicated in article 5, as to additional evidence; that we are engaged in a 'rehearing' (art. 8) of said claims, and not in a 'review' of the former adjudications or awards pertaining thereto; and that in our considerations we can not 'concede' to such adjudications or awards 'force and legal effect.'

"There remain, as before suggested, in each case the fact of the former adjustment; also the opinions pertaining to it. Whatever light these may give will, of course, be availed of. The action of the former commission, like any authority consulted, will have such consideration as it is thought entitled to.

"MUST CLAIMANTS APPEAR, OR BE PERSONALLY REPRESENTED?

"The claimants in some of the cases have not appeared in person or by representative. Is such appearance necessary? While it is desirable, we think it not essential for the purposes of adjudication. Article 5 of the treaty provides for the consideration of the evidence admissible under the old treaty, 'together with such other and further evidence as *the claimants may offer* through their respective governments,' etc. By article 6 it is made the duty of the commissioners in proper cases to issue certificates of award 'to *each claimant*,' etc.; and under article 10 the Department of State is required to distribute certain moneys '*to the holders* of certificates which may be issued under the present convention.'

"While the treaty, being a public law, is itself legal notice to everybody of what may be done in pursuance of it, yet in view of these provisions special pains have been taken to bring actual notice to all concerned of the pending proceedings, to the end of securing the appearance of claimants. Early notice was given by the Department of State, through the Associated Press, and inserted in newspapers of wide circulation, and other means of publicity employed.

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"Still there is a number of claims unrepresented, which, with all others in the submission, it is made our duty to decide, '*nolens volens*,' as counsel for awardees insist, within the limits, of course, of our ability to do so within the year. We are disposed to concur in their views that *bona fide* certificate holders are equitable assignees *pro tanto* of the claims out of which the awards arose, and have allowed those claiming to be such to appear in support of such claims. But whether we have the power or means of finally determining who are such holders is altogether another matter.

"While the decision of unrepresented claims is imperative, it does not involve the anomaly of adjudicating one's rights without his having a day in court. The parties to these controversies are the two governments. They are represented by learned counsel. If they were not, the commission is their joint agency, and its acts, within its authority, are theirs.

"In general, as we conceive, a claim of a citizen of one state upon another state, when taken up on his petition and diplomatically pressed for payment against the latter by the former, stands and is subject to be treated, for the purposes of prosecution, disposition, and settlement, as if owned by the plaintiff state. For these purposes, and in this sense, it ceases to be an individual, and becomes a national claim. Whatever settlement or mode of settlement it may agree to or adopt, binds him. Such is the implied understanding when he accepts the aid of his government. (See Diekelman *v.* U. S., 92 U. S. R. 524.) And the state's position, as seems to us, is not merely of a representative character. It is essentially that of an interested party as well. Its interest is broader and deeper than a mere monetary one. It comprehends the general weal. The state, as a corporate existence, being an aggregation of individuals, is by common understanding injured by injuring any of them. For his allegiance and services as a member of the community the citizen is entitled, as of right, while lawfully employed, to the return of the state's suitable protection against wrongs from without as well as from within its own confines. The observance of the obligation is fundamental and vital to government. Its violation involves a breach of trust disentegrating and destructive in tendency. Do away with its discharge and government perishes. Impair the public confidence in that discharge by failure of duty in any instance, and the state suffers far beyond any possible injury to the citizen. Hence, in these controversies, the United States Government is not a perfunctory party, but a real—in an important sense *the* real—party (on one side) in interest; not, of course, to secure the allowance of unjust claims—in the nature of things it can not vouch for validity in advance—but to assist as it may in securing justice to its citizens, whatever that may be. In truth, if a remark aside may be indulged, the real underlying interests of the two governments in this respect are identical. For it is as much the concern of the one, in a true international

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sense, to do justice as it is of the other to have justice done. Therefore, 'all things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets,' is a doctrine, it may be taken, lying at the base of the convention itself."

Results of the Commission.

The commission adjourned September 2, 1890. The results of its labors were very completely analyzed and summarized in a report of the secretary which bears date September 10, 1890. By this report it appears that 63 cases were presented to the commission, 49 of which were before the commission under the convention of 1866. But of the 14 "new cases" only 6 were wholly new, the other 8 being statements of demands which were incidental to certain claims submitted to the old commission. Of the claims presented to the old commission, only 7 were represented before the new commission by the original claimants; 24 were represented by the holders of certificates issued by the old commission, either in their own right or as executors, administrators, or trustees, or in some other legal capacity. The rest of the claims before the old commission were not represented before the new.

Of the claims before the new commission 37 were disallowed on the merits and 12 dismissed. Of the latter, 3 were dismissed on motion of the claimants, 4 for want of jurisdiction, and 5 without prejudice to their prosecution elsewhere.

By a comparison of the awards of the two commissions, it appears that of the 25 claims disallowed or dismissed by the old commission, all but 3 were disallowed or dismissed by the new; but in these 3 cases awards were made, respectively, of $3,206.10, $20,000, and $392,489.06, amounting in all to the sum of $415,695.16. On the other hand, of the 24 awards made in favor of claimants by the old commission, 15 were wholly annulled by the new, while the remaining 9 were materially modified.

In each case in which the new commission made a money award on a claim allowed by the old commission it deducted from the gross amount which it deemed to be due on the original demand an amount equivalent to 15 per cent of the old award, such deduction representing the two installments of 7 and 8 per cent distributed by the Department of State on the old awards. Owing to lack of time, however, the commission was unable to verify in every case the exact amount paid on the old certificates, and it was left to the Department of

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State to pay to the claimant any part of the 15 per cen
he might have failed to collect.

The whole amount of the claims before the commiss
$9,529,499.29, of which $3,778,810.11 represented pr
while $5,750,689.18 represented interest. The most
claims having been before the old commission, the "new
amounted, with interest, to $1,102,577.83, leaving $8,42
as the sum total claimed in the "old cases." The gross
of the awards of the Washington commission was $980
of which the sum of $584,901.53 was awarded in cases
by the old commission, while the sum of $496,341.72
sented new awards, chiefly on claims disallowed by
commission, the awards in the "new cases" amounting
$68,535.72. As has been seen, the awards of the old
sion amounted to $1,253,310.30. But, in comparin
amount with that of the awards of the Washington
sion, it is to be remembered that the latter included int
to September 2, 1890, so that the amount of the inter
$624,327.14, while that of the principal was only $356
Allowing interest at the conventional rate of 5 per cen
awards of the old commission up to September 2, 1
difference in favor of Venezuela would be $1,474,018.76

By Article X. of the convention of 1885 it was provid
upon the conclusion of the labors of the commission the
ment of State of the United States should distribute
among the new certificate holders "the moneys in the
ment of State actually received from the Government o
zuela on account of the awards of the former mixed
sion." During the sessions of the commission a quest
raised as to whether moneys in the Department of St
ing from the investment of the moneys paid by Venezue
within the stipulations of the convention. The Depart
State held that they did not.[2] This position the dep
continued to maintain, holding that as the convention
apply to the accretions, legislative authority would be r
for their distribution.[3] Such authority was afterwar
by an act entitled "An act to make disposition of the

[1] Secretary's report, 2.

[2] Mr. Warton, Acting Secretary, to Mr. Suarez, August 25, 1890, MS
of State.

[3] Mr. Gresham, Sec. of State, to Mr. Kennedy, May 23, 1893, MSS.
State.

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tions upon the fund received by the Government of the United States upon the account of the payment of the Caracas awards of 1868, and to apply said accretions to the payment of the new awards made in 1889 and 1890 under the Washington commission." By this act the Secretary of State was "authorized and directed to apply all the accretions of the said fund to the payment of the said new awards, and to credit the Venezuelan Government on account of the said new awards with the said accretions, as well as with the principal of the said funds."[1]

On being informed by the commissioners of the completion of their labors, the President of the United States caused the following letter to be sent to them:

"DEPARTMENT OF STATE,
"*Washington, September 4, 1890.*

"The Honorable JOHN LITTLE, Señor Don JOSÉ ANDRADE, and the Honorable JOHN V. L. FINDLAY, etc.

"GENTLEMEN: I have the honor to inform you that I am directed by the President to acknowledge the receipt of your letter of the 2d instant announcing to him the fact of the termination of the work of the commission and the completion of its duties, and to convey to you the expression of his cordial appreciation of the energy, industry, and intelligence which each of you brought to the inception of the delicate and difficult task intrusted to you, and which all of you have displayed in its careful accomplishment within the period provided by the treaty and the law.

"The President instructs me also to convey to you the assurance of his appreciation of the unavoidable delays generally inseparable from work of the character of that which you have performed; to confirm to you his confident hope that the results of that work will be met by all interested persons by acknowledgment of the justice and equity with which you have so earnestly sought to dispose of it, and to apprise you of his pleasure at your commendation of the counsel of the government of the United States, the secretary of the commission, and other gentlemen who have rendered you official assistance.

"I have, etc.,

"WILLIAM F. WHARTON,
"*Acting Secretary.*"

Action "Old Cases."

A statement has heretofore been made of the general results of the action of the present commission on the claims decided by the Caracas board. The following is a table, given in Mr. Suarez's

[1] 28 Stats. at L. 635. The accretions amounted to $117,502.93. (See S. Rep. 330, 53 Cong. 2 sess.; H. Rep. 1360, 53 Cong. 2 sess.)

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report, showing in detail the manner in which each one of those claims was finally disposed of:

Decisions of the United States and Venezuela Claims Commission as compared with those of the former mixed commission.

Docket No. of claim.		Original claimant.	Decision of the Caracas commission.	Decision of the Washington commission.
New.	Old.			
1		Union Insurance Co., of Philadelphia, Pa.		Dismissed.
2	1	Jacob Idler	* $252,814.00	$15,600.50
3	29	Executors of John Donnell	† 19,000.00	13,422.46
4	30	Hollins and McBlair	† 26,000.00	14,893.40
5	14	Joseph Forrest, George Beale, and Daniel Dulaney.	† 5,655.18	Disallowed.
6	40	Paul Bettiker	† Disallowed.	Do.
7	19	Seth Driggs	† $12,000.00	Do.
8	17	Oliver Taylor	† 1,742.630	$3,451.46
9	8	Jonathan C. Morril	† Disallowed.	Disallowed.
10	11	Seth Driggs	† $100,000.00	Do.
11	20	Seth Driggs	* 1,808.00	Do.
12	41	Mrs. E. B. Scott, widow of Alex. Scott	Dismissed.	Dismissed.
13	35	Seth Driggs, representing the owners of the *Nassau*.	† Disallowed.	$3,206.10
14	32	Seth Driggs	† $22,000.00	Disallowed.
15	21	Seth Driggs	† 16,000.00	Do.
16	39	John E. Gowen and Franklin Copeland	† Disallowed.	$20,000.00
17	43	Robert W. Gibbs	* $4,344.90	4,494.09
18	45	W. H. Aspinwall, executor of G. G. Howland, and others.	† Dismissed.	392,489.06
19	10	Margaret Watson de Clark	* Disallowed.	Disallowed.
20	46	Flanagan, Bradley, Clark & Co.	† Dismissed	Dismissed.
21	3	W. E. Willet	* $141,000.00	$95,786.45
22	12	Frederick Wipperman	* Disallowed.	Disallowed.
23	22	William S. Miller	* $11,500.00	Do.
24	16	Lorenzo H. Finn	† 10,000.00	Do.
25	47	Henry Woodruff	† Dismissed.	Dismissed.
26	6	José Castel	† $2,000.00	Disallowed.
27	25	Amelia de Brissot	† 35,000.00	Dismissed.
28	27	Ralph Rawdon	† 100,000.00	$20,000.00
29	26	Joseph Stackpole	† 15,000.00	7,250.00
30	24	Narcisa de Hammer	† 50,000.00	Dismissed.
31	31	Seth Driggs	† Disallowed.	Disallowed.
32	36	Seth Driggs	* $35,000.00	Do.
33	38	Richard O'Dwyer	† Disallowed.	Do.
34	13	Albino Abbiatti	* Disallowed.	Dismissed.
35	23	Seth Driggs, representing the heirs of Benjamin Goodrich.	* Disallowed.	Disallowed.
36	2	John H. Williams	* Disallowed.	Do.
37	5	Lorenzo Jove	† Dismissed.	Do.
38	7	Beales, Nobles, and Garrison	* $250,000.00	Do.
39	9	Amos B. Corwin	† 15,445.59	Do.
40	33	Seth Driggs	† Disallowed.	Do.
41	34	Seth Driggs, representing the owners of brig *Good Return*.	† Disallowed.	Do.
42	28	John Cortés	† Disallowed.	Do.
43	37	Seth Driggs, representing the widow and heirs of Capt. John Clark.	* $102,000.00	Do.
44	15	Charles H. Loehr	† Disallowed.	Do.
45	4	Leonardo Peck	† $25,000.00	$21,443.36
46	49	James Barnes	† Dismissed.	Disallowed.
47	48	José F. Garcia Cadiz	† Dismissed.	Do.
48	18	Morris Ketchum	† Dismissed.	Do.
49	42	W. P. Murray	† Disallowed.	Dismissed.
50	44	Leonardo M. Peck	† Disallowed.	Disallowed.
		Total	$1,253,310.30	$912,036.88

* Decided by the umpire. † Decided by the commissioners.

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CHAPTER XL.

CLAIM OF THE VENEZUELA STEAM TRANSPORTATION COMPANY: CONVENTION BETWEEN THE UNITED STATES AND VENEZUELA OF JANUARY 19, 1892.

Exceptional Character of the Claim.

The claim which forms the subject of this chapter originated in certain transactions in Venezuela in 1871 and 1872. The diplomatic correspondence to which it gave rise covered a period of twenty years, and was brought to a close only by the convention of arbitration. The persistent differences of opinion thus disclosed as to the merits of the claim were, however, due rather to controverted questions of law than to controverted questions of fact. Though there were disputes as to the consequences to be ascribed to certain actual conditions, the principal facts out of which the claim grew were not doubtful. But the circumstances were exceptional, and the questions raised by the attempt to apply the law to the facts were peculiar.[1]

Antecedents of the Claim.

When Mr. Thomas N. Stilwell, minister resident of the United States to Venezuela, arrived in Caracas in December 1867, his first impressions, derived from "the only newspapers published in Caracas, and the statements of gentlemen in whom he supposed he could rely," were that "the rebellion against the established Government of Venezuela was at an end, and that peace, order, and quiet had been fully restored." Twenty days later he reported with "regret" that his "information was incorrect," and that a "formidable rebellion" was "in progress." The government had "about six thousand soldiers in the field,"

[1] See Documentos | relativos á | la reclamación intentoda por la legación de los Estados Unidos de América | en Caracas, | á favor | del Ciudadano Norte-Americano Hancox, | ó | de la Compañía de Transporte por Vapor | de Venezuela. | Publicación Oficial | Caracas | imprenta y litografía del Gobierno Nacional | 1890.

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and the insurgents "probably not over four thousand." theless, he believed that in the end the existing gove of which President Falcon was the head, would "have way." The country was "demoralized from constan lions," business "almost suspended," and "the mone country, if any, garnered up and secreted."[1] Six wee Mr. Stilwell reported that "seven-eighths of the wea respectability of Venezuela," if not even a larger pro "favored quietly and secretly the revolt against the ment." President Falcon had sent his family away fr acas, and had gone to command the "federal army" in In May 1868, the revolutionists having generally be cessful in the field, a convention was made betwe Manuel E. Bruzual, who, as first "designado" (vice-pre became acting President in the absence of President from Caracas, and Gen. Miguel Antonio Rojas, who, professing to act as commander in chief of the revol forces, commanded only those in the western part republic, by which it was agreed that General Bruzua continue to discharge the duties of President, while Rojas should be commander in chief of the armies of t ern, central, and eastern States. The principal revol force was, however, commanded by Gen. José Tadeo M an ex-president of the republic, and commissioners w to confer with him. Mr. Stilwell hoped that the "co of peace" would "lead to a more permanent result" tha which had preceded it.[3] The result, however, was "oth The convention "was not accepted by General Mona the revolutionary party in the eastern states," and Monagas continued his march toward the capital.[4] fomal mediation was attempted by certain member diplomatic body, but without success. At the end Caracas was, after a three days' siege, taken by Genera gas, who immediately organized a provisional gove General Bruzual, having escaped from Caracas, so

[1] Mr. Stillwell to Mr. Seward, Sec. of State, December 26, 1867, 1868, part 2, p. 934.

[2] Mr. Stillwell to Mr. Seward, February 6, 1868, Dip. Cor. 186 p. 936.

[3] Mr. Stillwell to Mr. Seward, May 27, 1868, Dip. Cor. 1868, part

[4] Mr. Pruyr, chargé d'affaires *ad interim*, to Mr. Seward, June Dip. Cor. 1868, part 2, p. 943.

[5] Dip. Cor. 1868, part 2, pp. 945–947.

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establish a government at Puerto Cabello, but in the middle of August 1868 he fled to Curaçao, where he died of a wound received a few days before. "The army of the revolution," said Mr. Pruyn, chargé d'affaires *ad interim* of the United States at Caracas, "continues its westward march, but meets with little resistance. * * * Never was there a revolution so triumphant. * * * All is orderly and quiet. Trade and commerce are gradually reviving."[1] In the course of his dispatch, however, he casually mentioned a circumstance which had a more important bearing on subsequent events than he was aware of. "Gen. Guzman Blanco has arrived from Europe. It is not yet known if he intends to take any part in politics." Toward the end of September 1868 Mr. Pruyn, though reporting that Guiana had declared in favor of the government, said: "The Yellows, or partizans of the late government of Falcon and Bruzual, are said to be actively conspiring, with Curaçao as their headquarters. They still have two or three war vessels, which are said to be refitting at Maracaibo."[2] The followers of Monagas were called Monaquists or "Blues."

While General Monagas was prosecuting his western campaign Dr. Guillermo Tell Villégas, minister of foreign relations, acted as president of the provisional government. On October 1, 1868, an unsuccessful attempt was made to assassinate him. About the same time "reactionary disturbances" occurred in the States of Barcelona and Nueva Andalusia. General Rojas still held out against the government in the thinly populated States of Portuguesa and Zamora. In the state of Zulia the Caracas government came to terms with State President Sutherland, who had "always acted independently of the general government," for the possession of the custom-house of Maracaibo, and also obtained control of the war vessels which had been in the possession of the Bruzualists at that port. Late in October 1868 a general election was held, at which the "Blues" were "everywhere victorious," and General Monagas was elected president.[3] The only speck which Mr. Pruyn could see on the horizon was the possibility that the "relatives" of General Monagas—"some two dozen or more"—and "their

[1] Dispatch of September 4, 1868, Dip. Cor. 1868, part 2, p. 965.

[2] Dispatch of September 21, 1868, Dip. Cor. 1868, part 2, p. 970.

[3] Mr. Pruyn to Mr. Seward, October 30, 1868, Dip. Cor. 1868, part 2, p. 980.

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particular friends," all from the eastern States, would "endeavor to obtain all the places of honor and profit under the new administration." But before the time for his inauguration General Monagas, who was over eighty years of age, died, and the duties of the presidential office were assumed by his son, José Rupertó Monagas, who, as "primer designado," became acting president. On the 18th of February 1869 Mr. Lacombe, United States consul at Puerto Cabello, reported "fresh disturbances," growing out of "the pretensions of many ambitious chiefs to the presidency."[1] Arms and ammunition had been landed from Curaçao on various parts of the coast. Early in March a rising took place in the state of Coro. After a few weeks it was said to be suppressed; but late in May a "new revolution" was "brewing." In June 1869 the State of Zulia passed an ordinance of secession.[2]

Navigation of the Orinoco.

By a law approved May 14, 1869, the Government of Venezuela threw open to merchant vessels under foreign flags, subject to appropriate regulations, the navigation of the river Orinoco and its affluents. This law was as follows:

"The Congress of the United States of Venezuela decrees:

"ARTICLE 1. From the publication of this decree the navigation of the river Orinoco and its affluents, the Lake of Valencia, the Lake of Maracaybo and its tributaries in all the extension of Venezuela, is thrown open to merchant steam vessels under foreign flags that undertake the inland navigation, in conformity with the regulations on the matter; the respective States being subject to the restrictions established by base 4 of the thirteenth article of the constitution, section 1. Free importation is granted through the custom-house of Puerto Cabello to vessels in sections and their corresponding appurtenances for the navigation of the Lake of Valencia.

"ART. 2. Free importation is granted to all machinery and belongings thereto, and all fuel imported for said vessels, during ten years, in accordance with measures to be dictated by the national executive power.

"ART. 3. When, according to base 4, thirteenth article of the constitution, the States shall levy duties on navigation, such duties shall not be heavier on foreign shipping than on Venezuelan.

"ART. 4. All questions arising from the execution of the rights granted by this law will be decided by the courts in accordance with the laws of the republic, and they can in no case be made a matter of an international claim.

[1] S. Mis. Doc. 168, 50 Cong. 1 sess. 42.

[2] Id. 44.

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"SEC. 1. The national executive will dictate rules for the execution of the present decree.

"Given in the chambers of congress, in Caracas, the 10th day of May 1869.

"The president of senate, ENGO A. RIVERA.
"The secretary of senate, B. BURRIOS.
"The president of deputies, M. F. SAMUEL.
"The secretary of chamber of deputies, A. AGUERO.

"CARACAS, *May 14, 1869.*

"Be it executed. J. R. MONAGAS."

In accordance with the provisions of this law, the acting President on July 1, 1869, promulgated the following decree:

"By order of the first designate in charge of the national executive the minister of fomento, Francisco Conde, José Rupertó Monagas, acting President of the United States of Venezuela: In accordance with the powers granted to the national executive by the legislative decree of May 14 last, to regulate its execution as soon as use be made of the permission given for the navigation of the Orinoco and its affluents, the Lake of Valencia, and the Lake Maracaybo and its tributaries in all the extension of Venezuela to merchant steam vessels under foreign flags which undertake the inland navigation:

"DECREES.

"ART. 1. The owners or directors of steam vessels referred to in the mentioned decree, in order to make use of the rights granted, shall previously solicit from the minister of fomento the respective license.

"With this object they shall state the river or lake or affluents which they propose navigating, the names of the directors, the vessel and its nationality, its tons burden, the line of extension on which the river or inland navigation is intended to be carried on, and the time in which the same will be put in execution. In the same petition they will set forth that they submit in everything to the dispositions of the mentioned legislative decree, also to the present regulations established and to be established hereafter.

"ART. 2. On granting the licenses referred to by this decree for the navigation of the rivers and lakes determined, the minister of fomento shall advise the minister of finance, inclosing copies of the necessary documents, in order to enable the latter to take such measures as may be deemed proper for protection of the fiscal interest.

"ART. 3. For the free importion of the articles referred to in section 1 of article 1 and the second article of the above-mentioned legislative decree, which articles are liable to duties according to the law on imports, the owners or directors of the favored vessels shall apply in each case to the ministry of fomento, specifying the articles, the measures, the numbers

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and weights of the same, and their values, in or
finance department once notified may issue to th
custom-houses the order for exemption of the imp

"ART. 5. The importers of effects liable to i
introducing such as are intended for the favore
steamers, will incur, in case of proof to the effe
articles or part thereof have been put to any ot
penalty determined by the customs laws agains
importers.

"ART. 6. The national executive retains the po
fying or amplifying the present regulations wh
practical causes, it may be deemed necessary.

"Given at Caracas the 1st of July, 1869.

"JOSÉ RUPERTÓ

"The minister of fomento,

"FRANCISC

The Claimant Company.

On May 14, 1869, the day on wh
going law was passed at Caracas
ela Steam Transportation Compa
porated at the city of New York. Its incorporato
seven in number, were all Americans except Mr. A
a Venezuelan then in New York, who was at one ti
the courts of the States of Barinas and Lara. The
company, as declared in the articles of incorpora
"carrying and transporting passengers and frei
kind, nature, and description, by vessels or ships
steam from the port of New York to the ports alo
bays, harbors, and coast of Venezuela, Mexico, and
ica."[1] In June 1869 the company sent out a steam
which was put on the route between Port of Spa
and Ciudad Bolivar, on the Orinoco. Her draft
for the up-river trade. Subsequently in the same
pany sent out a second steamer, the *Nutrias*, w
established communication between Ciudad Bol
town of Nutrias, on the river Apure, an affluent of
and in 1871 it dispatched a third steamer, the *S*
to run on the same route. The *Nutrias* and *San F*
duly examined and licensed for the up-river trad
act of 1869 and the regulations adopted to carry
All three steamers had American registers and
by citizens of the United States. The presiden
pany was J. W. Hancox, also a citizen of the U

[1] S. Ex. Doc. 143, 50 Cong. 1 sess. 6.

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The "Blues" and the "Yellows."

In the autumn of 1869 the question whether General Guzman Blanco "intended to take any part in politics" was definitely answered in the affirmative by himself. As early as the middle of August a revolutionary movement was expected at Caracas, and it was rumored that General Guzman Blanco, who had issued invitations for a large ball at his house on the evening of the 14th of the month, would, if the ball was successful, be "called to the head of the government." The ball was held, but the house was attacked by a mob, it was said with the connivance of the authorities. The guests were "prevented from going on with their amusements," and "many left after the windows were broken." Threats were made of sacking the house, and of assassinating the host. The renewal of these threats on the following day induced General Guzman Blanco to seek asylum in the legation of the United States, and on the 19th of August he fled to Curaçao. Early in October "revolutionary and predatory parties," supposed to be acting in his interest, were within 20 miles of Caracas. By December a "civil war" was "raging," and General Guzman Blanco, desiring to assume personal direction of his partisans, early in January 1870 abandoned Curaçao and landed with men and supplies near Puerto Cabello. He came as the leader of the Falconists, or "Yellows." In April 1870 he took the city of Caracas and assumed dictatorial powers. The Monaquists, or "Blues," however, who claimed to be the constitutional government, did not at once succumb to him, but continued to maintain an armed opposition in various parts of the republic till the latter part of 1872.[1]

Seizure of the "Hero."

Meanwhile the State of Guayana, under its president or governor, Señor Juan B. Dalla Costa, for the most part preserved an attitude of neutrality and thus escaped the ravages of the war till the summer of 1871. But in the month of August in that year the tranquillity of the State was disturbed. At that time the State of Barcelona, which lies across the Orinoco from the State of Guayana, was under the control of the Monaquists, or Blues. On the afternoon of the 28th of August the *Hero*, while lying to at Guayana Vieja waiting for a customs officer to come on board, was seized by a military force of that faction under the

[1] S. Mis. Doc. 168, 50 Cong. 1 sess. 46, 50, 53, 55, 59.

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command of General Barreto, who, after compelling the captain and engineer by threats of death to obey his orders, proceeded with his forces on board of the steamer to a point opposite Ciudad Bolivar, where he arrived on the 30th of August.

Seizure of the "Nutrias."

On the preceding day the master of the *Nutrias*, in the absence of the company's agent and without the authority or consent of the company, had let his steamer to President Dalla Costa "for purposes of patrol only." It seems, however, that immediately afterward, by order of Dalla Costa, the master was deposed, the steamer armed with cannon, and a military force put on board of her. This was done in the interest of the Yellows, or at least with an intent to resist the Blues, and on the 30th of August, after the *Hero* had arrived opposite Ciudad Bolivar, and after General Barreto had sent a commission ashore with a flag of truce, the *Nutrias* fired on her.

The *Hero* then withdrew and, with a flotilla in tow, proceeded up the river to Soledad. On her way she was fired into by the battery at Ciudad Bolivar and struck with cannon shot. A part of her cargo, consisting of sacks of salt, was used in forming barricades for the troops. At Soledad another party of the Blues, under General Quintana, came on board of the steamer and her flotilla, and the whole force proceeded to a point near Ciudad Bolivar, where the most of the troops were landed. Here the *Hero* was again fired on by the *Nutrias*, but, although she was seriously damaged by cannon shot, she was not sunk, and later in the day she was brought to Ciudad Bolivar, which had in the mean time been captured by the Blues. Here she remained in the possession of an armed guard till September 5, 1871, when she was released, after having been detained and employed in war by the Blues for nine days.

After her failure to sink the *Hero* the *Nutrias* escaped from Ciudad Bolivar under a fire of musketry and proceeded in charge of her captors to Port of Spain. On her arrival there the master appealed for protection to the commander of the British man-of-war *Cherub;* and through his intervention the steamer was, on the 12th of September, restored to the company's agents.

Seizure of the "San Fernando."

September 3, 1871, as the *San Fernando*, on her return from the town of Nutrias, came to her landing at Ciudad Bolivar, she was boarded by a force of the Blues, who kept her under surveillance till

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September 14, when she was forcibly pressed into service for the transportation of troops and supplies. When she was seized the president of the company, J. W. Hancox, was on board, and the captors refused to allow either the *San Fernando* or the *Hero* to leave Ciudad Bolivar till September 5, when they permitted the *Hero* to sail for Trinidad on condition that Hancox pledge his word and honor as a Mason that she should return and resume her regular trips, and that the *Nutrias* should return to Ciudad Bolivar and resume with the *San Fernando* the up-river trade. Moved, as he said, by the desire to secure the *Hero's* release and to communicate with his government, as well as by other considerations not necessary to be enumerated, Hancox gave the pledge and departed.

Second Seizure of the "Nutrias."

The *Nutrias* returned to Ciudad Bolivar for the purpose of resuming her trips, but on September 15 she was again seized, this time by the Blues, who were then in possession of the city, and was retained and used by them, together with the *San Fernando*, in the transportation of troops and supplies till February 14, 1872, when they were delivered to Edward E. Potter, commander of the United States man-of-war *Shawmut*, who had been sent out to obtain their restoration.[1]

Refusal to Grant Clearances.

Having overthrown the Blues and ordered a general election, General Guzman Blanco was, on February 20, 1873, inaugurated as constitutional President of Venezuela. Thereafter, as was alleged, "he prohibited the company's steamers from resuming their business," so that the "*Nutrias* and *San Fernando* lay idle at their moorings at Ciudad Bolivar for five months, to wit, from the opening of the up-river navigation in May 1873 to the 27th of September 1873, being there detained by the refusal of the local authorities, under instructions from General Blanco's government at Caracas, to grant the necessary clearances, to the pecuniary damage and injury of the said company in the sum of thirty thousand dollars ($30,000)."[2]

The Perez Concession.

In August 1873 the government at Caracas granted to General Perez, of that city, the concession of an exclusive right to navigate the Orinoco and its affluents.[3]

[1] S. Ex. Doc. 79, 52 Cong. 1 sess. 45–48.

[2] Statement of the case of the United States before the commission, 11.

[3] S. Ex. Doc. 139, 50 Cong. 1 sess. 32.

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Diplomatic Correspondence.

Mr. Bancroft Davis, Acting Secretary of State, instructed Mr. Pile, then minister of the United States at Caracas, on September 22, 1871, to remonstrate to the minister for foreign affairs against the seizure of the steamers and to "demand the restitution of the steamers and indemnification for their detention." It was represented, said Mr. Davis, that one of the steamers was seized "by the government troops, and the other by those of their adversaries.[1]

Mr. Fish's Instructions.

May 9, 1872, Mr. Fish instructed Mr. Pile again to address the Government of Venezuela in regard to the seizure of the steamers. In these instructions Mr. Fish said that the regret of Venezuela for "all acts of lawless violence, such as those now in question, committed, whether by the people or the public authorities of Venezuela, against the persons and property of citizens of the United States," would best be shown by "their promptly making indemnification for the injuries now complained of." He also referred to the "invitation to foreigners" given by the law of May 14, 1869, "to embark their capital and skill in Venezuelan commerce," and said that "on the faith of this public decree and relying on the protection which a public law always implies," the company had "put four steamers afloat on the inland waters of Venezuela." For the performance of its obligations it was "responsible to the laws of Venezuela administered in the courts of that republic." Yet, "in defiance of law and in disregard of the immunities due to the flag of a friendly nation, three of their ships were seized, one by a band of two hundred armed men, calling themselves revolutionists, and the other two by the public authorities." Under the circumstances Mr. Pile was to urge upon the Venezuelan Government "a prompt payment of such indemnity as the memorialists may be found entitled to."[2]

Reply of Venezuela.

Mr. Pile duly executed his instructions, and on August 29, 1872, a reply was made on behalf of Venezuela by Mr. Antonio L. Guzman, then secretary of foreign relations. In this reply Mr. Guzman stated that the *Hero* was seized in August 1871 by "the rebels in the east," who used her in the capture of Ciudad Bolivar, where, on September 1, they overthrew "the legitimate gov-

[1] S. Ex. Doc. 28, 42 Cong. 2 sess. 11.
[2] S. Ex. Doc. 143, 50 Cong. 1 sess. 12.

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ernment of the State." The *Nutrias*, which was, "according to contract," in the service of Mr. Dalla Costa, the constitutional president of the city of Guayana, on hearing of the occupation of the city "by the rebels," sailed for Port of Spain, where she arrived September 3. The *San Fernando* was then in the river Apure, and had on board Mr. Hancox, who, notwithstanding Mr. Dalla Costa's having made known to him the peril of going to Bolivar, went down three or four days afterward. Mr. Hancox, said Mr. Guzman, "conferred with the rebel chief, contracted with him, and left for Trinidad on the 6th of September on the *Hero*, leaving the *San Fernando* in possession of the insurgents." When it became known that the *Hero* was about to return to Bolivar, the Venezuelan consul at Port of Spain, Dr. Montbrun, personally informed Mr. Hancox that he "could not allow any trading with a point occupied by the enemy." Mr. Hancox replied that he was going to Bolivar to fulfill a promise made "to the chief, Amparán, and to take possession of all his steamers." Dr. Montbrun then declared that nobody could go to the Orinoco; that all vessels going thither were liable to be detained and confiscated by the government; and that the government would not be responsible in respect of any losses which might befall the steamers, "from the fact of their communicating with the enemy." He gave a similar warning when he heard that the *Nutrias* was going to Caballero, and added that it was probable that the enemies of the government, then holding possession of Bolivar, would attempt to seize the steamers again in order to use them in hostilities; and he refused to clear the steamers. Nevertheless the *Hero*, continued Mr. Guzman, left for Bolivar, "dispatched by the kindred rebel, Dr. Francisco Padron, who styled himself consul-general and confidential agent of Venezuela in the British West India Islands;" two days afterward the *Nutrias* left for Bolivar "without any legal dispatch;" and it appeared that Mr. Hancox had "bound himself with the rebel chief, José Amparán, to go to Trinidad with the *Hero*, take there the *Nutrias*, and bring her to the city of Bolivar, to continue regularly the voyage between that city and Trinidad." The *Hero* continued to run between Trinidad and Bolivar till the decree of October 2, 1871, blockading the coasts of the Orinoco;[1] and Mr. Hancox then went to New York, leaving the *Hero* at Port of Spain, and the *Nutrias* and *San Fernando* "in possession of

[1] S. Ex. Doc. 28, 42 Cong. 1 sess. 23.

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the rebels," to transport "the forces that carried terror and desolation to San Fernando de Apure." It thus appeared, declared Mr. Guzman, that Hancox, having it in his power to take the *San Fernando* to Trinidad, did not do so; that having the *Nutrias* safe, he dispatched her to Bolivar "in violation of law;" and that he continued to trade in the *Hero* "with points ruled by the rebels," contracting with them and executing his contracts. He was responsible for the consequences. By the legislative decree of March 6, 1854, it was provided that no foreigner should have any action or claim against the government for indemnity for damages suffered in political commotions, unless such damages were inflicted by "legitimate authorities." It was indeed true that the *Nutrias* was in the service of the constitutional government of Guayana from August 29 till September 1, 1871, but she was employed with the consent of the captain at a daily hire of 250 pesos. The accidents of war were clearly foreseen in making the contract.[1]

Further Correspondence.

Such was the answer of Venezuela to the first representations of the United States. In reply Mr. Davis, as Acting Secretary of State, instructed Mr. Pile that, as the Venezuelan Government was "not understood to have granted belligerent rights to the insurgents who seized Mr. Hancox's steamers, Venezuela must be held accountable for the seizure and forcible employment of these vessels by any persons within her jurisdiction, whether on behalf of insurgents or of the existing government."[2]

More than ten years after the discussion of the claim began, an argument was advanced on the part of the Venezuelan Government which promised at one time to change the course of the negotiations. In a note of March 27, 1883, Mr. Rafaèl Seijas, then Venezuelan minister for foreign affairs, stongly contended that the executive could not, even if the claim were well founded, afford relief, since all alien claims must be adjudicated by the courts, which were open to the claimants for that purpose. This contention was based on a law of February 1873 and an executive resolution of 1881. The law of 1873 required "persons preferring claims against the nation, whether natives or foreigners, on account of damages, injuries, or seizures by national or state officers, either in civil or international war, or in time of peace," to "do so in the manner established

[1] S. Ex. Doc. 143, 50 Cong. 1 sess.

[2] Mr. Davis to Mr. Pile, July 28, 1873.

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by the present law," viz, "by a formal application to the high federal court." The resolution of 1881, after reciting that "the illustrious American, President of the Republic," regretted to observe the forgetfulness of certain foreigners of "sound principles," in that they insisted, in spite of the law of 1873, "on disregarding the legal methods of redress, and on laying their complaints before the executive diplomatically," declared "that claims not presented in the manner required by law will hereafter be disregarded."[1] The obvious purpose in citing these provisions was to deny the right of the United States for the time being to take further action in regard to the claim in question. The note of Mr. Seijas was in fact so interpreted, and Mr. Frelinghuysen informed the attorney of the claimants that, "until there shall be pronounced in the competent courts" of Venezuela "a decision amounting to a denial of justice" in the case, it was "not perceived" how the Department of State could "with propriety take any further steps in the matter."[2] Subsequently, however, Mr. Frelinghuysen, after having "caused the antecedents of the claim to be carefully reexamined," informed counsel that he had reached the conclusion that the United States "should continue to prosecute and press the claim diplomatically," and that "no just ground" existed for remitting the claimants to the "high federal court of Venezuela," "the more so as the jurisdiction of that court, under the law of February 1873 and the resolution of 1881, referred to by the minister [Mr. Seijas], in a case like the present one is, to say the least, doubtful."[3] Instructions in this sense were sent to the minister of the United States at Caracas,[4] and representations were made to the Venezuelan Government of a "strenuous character."[5]

The diplomatic discussion therefore returned to the merits of the claim, but without any approach to an agreement. The Venezuelan Government in further defense of its position referred to the fourteenth amendment to the Constitution of the United States, and to the uniform denial by the United States of responsibility for the acts of the Confederates. In

[1] S. Ex. Doc. 143, 50 Cong. 1 sess. 65–67.

[2] Id. 69.

[3] Id. 81.

[4] Mr. Frelinghuysen to Mr. Baker, April 18, 1884, S. Ex. Doc. 143, 50 Cong. 1 sess. 81.

[5] Mr. Porter, Acting Secretary, to Mr. Kennedy, February 3, 1886, S. Ex. Doc. 143, 50 Cong. 1 sess. 95.

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respect of the case of the *Montijo*[1] it observed that the revolutionists who committed the acts complained of, afterward became the government. It also contended that the "legitimate government" of Venezuela had a right to seize the vessels, on the ground that, as they were in reach of "factionists," it was a lawful operation of war to seize them in order to prevent them from falling into the hands of the enemy, just as a country might be laid waste in order to arrest an enemy's progress.[2]

Joint Resolution of 1890.

Though the discussion of the claim was retarded by political changes at Caracas, the minister of the United States reporting in November 1887 that there had been, during his term of about two years and a half, four administrations and six ministers for foreign affairs,[3] the position taken by the Government of Venezuela as to the effect of the law of 1873 and the resolution of 1881, in excluding diplomatic intervention, doubtless influenced the claimants in their decision to appeal to the United States Congress. A joint resolution was introduced in the Senate to empower the President to take such measures as might in his judgment be necessary promptly to obtain indemnity, and was referred to the Committee on Foreign Relations. On August 1, 1888, Mr. Evarts submitted a report, recommending the adoption of the resolution with amendments.[4] This report, after reciting the facts as disclosed in the correspondence, the seizure of the *Nutrias* and *San Fernando* "by or under the authority of persons exercising in part the powers of and claiming to be the Government of Venezuela," the seizure of the *Hero* "by a body of forces claiming to be of the true government," her being "fired into by an armed steamer of the other party claiming to be under the true Government of Venezuela," and her having finally "come into the possession of the so-called regular authorities of the Venezuelan Government, if, which is more than doubtful, any government was regular at that time," said:

"It is evident that the contending parties, factions, and forces in Venezuela preceding and at the time of the events affecting all these vessels, were none of them legitimate in the

[1] *Supra*, 1421.

[2] S. Ex. Doc. 79, 52 Cong. 1 sess. 7; S. Ex. Doc. 143, 50 Cong. 1 sess. 81.

[3] S. Ex. Doc. 143, 50 Cong. 1 sess. 108.

[4] S. Rep. 1964, 50 Cong. 1 sess.

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sense of the constitution of Venezuela, but all were struggling with varying success for the practical possession of the government of the country, with little, if any, regard to its written constitution, and there seems to be just as good ground for taking the organization of the party of the 'Blues,' so called, as the legitimate government at that time, as the forces and managers of the party of the 'Yellows.' Under these circumstances it appears to the committee that the fact that the steamer *Hero* was seized by parties claimed to be in rebellion by the party with whom diplomatic communication was from time to time kept up by the representatives of the United States, furnishes no reason, if any such has ever been set up by the Venezuelan authorities, why the present government of that country should not be responsible for it and the damages consequent thereon.

"In respect of the other vessels mentioned in the papers, viz, the *Nutrias* and the *San Fernando*, there does not appear to be any possible ground of excuse on the part of the present Government of Venezuela for not making proper indemnification * * *.

"The committee is of opinion that it is the manifest duty of the United States, under these circumstances, to take such measures as shall be adequate to obtain indemnity and reparation for all wrongs and damages suffered by the said steamship company and its officers and crews (being citizens of the United States), in respect of all said vessels."

During the second session of the Fiftieth Congress the joint resolution passed the Senate, but it was not finally acted on in the House, though it was favorably reported by the Committee on Foreign Affairs.[1] In the next session it again passed the Senate, and was also adopted by the House. It was received by the President June 7, 1890, and became a law without his approval. The text of the resolution was as follows:

"Joint resolution for the relief of the Venezuela Steam Transportation Company.

"Whereas it appears from the correspondence transmitted to the Senate by the message of the President, of the second day of February, eighteen hundred and seventy two (Executive Document Numbered Twenty-eight, second session Forty-eighth Congress) and on the twelfth of April, eighteen hundred and eighty-eight (Executive Document Numbered One hundred and forty-three, first session Fiftieth Congress), that since the year eighteen hundred and seventy-one indemnity has been repeatedly demanded by the Executive Department of the United States from the Venezuelan Government, but without avail, for the wrongful seizure, detention, and employ-

[1] H. Rep. 3880, 50 Cong. 2 sess.

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ment in war and otherwise of the American steamships *Hero*, *Nutrias*, and *San Fernando*, the property of the Venezuela Steam Transportation Company, a corporation existing under the laws of the State of New York, and a citizen of the United States, and the imprisonment of its officers, citizens of the United States, under circumstances that render the Republic of Venezuela justly responsible therefor; and

"Whereas all the diplomatic efforts of the Government of the United States repeatedly exerted for an amicable adjustment and payment of the just indemnity due to said corporation and its officers, citizens of the United States, upon whose property and persons the aforesaid wrongs were inflicted, have proved entirely unavailing: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and he is hereby, authorized and empowered to take such measures as in his judgment may be necessary to promptly obtain indemnity from the Venezuelan Government for the injuries, losses, and damages suffered by the Venezuela Steam Transportation Company of New York, and its officers, by reason of the wrongful seizure, detention, and employment in war or otherwise of the said company's steamers *Hero*, *San Fernando*, and *Nutrias* by Venezuelan belligerents in the year eighteen hundred and seventy-one, and to secure this end he is authorized to employ such means or exercise such power as may be necessary.

"Received by the President June 7, 1890.

"[NOTE BY THE DEPARTMENT OF STATE.—The foregoing act having been presented to the President of the United States for his approval, and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]"

Execution of the Resolution.

Counsel for the claimant took the ground that, in giving effect to the foregoing resolution, the President might, in his discretion, "consent to the ascertainment of the amount of the damages by arbitration, barring unnecessary delay," but that "the question of Venezuela's liability" was, so far as the United States was concerned, "settled by the joint resolution which is now the law of the land, and the *execution* of which is at once the President's highest prerogative and his most sacred and imperative duty."[1] To this communication Mr. Blaine replied, as Secretary of State, November 7, 1890. In his reply he referred to a letter from counsel of June 17, 1890, urging the President

[1] Messrs. Shellabarger & Wilson, and Crammond Kennedy, to the President, July 9, 1890, S. Ex. Doc. 79, 52 Cong. 1 sess. 88.

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to approve the joint resolution of Congress, which was then before him. In this letter counsel expressed regret that the passage of the resolution had been "interpreted by certain newspapers as indicating a difference of opinion between the Executive and Congress in regard to arbitration and the measures recommended by the international conference of American states recently in session at this capital," and declared that while "there might be room for differences of opinion upon the question whether the liability of Venezuela for the conduct of her belligerent factions in seizing and arming these American steamers, and engaging them in a fight against each other, was not outside the pale of arbitration, the acts being of such a violent and piratical character, and constituting such an extraordinary invasion of the respect due to the United States and her flag, which these steamships carried," yet there could be "no question that, while the resolution clothes the President with all the necessary authority to promptly obtain indemnity, the methods of accomplishing the desired end are left entirely to his discretion." Mr. Blaine stated that he entirely concurred in this view. To speak of using means to obtain indemnity did not, he said, exclude arbitration of a case on the merits. If the fact were otherwise, it would appear that the Government of the United States had "consistently failed to obtain indemnity for its injured citizens" from the beginning. The same charge might also be made against all other governments since arbitration came into general use as a means of adjusting pecuniary demands.[1]

Convention of Arbitration.

In accordance with these views, a convention was signed at Caracas January 19, 1892, by the first article of which the contracting parties agreed to submit to arbitration "the question whether any, and if any, what indemnity shall be paid by the Government of the United States of Venezuela to the Government of the United States of America for the alleged wrongful seizure, detention, and employment, in war or otherwise, of the steamships *Hero*, *Nutrias*, and *San Fernando*, the property of the 'Venezuela Steam Transportation Company,' a corporation existing under the laws of the State of New York, and a citizen of the United States, and the imprisonment of its officers, citizens of the United States." This definition of the question to be arbitrated was framed in the words of the joint resolution.

[1] S. Ex. Doc. 79, 52 Cong. 1 sess. 96.

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As arbitrators, the convention provided for the appointment of three commissioners, one by the United States and another by Venezuela, and the third, who should not be a citizen of either country, by these two, or if they could not agree, by the diplomatic representative of Belgium, or of Sweden and Norway, at Washington. The commissioners appointed by the contracting parties were required to meet in Washington within three months from the date of the exchange of the ratifications of the convention, and all three commissioners were required to meet there within five months from the same date.

The rule by which the commissioners were to be guided in their decision was laid down in the solemn declaration which they were required to subscribe. This declaration, as prescribed by the convention, was "to examine and decide the claim submitted to them in accordance with justice and equity and the principles of international law." The "concurrent judgment of any two of the commissioners" was pronounced "adequate for the decision of any question that may come before them, and for the final award." The commissioners were required to decide the claim on the "diplomatic correspondence" and on "such legal evidence" as the high contracting parties should submit to them, and to hear one person as agent on behalf of each government. They were authorized, in their discretion, to hear other counsel, either in support of or in opposition to the claim. They were obliged to render a final decision within three months from the date of their first full meeting.[1]

Appointment of Commissioners.

As commissioner on the part of the United States, the President appointed Mr. Noah L. Jeffries; the President of Venezuela appointed, as commissioner on the part of that government, Señor José Andrade, Venezuelan minister at Washington. The commissioners thus chosen met in the diplomatic anteroom of the Department of State, at Washington, in the afternoon of October 27, 1894, and effected a temporary organization, exchanging their credentials and designating Francis S. Arnold to act as temporary secretary. They then proceeded to confer as to the selection of a third commissioner, and on November 5, after having adjourned from day to day, they agreed to tender

[1] For an estimate of appropriation to carry the convention into effect, see H. Ex. Doc. 251, 53 Cong. 3 sess.

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the office to Mr. G. de Weckherlin, envoy extraordinary and minister plenipotentiary of the Netherlands at Washington. The tender was duly made, but Mr. de Weckherlin's government declined to permit him to serve. The post was next offered to Baron A. von Saurma-Jeltsch, German minister at Washington, but he was unable to accept it. By this time the five months from the date of the exchange of the ratifications of the convention,[1] within which the three commissioners were required to meet, had nearly expired, and on December 24, 1894, an invitation was extended to Señor Don Matiás Romero, Mexican minister at Washington, to act as third commissioner. Mr. Romero accepted, and assisted at the organization of the commission; but during the next month he resigned and was succeeded by Mr. A. Grip, the minister of Sweden and Norway, who appeared at the board January 29, 1895, and subscribed the necessary declaration.

Organization of the Commission.

The three commissioners, Messrs. Jeffries, Andrade, and Romero, met at No. 2 Lafayette place, in Washington, at 11.30 a. m. December 27, 1894. Their first act was to subscribe the declaration prescribed by the convention, after which Mr. Romero was chosen as president of the commission.

Mr. Alexander Porter Morse appeared and presented his credentials as agent of the United States. At a subsequent meeting Mr. Samuel F. Phillips appeared and presented credentials as agent for Venezuela.

Mr. Morse presented to the commission Messrs. Crammond Kennedy and J. M. Wilson as special counsel for the claimants.[2]

Rules drafted by the agents were adopted by the commission, and the secretary was directed to publish a notice stating the organization of the commission and the addresses of the agents in certain newspapers to be selected by the agents. The notice was published in the New York *Herald* and the Washington *Evening Star*.

Mr. Arthur W. Fergusson was appointed secretary to the commission, at a compensation of $250 a month. His appointment took effect January 7, 1895, when he subscribed a declaration faithfully and carefully to discharge the duties of his office.

[1] July 28, 1894.

[2] The names of Messrs. Sidney Webster and Samuel Shellabarger appear on one of the briefs for the United States. Mr. Webster was one of the original counsel in the case, when the claim was first presented.

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Mr. Francis S. Arnold, who had acted as temporary secretary, became clerk to the commission. José C. Sarmiento was appointed messenger.

When Mr. Grip on January 29, 1895, succeeded Mr. Romero as third commissioner, he also became president of the commission by the votes of his associates. He continued to preside till the final adjournment April 5, 1895.

Statement of Claim.

January 7, 1895, the commission prescribed periods for the filing of a formal statement of claim by the agent of the United States, and of a formal answer by the agent of Venezuela. Agreeably to this direction the agent of the United States on January 16 filed a statement in thirty-five paragraphs (I.–XXXV.), setting forth the claimants' demands. The first twenty-one paragraphs (I.–XXI.), constituting Part I. of the statement, related to the claim on account of the "seizure, detention, and employment of the company's steamers;" the remaining paragraphs (XXII.–XXXV.) constituting Part II. of the statement, related to the claim on account of "the imprisonment of the company's officers." The only paragraphs which it is necessary here to quote are those numbered XIX. to XXV., inclusive. Paragraphs I. to XVIII., inclusive, related to the seizure, detention, and employment of the steamers prior to 1873, as heretofore narrated. Paragraphs XIX. to XXV. were as follows:

"I.

"CLAIM ON ACCOUNT OF SEIZURE, DETENTION, AND EMPLOYMENT OF THE COMPANY'S STEAMERS.

* * * * * * *

"XIX. That on February 20, 1873, General Blanco, having totally overthrown the Monagas government and having ordered a general election, was inaugurated as constitutional president of Venezuela, and that thereafter he prohibited the company's steamers from resuming their business; and the said steamers *Nutrias* and *San Fernando* lay idle at their moorings at Ciudad Bolivar for five months, to wit, from the opening of the up-river navigation in May 1873 to the 27th of September 1873, being there detained by the refusal of the local authorities, under instructions from General Blanco's government at Caracas, to grant the necessary clearances, to the pecuniary damage and injury of the said company in the sum of thirty thousand dollars ($30,000).

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"XX. That the complainant claims from the Government of Venezuela as direct damages on behalf of the Venezuela Steam Transportation Company the following items as set forth in the said company's memorial addressed to the Hon. Hamilton Fish, Secretary of State, dated April 25, 1872, and printed in Executive Document No. 143, Senate, Fiftieth Congress, first session, page 5:

Steamer *Hero:*	
Damages for injuries to steamer inflicted by the regular and insurgent authorities, as per survey on file in your office	$57,000
Nine days' use of steamer, as per affidavit of Joseph W. Hancox, hereto annexed	5,400
Ninety days' time to repair damages, as per affidavit of Joseph W. Hancox, hereto annexed	54,000
Loss and damage to cargo for which your memoralists are responsible, as per affidavit of Joseph W. Hancox, hereto annexed	6,000
Steamers *San Fernando* and *Nutrias:*	
Damages for injuries to steamers while in possession of the Government of Venezuela, as per survey hereto annexed	43,444
Deficiency in inventory, articles lost or taken while in possession of said government, as per affidavit of Joseph W. Hancox, hereto annexed	6,566
Time and use of both steamers 164 days, as per affidavit of Joseph W. Hancox, hereto annexed	98,400
Ninety days' time to repair damages, as per affidavit of Joseph W. Hancox, hereto annexed	54,000
Claim of Converse for nondelivery of freight, for which your memorialists are responsible, as per affidavit of Joseph W. Hancox, hereto annexed	10,000
Total damages	334,800

"to which amount is to be added $30,000, as claimed in paragraph XIX. (*supra*), making $364,800, with interest at six per cent per annum on $334,800 from February 15, 1872, and interest at six per cent per annum on $30,000 from September 27, 1873.

"XXI. That for the purpose of depriving the said company of its business and of its rights and privileges under the aforesaid act of the Venezuelan congress and under the licenses granted to the said company in accordance therewith, General Blanco granted the exclusive right of navigating the Orinoco and Apure rivers to one Consuegra in the summer of 1873 for a period of seven years; that the said Consuegra and those associated with him, having failed in the accomplishment of their purposes, the said concession was revoked, and thereupon another concession was granted by General Blanco for the exclusive navigation of the rivers to General Juan Francisco Perez, who associated with himself Scandello and Trevarinus, together with Wm. A. Pile, for the purpose of utilizing said concession and carrying out the purposes aforesaid; and that, in the meantime, to enable the parties to accomplish their said ends and force the said company to dispose of its steamers at a great sacrifice, the steamers *San Fernando* and *Nutrias*

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were detained as aforesaid at Ciudad Bolivar, and prohibited from making their usual trips or doing any business whatever from May until September 27, 1873, and by this duress the company was deprived of its business and of its rights and privileges and of the profits thereof, and forced to sell its steamers at greatly less than their actual value, and without consideration or compensation for the profitable business which the company at great expense and risk had created.[1]

"As this loss of business and its transfer to the purchasers were the direct and necessary consequences of the aforesaid detention, and as the new concessions for the exclusive navigation of the Orinoco and its affluents were based upon and sought to be justified by the arbitrary, illegal, and unconstitutional abrogation of the act of Congress of May 14, 1869, by a dictatorial decree, it is respectfully submitted to the commission whether an allowance should not be made to the company for the value of its business so lost and transferred as aforesaid, as well as for the damages hereinbefore specified.

"II.

"CLAIM ON ACCOUNT OF THE IMPRISONMENT OF THE COMPANY'S OFFICERS.

"XXII. That complainant claims from the Government of Venezuela as indemnity for the imprisonment of the master of the *Hero*, Abram G. Post, a citizen of the United States, and for his violent and forcible deposition from the command of his vessel, and for the duress, threats, indignities, and hardships which he suffered at the hands of the military authorities, who claimed to be of the true Government of Venezuela, and seized the said vessel at Guayana Vieja and held her by force of arms from the 28th of August to the 6th of September 1871, and for his compulsory exposure to peril of life and limb while the *Hero* was under fire from the guns on the *Nutrias* and the battery on shore, as hereinbefore set forth, the sum of $10,000, with interest at 6 per cent per annum from the last-mentioned date.[2] * * *

"XXIII. That the complainant claims from the Government of Venezuela as indemnity for the imprisonment of the chief engineer of the Venezuela Steam Transportation Company, Jacob J. Maurinus, a citizen of the United States, on board the steamboat *Hero*, and for his continuous confinement in the engine room of the said vessel, and for the duress, threats, indignities, and hardships which he suffered at the hands of the military authorities claiming to be the constitutional government of Venezuela, from the 28th of August to the 6th of

[1] S. Ex. Doc. No. 143, 50 Cong. 1 sess. 34, 35.

[2] S. Ex. Doc, No. 28, 42 Cong. 2 sess. 4, 5; S. Ex. Doc. No. 143, 50 Cong. 1 sess. 11.

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September 1871, and for his compulsory exposure to peril of life and limb while the *Hero* was under fire from the guns on board the *Nutrias* and the battery on shore, as hereinbefore set forth, the sum of $10,000, with interest at 6 per cent per annum from the last-mentioned date.[1]

"XXIV. That the complainant claims from the Government of Venezuela indemnity for the imprisonment of the master of the *Nutrias*, David J. Sturgis, a citizen of the United States, and for his violent and forcible deposition from the command of his said vessel on or about the 29th of August 1871, and for his compulory exposure to peril of life and limb in the attacks which the said vessel made thereafter upon the steamboat *Hero*, and for his enforced deportation on board the said vessel to the island of Trinidad by order and under authority of Juan B. Dalla Costa, president of the State of Guayana, one of the United States of Venezuela, the sum of $10,000, with interest at 6 per cent per annum from September 23, 1871.[2] * * *

"XXV. That the complainant claims from the Government of Venezuela as indemnity for the unlawful imprisonment of Cornelius J. Brinkerhoff, a citizen of the United States, for six days in the common jail of Ciudad Bolivar, to wit, from the 6th to the 12th of August, 1873, while he was in charge of the steamboats *San Fernando* and *Nutrias*, which were then and had been since May 1873 detained at the said port by the refusal of the constituted authorities to issue the necessary clearances for their up-river trips, the sum of $5,000, with interest at 6 per cent per annum from August 12, 1873."

Answer of Venezuela.

The formal answer of Venezuela to the statement of claim on the part of the United States was—

1. That in regard to each and all the claims that government made a "general denial," and that it required "that they be duly established in point both of fact and law."

2. That as to the claim stated in Paragraph XX., "except partially that in respect to the steamer *Nutrias*," and as to the claims stated in Paragraphs XXII. and XXIII., the Venezuelan Government denied "all responsibility" on the ground that the acts which gave rise to these several claims "were done exclusively by an armed force of its insurgent enemies, at times and places where they were beyond its control, and to the end of obtaining means for maintaining their position and pretensions as such enemies; and also with the direct result of

[1] S. Ex. Doc. No. 28, 42 Cong. 2 sess. p. 3; S. Ex. Doc. No. 143, 50 Cong. 1 sess. 11, 12.

[2] S. Ex. Doc. No. 28, 42 Cong. 2 sess. p. 9; S. Ex. Doc. No. 143, 50 Cong. 1 sess. 26, 27.

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enabling them thereby to make good the same [position and pretensions] during six months of destructive military enterprises, extending for 500 miles along the Orinoco River and its affluents."

3. That the claims stated in Paragraphs XIX., XXI., and XXV. were, because of "their date and character," not within the jurisdiction of the commission, as defined by Article I. of the convention, construed in connection with the joint resolution of Congress of 1890.

Hearings. After the formal statement and answer were filed, the commission proceeded to hear the case. Meetings were held on December 26, 28, and 29, 1894, and on January 8, 11, 17, 18, 29, 30, and 31, 1895. Eight witnesses were produced and examined on behalf of the claimants.[1] A small quantity of documentary evidence was filed on the part of Venezuela.

Argument for the United States. In the brief and oral argument of the agent of the United States and of special counsel, it was contended that Venezuela was liable for the seizure, detention, and employment of the three steamers of the company, and the imprisonment of its officers (1) by the Blues, (2) by the authorities of the State of Guayana, and (3) by the federal authorities.

1. On the general principles of international law: The government of Guzman Blanco was, so it was argued, as the government *de facto*, liable for the acts of the Blues, because there was not a state of war in Venezuela in the sense of the law of nations. Neither the United States, nor the government at Caracas, recognized the Blues as "belligerents." On the other hand, none of the governments of Venezuela had sought to punish the guilty and indemnify the sufferers in respect of the acts complained of.[2]

2. Under an extension of the rules of international law touching revolutionary states: The state, it was argued, is continuous, and can not escape responsibility by internal or external changes.[3] Its responsibility extends to the torts of

[1] The witnesses were Alexander F. Mathison, Thomas J. Rider, Jacob J. Maurinus, Cornelius H. Brinkerhoff, John Neilson Harriman, Edward E. Potter, George Wuppermann, and Joseph W. Hancox.

[2] Citing Halleck, Int. Law, Ch. XI. § 4; Vattel, Droit des Gens, Liv. II. Ch. III. §38; Phillimore, Int. Law, I. § 168; Rutherforth's Institutes, Liv. II. Ch. IX. §§ 12, 13; De Felice, Droit des Gens, IV. 3; Dana's Wheaton, § 23, p. 34; Bluntschli; Droit Int. Codifié, § 380, note 1.

[3] Wheaton, Elements, sec. 32.

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factions struggling for political power.[1] The government of Guzman Blanco stood for Venezuela, and "internationally was Venezuela." Yet it "permitted" a "handful of men" to hold Ciudad Bolivar, govern the State of Guayana, and control the Orinoco from its mouth to Nutrias for nearly six months. A government "which refuses to repair the damage committed by its citizens or subjects, to punish the guilty parties, or to give them up for that purpose, may be regarded as virtually a sharer in the injury and as responsible therefor."[2] Sovereign responsibility "is not," said the agent of the United States, "regarded as being suspended by mobs, tumults, commotions, seditions, or even insurrections, or by anything short of belligerency; i. e., the exercise of military force by a political organization, within the national territory, of such consistency and strength as to be beyond the control, at the time, of the parent government, and to make it probable that a new state has come or is about to come into the family of nations."

3. Under the Venezuelan law of May 14, 1869, in relation to the navigation of the Orinoco: It was argued that by accepting the terms of this act and of the regulations under it, the company entered with Venezuela "into a relation of trust and confidence which immediately gave rise to reciprocal obligations and duties."[3] The decree of Guzman Blanco, issued at his military headquarters on the capture of Caracas April 27, 1870, annulling all laws and decrees made since June 28, 1868, was, it was contended, mere *brutem fulmen*, and the act of 1869, remaining unrepealed, was binding on every department of the government. The company was legally entitled to the benefits which it conferred.

As to the special plea of the agent of Venezuela, to paragraphs XX., XXII., and XXIII. of the statement of claim, that the injuries therein described were committed by "insurgent enemies," at times and places where they were beyond the control of the government, the agent of the United States maintained that the burden of proof was upon Venezuela to show, in support of this plea, (1) that the acts were done exclusively by "insurgent enemies," (2) that the acts were beyond control, and (3) that the "insurgent enemies" were belligerents,

[1] Lawrence's Wheaton, 176.

[2] Citing Calvo, Droit Int. ed. 1870, I. 408, 409; II. 397; Wharton's Int. Law. Dig. sec. 223.

[3] Citing Vattel, Law of Nations, Book II. Ch. XIV. sec. 214, Phila. ed., 1879.

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i. e. parties to a war in the international sense. It was contended that Venezuela had failed under this plea to establish, as she was bound to do, "affirmatively by competent evidence that the dictatorship of Guzman Blanco was the government of Venezuela, and that it could not by due, reasonable, and adequate diligence have protected the Venezuela Steam Transportation Company."

In respect of the capture of the *Nutrias* by the Blues at Ciudad Bolivar after her return from Trinidad, the agent of the United States adverted to certain special facts. In the early diplomatic correspondence the Venezuelan Government had placed much stress on the allegation that the *Nutrias* returned to Ciudad Bolivar against the warning of the Venezuelan consul at Port of Spain. To this the agent of the United States replied that, prior to the capture of Ciudad Bolivar by the Blues, a contract had been made by the company with an agent of the Colombian Government for the dispatch of one of the company's steamers to Cabullaro, on the river Meta, in the Republic of Colombia, and that the trip had been duly advertised; that, as there was no war between Colombia and Venezuela, the latter had no right to prohibit foreign commerce with a Colombian port; that the *Nutrias* was regularly cleared for Cabullaro, and had no freight or passengers for Ciudad Bolivar; that, after Ciudad Bolivar was captured by the Blues, everything was quiet till the reoccupation of the town by the Yellows; that, in view of the provisions of the law of 1869, the steamers could not safely omit to make trips and carry the mails, unless prevented by overpowering force or lawful authority from so doing; that the company had a right to expect that the flag of the United States would be respected by all factions; and that, as no blockade of the Orinoco had then been proclaimed or established, the company would have had no defense to claims for damages growing out of its voluntary abandonment of an advertised trip.

In conclusion, the agent of the United States insisted—

1. That a distinction was to be taken between ships and property, whether movable or immovable, on land.[1]

2. That a distinction was to be taken between "casualties of war," i. e., injuries to persons or property in the theater of active hostilities, for which governments generally are not responsible, and deliberate seizures of foreign vessels, under

[1] Citing Papers relating to the Treaty of Washington, VI. 370.

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the flag of their country, and the coercion and imprisonment of their officers, by authorities claiming to act in a public capacity, no hostilities being actually in progress at the times and places of the seizures.

Argument for Venezuela.

The agent of Venezuela in his brief set forth the order of his defense thus:

1. An exception to the jurisdiction of the commission over one portion of the claim.

2. A special denial of liability on the part of Venezuela for another portion of the claim.

3. A general denial of all liability.

The exception to the jurisdiction related to the claim of $30,000 for the "detention" of the *Nutrias* and *San Fernando*,[1] to the "imprisonment" of Brinkerhoff,[2] and to the alleged breaking up of the business of the company,[3] "all three of which matters occurred in 1873." The words "seizure" and "detention" had, so the agent of Venezuela argued, the same meaning as the words "arrest" and "detainment," and were inapplicable to what occurred in respect of the *Nutrias* and *San Fernando* in 1873. The effect of the revocation of the river navigation license in 1873 "was to blockade the steamers from the upper Orinoco, they remaining in the hands of the company." This could not be called a seizure or detention.[4] Hence, the language of the convention defining the claim as one for the "seizure," "detention," and "employment" of the vessels could apply only to the condition of things which existed during portions of the time from August 1871 to February 1872, when the vessels were in actual "possession" of persons other than the owners. In accordance with this view the joint resolution of 1890 carefully referred to the matters of complaint as having occurred in "1871," and as having been a subject of diplomatic demand ever since 1871. The claim for the breaking up of the company's business by the revocation of the navigation license in 1873, Mr. Fish had treated as "based upon a contract," and therefore as not a proper subject for a diplomatic demand.[5] As to Brinkerhoff's claim, the agent of

[1] United States statement of claim, Paragraph XIX. *supra*.

[2] Id. XXV.

[3] Id. XXI.

[4] Citing Olivera *v.* The Union Company, 3 Wheaton, 183, 189, holding that a blockade did not come within the phrase "arrests, restraints, and detainments of kings," etc., in an insurance policy. S. P., L. R. 9 C. P. 513, 518.

[5] S. Ex. Doc. 143, 50 Cong. 1 sess. 36.

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Venezuela stated that it had never before been defined, nor presented either to the United States or to Venezuela; that no attempt had ever been made to bring the alleged wrongdoing magistrate before the law of Venezuela; and that the contracting parties could not have intended to include it in the convention.

The second and third points of his argument the agent of Venezuela discussed together. He said that from April 27, 1870, when Guzman Blanco captured Caracas and was installed as President "by an assembly of the *Notables* of the republic, he being the chief of the *Yellow* party," down to August 1871, the fortunes of the Blue party "had greatly and with fluctuations *steadily* waned, the *Yellows* having from the former date been in possession of the civil offices and reins of government;" that on and after August 1871, as "for many months before," "there was no person in Venezuela who was or who pretended to be President of that republic, except [Guzman] Blanco;" that the Blues had become a mere party of "paramount force,[1] limited to such camps and barracks as were held by their soldiery with *rifle range* beyond," and that "they were finally destroyed and their party entirely suppressed within six months thereafter by battles at San Fernando and the neighboring Aranca in January 1872."

On these grounds the agent of Venezuela argued that the "Yellow" government of Guzman Blanco was, during the period covered by the acts complained of, the "legitimate government," and that it could not be held liable for the acts of the Blues, its "insurgent enemies." He repelled the allegation that there had been a "want of vigor" on the part of the government in moving upon the Blues. It seemed a "ludicrous thing" that "under the circumstances in which Venezuela must have found itself in 1870–71—from the effect of a prolonged strife, well known to the claimants—its success in suppressing by arms a party of the prestige and boldness of the Blues within the space of two years should be regarded as manifesting a sort of criminal inactivity—to the extent of making it liable to foreigners on that account." As to the claim on account of the *Nutrias*, during the brief period when she was in the military service of the Yellows, he intimated that the master understood when he let her to Dalla Costa that "patrolling" the river included probable military operations.

[1] Thorington's Case, 8 Wallace, 1.

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As to the revocation of the river navigation privilege granted by the law of 1869, the argument of the agent of Venezuela was fourfold: (1) That this ground of complaint did not affect the case of the *Hero*, which was not engaged in the river service; (2) that in point of fact the company was not induced to go to Venezuela by the law of 1869, which was passed at Caracas on the day the company's articles of incorporation were filed in New York, and which was on its face subject to modification by executive decree, and that no decree was issued till July, 1, 1869; (3) that an alien who establishes his domicil and enters into business in a particular country must assume incidental hazards, such as grew out of the disturbed condition of Venezuela during the years in question; (4) that the control of the river trade was clearly within the *police power* of the country,[1] which embraced "its whole system of internal regulation for preserving public order,"[2] including the control of navigable waters. The opening of her river trade to the world under the law of 1869 was, on the part of Venezuela, "an act of generosity;" and such a concession, even if it had been made for a valuable consideration, would have been revocable at pleasure. In the present case there could be no ground whatever for pecuniary compensation for its withdrawal.[3]

To the particular items of damage in the statement of claim of the United States, the agent of Venezuela made various objections. As to the first item of $57,000 for injuries inflicted on the *Hero*, he said that, so far as they were inflicted "by the legitimate authorities," it must be recollected that the *Hero* was at the time "an enemy of Venezuela doing great damage," and that it was "the duty of loyal citizens" of Venezuela on August 29–31, and September 1, 1871, "to destroy her if they could" as "an active engine of war."[4]

The second item might have been "fair enough" against any possible "Blue" government. The third was "wholly fanciful." The fourth might be payable by a "Blue" government.

[1] Stone *v.* Mississippi, 101 U. S. 814; Beer Co. *v.* Massachusettss, 97 U. S. 25.

[2] Cooley, Const. Limit. ed. 1883, p. 706.

[3] In the course of his brief the agent of Venezuela cited, besides the authorities already referred to, Wharton, Int. Law Dig. I. sec. 87; II. sec. 213, pp. 576–582; Bluntschli, Droit Int. Codif., Paris, 1886, secs. 380, 380 *bis;* Hautefeuille, I. 244; Calvo, Droit Int. Public, 3d ed. p. 143; Calvo, Manuel, Paris, 1884, p. 138; Vattel, 425 (*sic*); Young's Case, 97 U. S. 39, 67; Parham *v.* Justices, 9 Ga. 341.

[4] Young's Case, 97 U. S. 39, 67.

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The fifth, relating to the *San Fernando* and *Nutrias*, could not "possibly be imagined" to concern Venezuela, except as to the *Nutrias*, while she was in the possession of "the legitimate government." The seventh item ($98,400) might be "fair" in principle against a "Blue" government.

The agent of Venezuela, besides presenting a printed brief, addressed an oral argument to the commission. This argument was not reported, but the agent of the United States, in his final report, states that it maintained, among other things, the position that the conflict between Guzman Blanco and the Blues in August and September 1871 was a war in the sense of the law of nations; that it was waged by two "belligerent" parties, in the sense of the authorized definitions of "belligerency;" that it was a part of the armed contest that was begun by Guzman Blanco late in 1869, and that that contest was from its beginning to its end, in January 1872, to be considered as a unit.

Final Argument.

The final argument was made by special counsel for the claimants. Assuming that "war" in the technical sense existed in Venezuela during the period in question, they maintained that Venezuela would be liable for the acts of the Blues, as representing the old Monagas government, on the principle that if a revolution proves successful, "the government *de facto* succeeds to the rights and obligations of its predecessor in all international matters, and intercourse is resumed with other nations on that understanding."[1] But they denied that there was a state of war in Venezuela during the period in question. The Venezuelan minister for foreign affairs of the time described the Blues as "vagrant forces," "wandering factions," "mere marauders." Their situation was different from that of the Confederates, for whose acts the United States had denied liability, since the Confederates controlled "an extensive and well-defined territory, including State governments, some of which were older than the republic itself," and possessed "a political, civil, and military organization so complete as to guarantee the performance of all the duties and responsibilities of separate nationality if the independence of the Confederacy had been achieved." Venezuela must in any event be responsible for the acts "of the *de facto* government of the State of Guayana," committed in the name of Venezuela, "no matter

[1] Twiss, Law of Nations, 21.

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what government or whether any government was administering federal affairs at Caracas," since it was "only with Venezuela that the United States could deal in respect of the acts of any of the States composing the Venezuelan Union."

As to the revocation of the privilege of navigating the Orinoco by Guzman Blanco's order annulling the laws of the Monagas government, special counsel maintained that, even assuming that the control of inland waters formed a part of the police power, which could not be contracted away, yet the law of 1869, having been passed by the Venezuelan Congress, could be repealed only by that body. They also contended that the authorities cited by the agent of Venezuela on the question of police power related to matters of regulation not affecting the essence of any contract. When the steamers were seized they were, said special counsel, "all licensed by the proper authorities under the act of the Venezuelan Congress of May 14, 1869, to navigate the Orinoco and its affluents;" the facts in regard to them were well known to the government at Caracas, by which indeed "the *San Fernando* was licensed in July 1871." "These licenses had not been withdrawn and the steamers were doing what they were licensed to do when they were seized and detained from their owners."[1]

Award.

The award of the commission was announced March 26, 1895. It was as follows:

"Whereas by a convention between the United States of America and the United States of Venezuela, signed at Caracas the 19th of January 1892, and of which the ratifications by the two governments were exchanged at Washington the 28th of July 1894, it was agreed and concluded that the high contracting parties should submit the claim of the 'Venezuela Steam Transportation Company' against the Government of Venezuela to the arbitration of a board of three commissioners, one to be appointed by the President of the United States of America, one by the President of the United States of Venezuela, and the third to be chosen by the two appointed as aforesaid; and

"The President of the United States of America having appointed Gen. N. L. Jeffries commissioner; and

"The President of the United States of Venezuela having appointed Señor Don José Andrade, envoy extraordinary and minister plenipotentiary of His Majesty the King of Sweden and Norway at Washington, as third commissioner; and

"The board of commissioners, thus composed, having duly examined and considered the documents, evidence, and argu-

[1] Report of Mr. Morse, 25.

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ments submitted to them by the respective parties pursuant to the provisions of said treaty:

"Now, we, the said commissioners:

"Whereas the agent on the part of the United States of Venezuela has raised an exception to the jurisdiction of the commission over the portions of the claim stated in Articles XIX. XXI. and XXV. of the 'Statement of the case of the United States of America,' filed by the agent on the part of the United States of America on the 16th of January last, do hereby unanimously declare ourselves competent on the said portions of the claim:

"Do hereby, by a majority of the commission, award to the United States of America from the United States of Venezuela the sum of one hundred and forty-one thousand five hundred dollars ($141,500) in American gold, without interest, for the satisfaction in full of all the claims mentioned in Part I. Articles I. to XXI. inclusively, of the aforesaid statement of the case;

"Do hereby, by a majority of the commission, award to the United States of America from the United States of Venezuela the sum of three hundred dollars ($300) each in American gold with simple interest at the rate of five per cent per annum from the 6th of September 1871, until this date in the first two cases, and from the 3d of September 1871, until this date in the last case, for the satisfaction of the three claims set forth in Part II. Articles XXII. XXIII. and XXIV. of the aforesaid statement of the case; and

"Do hereby unanimously disallow the claim mentioned in Part II. Article XXV. of the aforesaid statement of the case.

"Done in duplicate, at the city of Washington, and signed by us this twenty-sixth day of March, in the year eighteen hundred and ninety-five.

"N. L. JEFFRIES.
"JOSÉ ANDRADE.
"A. GRIP."

Dissenting Opinion.

When the award was announced, Mr. Andrade stated that he would file a dissenting opinion touching the points of the decision in which he had not concurred. He subsequently filed the following opinion:

"It is an elementary principle of law that the burden of proof rests on him who charges another with an unlawful act and endeavors to make good a claim to damages therefor. According to the Roman law he who accuses another of a *wrong* must prove the *wrong*. This is also a maxim of the Spanish law, according to which the obligation to prove attaches to the complainant. Anglo-American law expresses it in these or similar terms: *A party setting up a tort has the burden on him to prove such tort.* And it has passed into international law, in Calvo and Fiore, in the form following:

"'It is not sufficient for a state to furnish the proof of having experienced an injury through individuals residing in another state in order to hold the latter liable; it is necessary to go beyond this and show that the

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act causing the injury is morally chargeable to the state, or that this state should or could have prevented it, and voluntarily failed to do so.'

"In the present case the Government of the United States of America has proved 'the seizure, detention, and employment in war or otherwise of the steamships *Hero*, *Nutrias*, and *San Fernando*, the property of the Venezuela Steam Transportation Company,' and what it calls the imprisonment of the officers of these steamships, but not that it can rightfully charge said acts to the Government of the United States of Venezuela.

"It is alleged in the complaint that the *Hero* was seized by armed men belonging to the insurgent forces of the 'Blues,' and that Captain Post and the chief engineer, Maurinus, were compelled by them to obey their orders; that those that detained the *San Fernando* and took and used her for the transportation of troops and supplies were also 'Blue' forces; that military authorities of the 'Blues' took forcible possession of the *Nutrias* and *San Fernando* in September 1871, and employed both steamers in their service up to the 14th of February 1872, and, finally, that the 'Blues' were adherents of that government of Venezuela which had been overthrown on the 27th of April 1870 by Gen. Guzmán Blanco, whom they continued to resist after he had taken Caracas and established a *de facto* government to the extent of having defeated his troops at Barquisimeto, blockaded the port of La Guayra in the fall of 1870, and maintained thereafter in various parts of Venezuela an armed opposition until the summer or fall of 1872, not allowing him to exercise his authority save in such parts of Venezuelan territory as submitted to his military forces.

"It is alleged also that the military forces of the 'Blues' or 'Monaguistas,' who seized the *Hero* on the 28th of August 1871 and were transported on said vessel, took Ciudad Bolivar by fire and sword on the 1st of September; deposed Señor J. B. Dalla Costa from the presidency of the state of Guayana; took possession of the custom-house and other public buildings and offices, federal and state, in said city; appointed state and federal officers, and exercised and continued to exercise all the powers of government, civil and military, there and in the State of Guayana for a period of nearly six months.

"It is alleged, finally, that, owing to the neutrality observed by President Dalla Costa, the peace of the State of Guayana had not been disturbed by the contest between the adherents of the former government of Monagas and the forces of the new government represented by Gen. Guzmán Blanco until the month of August 1871.

"These allegations are corroborated by Ex. Doc. No. 28, Senate, Forty-second Congress, second session; Ex. Doc. No. 143, Senate, Fiftieth Congress, first session; Ex. Doc. No. 79, Senate, Fifty-second Congress, first session, and Misc. Doc. No. 168, Senate, Fiftieth Congress, first session, to which the learned agent of the United States refers in the said complaint.

"It appears, therefore, that, beyond all doubt, there was in Venezeula, from the 27th of April 1870 until the summer or fall of 1872, an actual war in the international sense according to the definition of Grotius, cited by Wheaton, Dana's edition, in the paragragh following:

"'A civil war between the different members of the same society is what Grotius calls a *mixed* war. It is, according to him, *public* on the side of the established government and *private* on the part of the people resisting its authority; but the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations.'

"Such also was the conception entertained by the Venezuelan constitution of 1864, as follows:

"'ART. 120. The law of nations forms a part of the national legislation; its provisions shall especially govern in cases of civil war. Therefore the latter may be brought to a close through treaties between the belligerents, who should respect the humanitarian practices of Christian and civilized nations.'

"And in accordance with this principle it was that General Guzmán Blanco characterized as civil war the still unsubdued resistence of the 'Blues,' when he declared, in the decree of the 27th of April 1870, calling a congress of plenipotentiaries of the States (Articles V. and VI.), that the

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validity of every compact or capitulation between belligere
forces was subject to his approval, and that the provisions wh
stitution of 1864 had made a fundamental rule would be re
spected and observed. And so also when, in a Presidential
1873, referring to 1870–1872, he announced that the civil wa
with the campaigns of Apure and Tinaquillo.

"And it may not be too minute to notice in this connection th
Hancox, president of the claimant company, also recognize
then opposing by force the authority of the established go
Venezuela (which, on the 28th of August 1871, had seized the s
and on the 3d of September the *San Fernando*), as having all
war in the international sense, since, having the *Hero* and *Ne*
had been restored to him, safe in Port of Spain, he voluntar
although warned, to return with them to Ciudad Bolivar while
pied by the 'Blues,' thereby exercising his rights as a neutral

"And Mr. Bancroft Davis, Assistant Secretary of State of
States, likewise admitted that the said armed contest was poss
legal, true, and proper character of war, when he denied the b
of the warning of the Venezuelan consul, Dr. Montbrun, in c
of the right which authorized Mr. Hancox, as a neutral, in ca
that time his regular communications with Ciudad Bolivar.

"An investigation of the question whether to deny or gra
characteristics of war to the struggle which the 'Blue' par
from 1870 to 1872 for the purpose of overthrowing the establis
ment of Venezuela in order to constitute another of its own, i
to an inquiry whether there should be applied to such party
war, or those rules of *municipal law* by which armed resistan
lished power is repressed.

"*In the first case, Venezuela would not be liable internationally*
claim, according to the doctrine admitted by all civilized nati

"'A nation which would not prevent its subjects from causi
to foreigners would engage its responsibility, because the na
under its authority, it must look after them in order that th
cause damages to others. But such negligence does not ren
responsible for the acts of those among its subjects who hav
selves in a state of insurrection, and have broken their bond
or who are no longer within the limits of its territory. Und
cumstances, and whatever the character attributed to their a
duct may be, those citizens cease to be, in fact, under the ju
their government.' (Rutherforth.)

"'States are not bound to allow indemnities for losses and d
fered by aliens or natives resulting from internal troubles o
(Bluntschli.)

"'As to damages suffered in case of war or revolution, for
no right to be indemnified by the state where they reside; th
to demand for the persons residing in another country advan
the natives do not enjoy. When a person establishes himself
state he is bound to bear the consequences. The claim of Eng
Naples and Tuscany, in 1848, was rejected, and not only t
Russian Government having been invited by the two Italian
as umpire, refused the arbitration on the ground that the Eng
seemed to it so groundless that to accept the part of umpire
been to admit doubts which did not exist.' (Heffter, Note G.)

"On the very occasion alluded to above by Heffter, when
Government was pressing claims through diplomatic chan
Tuscany and Naples, immediately after certain political dist
Italy, and was also endeavoring to involve Austria for the assis
that government had given to the Grand Duke, the Cour
addressed a note to its ambassador in London which he was
cate to the foreign office, expressing the opinion that when
establishes himself in a country in which civil war soon brea
foreigner should submit to the consequences of his determin
that however much disposed the civilized nations of Europe
extend the limits of the right of protection, they would nev

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extent of granting to *aliens* privileges not guaranteed to *natives* by municipal laws.

"The very same principle was followed with respect to the last Polish insurrection. And later, it was sustained with such vigor by the United States of America, after the great war of secession from 1860 to 1865, that they were not content until it was consecrated in Amendment XIV. to the Constitution. And their convictions in the premises were carried to the extent that the commission organized in 1868 to investigate the pecuniary claims of Americans or foreigners, for losses or acts of spoliation suffered during the civil war and growing out of the act of the federal authorities, not only should reject all diplomatic intervention in behalf of aliens, but at the slightest attempt at such intervention any claim which was the object thereof should be *ipso facto*, and without further examination, disregarded.

"In both cases a large number of aliens had suffered serious losses and damages through the insurgents. Nevertheless no European nation thought of holding either of the governments of the two countries responsible, nor would the latter have admitted such a pretension.

"With reason, therefore, does Calvo, supported by Rutherforth, Martens, Miraflores, Torres Caicedo, Pradier-Fodéré, and Vattel, conclude that the principle of indemnity and diplomatic intervention in behalf of aliens, by reason of injuries suffered in cases of civil war, has never been admitted by any nation of Europe or America; and that the governments of powerful nations, who exercise or impose this pretended right as against relatively weak states, commit an abuse of strength and of force which nothing can justify, and which is as contrary to their own laws as to international usage.

"Evidence in favor of the assertion of Calvo is to be found in the treaties now in force between the Netherlands (declaration of 1855) and Venezuela; between Italy and Venezuela, 1861; Spain and Venezuela, 1861; Belgium and the United States of Venezuela, 1884; France and Mexico, 1886; Spain and Ecuador, 1888; Germany and Colombia, 1892; France and Colombia, 1892; Italy and Colombia, 1892.

"Those of France with Mexico; and of Germany, and Italy, with Colombia are explicit to the utmost limit. As witness extracts:

"From the first: 'It is agreed further between the contracting parties, that their respective governments, save in cases where there is a want of vigilance on the part of the authorities of the country or their agents, will not hold each other reciprocally liable for the injuries, oppressions, or exactions which the citizens of one may experience in the territory of the other in time of insurrection or civil war, through the insurrectionists, or at the hands of savage tribes or hordes who refuse obedience to the government.' (Art. 11, clause 2.)

"From the second: 'It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be want of due diligence on the part of the Colombian authorities or their agents, for the injuries, vexations, or exactions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the government.' (Art. 20, § 3.)

"From the third: 'It is also stipulated between the two contracting parties that the Italian Government will not hold the Colombian Government responsible, save in the case of *proven* want of due diligence on the part of the Colombian authorities or of their agents, for injuries occasioned in time of insurrection or civil war, to Italian citizens in the territory of Colombia, through the acts of rebels, or caused by savage tribes beyond the control of the government.' (Art. 21, § 3.)

"Even if we deny the character of *war*, properly so called, to the struggle sustained from 1870 to 1872, against the established power of Venezuela by the "Blue" party, the author of the wrongs of which the claimant company complains, and consider that party as a band of armed marauders subject to the penal laws, it would not be reasonable, in the eye of the law of nations and of the elementary rules of justice and equity, to compel Venezuela to make good the injuries caused by such wrongs.

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"France, after the revolution of July 1830; the uprising of Lyons in 1834; the revolution of the month of February 1848; the insurrection of the Commune in Paris in 1871; and the events of Port Saïd in 1881; Belgium, on the occasion of the disturbances which took place there about the month of April 1834; the United States of America, in 1851, 1886, and 1891, with respect to the claims brought against them for damages caused to aliens during riots at New Orleans and Key West, Rock Springs and New Orleans again—all, have categorically rejected the principle of *obligatory indemnity by the state* in the circumstances cited. Whenever they have accorded pecuniary assistance to the victims of misfortunes of that nature, they have expressly declared that they did so through spontaneous liberality, not through *legal obligation;* in the sense of *compassion for personal misfortune and not as a legal right or for indemnity;* that acts of reparation in such cases are not founded on legal obligation; that such events come under the category of those inevitable acts to which all inhabitants of a country are exposed as they are to the effects of plague, and they can not compromise the responsibility of the state; and that aliens establishing themselves on national territory to engage in business, *ipso facto* submit themselves to local law and courts.

"In 1885, a British subject injured by the burning of Colón, having sought the aid of the representative of his government in Colombia to claim reparation for the damages he had suffered—the English minister, Mr. W. Y. Dickson, replied to him as follows, pursuant to instructions from the foreign office: 'From the reports obtained by Her Majesty's Government it clearly appears that the destruction of Colón *was due solely to the revolutionists,* who, declaring themselves against the government, succeeded in obtaining complete possession of the city for a short time, and possessed thereof set it on fire in several places. It appears that when these events took place the Government of Colombia was entirely unable to prevent them, even though it afterwards accidentally succeeded in putting down the rebellion.

"'Under these circumstances, there is not, in the opinion of Her Majesty's government, sufficient reason for asserting that the destruction of Colón was directly due to the fault of the Colombian Government, to the extent of justifying a demand for redress in behalf of those English subjects who, like yourself, have unfortunately suffered losses by reason of the fire.

"'Therefore I have to communicate to you, pursuant to instructions of the prime minister, that, regretting the injuries suffered by you, *I am unable to support your claims against the Government of Colombia.*'

"To terminate the consideration of this point—it is to be observed that the Department of State of the United States, on the 8th of October 1888 addressed the American minister at Lima, as follows:

"'I have to acknowledge the receipt of your No. 420 of the 7th ultimo, in which you inclose copies of correspondence with the minister of foreign relations of Peru, on the subject of the outrage upon Mr. V. H. MacCord in 1885.

"'Your note of the 3d ultimo to Mr. Alzamora is generally approved, but for your guidance in the future, it is proper that the department should state some qualifications of the doctrines you have announced on the subject of the *liability of a government for the acts of insurgents whom it could not control, and for the violence of mobs.*

"'In respect of the latter, *it is the doctrine of the department that a government can not be held to strict accountability for losses inflicted by such violence.* This subject has recently been discussed in the correspondence between this government and that of China in relation to the outrages inflicted upon Chinese subjects at Rock Springs and other places in the United States *by bands of lawless men.* While the United States have paid a considerable sum toward the relief of the unfortunate victims of these outrages, *yet this has been done as an act of generosity and friendship,* and *not in pursuance of an acknowledged liability. The position of this government was the same in reference to the attacks on the Spanish consulate in New Orleans, in 1850,* to which you advert in your note to Mr. Alzamora as

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affording an acknowledgment of the liability of a government for acts of mob violence toward foreigners.

* * * * * * *

"'In regard to the question of the liability of a government for the acts of insurgents whom it could not control, it may be admitted that there is some contrariety in the opinions the department has heretofore expressed. *But while you cite to Mr. Alzamora the contention of his government in regard to the liability of the United States for the destruction of a Peruvian ship by insurgents in the Chesapeake Bay in 1862, it must also be remembered that the position the United States took on that subject was that, such destruction, having been effected by a sudden attack of insurgents which could not by due diligence have been averted, the Government of the United States was not bound to make indemnity.*'[1] (Mr. Rives to Mr. Buck, Foreign Relations of the United States, 1888, part 2.)

"It appears to be beyond all doubt that the seizure of the *Hero* in this case of the Venezuela Steam Transportation Company was an unforeseen act, and *force majeure*, growing out of a sudden invasion of insurgents—like the attack on the Peruvian ship in Chesapeake Bay, or the burning of Colón, or the outrages on the Italians and Chinese in New Orleans and Rock Springs—in nowise due to want of diligence on the part of the Venezuelan Government.

"'When the cause of action is negligence, the plaintiff must prove the negligence.'[2] And it has not proven it.

"And much less reason, by far, is there to hold Venezuela liable for the seizure of the *San Fernando* and the *Nutrias* by the revolutionists in possession of Ciudad Bolivar from the 1st of September 1871.

"The former vessel had gone to Nutrias, the terminal point of its route on the Apure River; and it appears from the letter of the 3d of July of said year, written from Ciudad Bolivar by Mr. Alexander F. Mathison, agent of the company, to the president of the same, Mr. Hancox, which letter figures among the proofs filed before the commission, that the Government of Venezuela *insisted* at that time that the steamers on the line between Ciudad Bolivar and Nutrias should always carry on board a military guard to protect them, and that if the *San Fernando* was not under guard on that trip it was due to a voluntary determination by the said Mathison. See the following extract from the letter aforesaid:

"'I sincerely trust that everything will go right, but I am very much afraid that the carrying of troops will involve the company, and may hereafter prove dangerous to our boats, as it is sure to affect that strict neutrality which is so essential in a country where the contending parties change places so often. I have now reasons to believe that the government party will insist upon putting on board, *not a guard to protect the boat*, but a body of troops which is intended for an attack upon the opposite party. *You may rest assured that I will do all in my power to make things go straight and give no cause of complaint.*'

"Still more: It appears from the same testimony and from the evidence of the president of the company that, on the morning of the 2d of September, while the *San Fernando* was returning from Nutrias on the same trip and was taking wood a hundred miles or so from Ciudad Bolivar, a canoe came alongside with a communication from the captain of the port for Mr. Mathison or Mr. Hancox, who were on board, or for Captain Brinkerhoff, in which they were informed that the 'Blue' party had taken the *Hero*, and were advised to return to the interior to prevent the *San Fernando* from falling into their hands.

"Hancox, after mature deliberation during the rest of the day and all of the night, determined, on the 3d, to continue the trip to Ciudad Bolivar, and there the steamer was seized by the very captors of the *Hero*.

"As regards the *Nutrias*, it was safe in Port of Spain from the 3d of September. Mr. Hancox again wished to take her thence to Ciudad Bolivar; he requested clearance of the vessel from the legitmate consul of

[1] Italics mine.

[2] Wharton, Law of Evidence, second edition.

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Venezuela; this official not only refused clearance, but endeavor
suade him from his purpose, laying before him the risks to which h
the steamer and the company to which it belonged if he continue
trips to places under the control of the enemies of the government.
paid as much attention to this warning as he had to that respe
San Fernando, and of his own volition he again took the *Nutrias*
Bolivar, where the 'Blues' took it from him, as they had previou
the *Hero* and the *San Fernando*.

"It was of necessity the duty and the right of the Government
zuela to oppose the continuing of the trip of this last vessel t
Bolivar, this being the best means of preventing her, under th
stances of the time, from falling into the hands of the insurgents
already seized the *Hero*. It could thus, on the one side, paralyze to
degree the forces and the activity of the revolution, and place i
position more easily to repress it, and more efficaciously to provi
defense of the State of Guayana; on the other side, it afforded
proof that it omitted nothing on its part that could serve for the p
of the property of the company. Whatever reasons the latte
agents on board of the *San Fernando* may have had for going to Ciu
var, it is certain that if they had harkened to the advice and w
the captain of said port, the steamer could not have been take
time by the revolutionists in control of the city.

"The same may be said, with greater force, if possible, of th
A little more deference to the suggestion and admonition of the
agent of Venezuela in Port of Spain would have sufficed to sav
time, the interests of the company from a new violence by the '

"Neither of the two steamers was bereft, during that period o
of the protection of the Venezulean Government, in so far as the
the war permitted it to afford this. We do, though, at every ste
the managers and agents of the company the prudence and cir
tion of business men, and the respect and submission which ev
should observe with regard to the public authority of the coun
he has transferred his industry and his business. About the
April 1871 the State of Apure was invaded by insurgent forces,
possession of Nutrias. The government of Caracas believed it
duty to order the authorities of San Fernando to suspend, w
conditions obtained, the license which the *Nutrias* had to navig
as the port of the same name. A like order was afterward tr
to the authorities of Ciudad Bolivar. On each occasion Mr.
complained bitterly of this most reasonable measure, which mi
or less affect the results of that year's business, and in which
quently saw nothing but an illegal act of a government that i
itself little or not at all in the advance of trade, an attack on the
flag and on the rights of the company, which he proposed to r
just grounds for a future claim. See, in the evidence, his letters o
of May and the 19th of June 1871 to Mr. Wuppermann at Trinid

"The seizure of the *San Fernando* and *Nutrias* was the fault of
cox, and the direct and immediate result of his own acts done
deliberation, and not of acts by the Government of Venezuela.

"Even admitting that he is not responsible to Venezuela for hi
in these particulars, it must be plain beyond peradventure that
entitled to claim from Venezuela indemnity for the damages to
of his own motion, exposed his two vessels by taking them into the
of the enemy.

"The charge of neglecting to punish those guilty of the wrongs
this claim is founded, and which is now insinuated for the first
just ground for holding the Government of Venezuela liable,
proved like all the other charges. As a general rule, the priva
citizens do not compromise the liability of the state, save wh
prevent these and fails to do so, or when, after their consumm
approves or ratifies them in some way; and Venezuela, far from a
or ratifying the acts committed by the 'Blues' of San Fernando
dad Bolivar, made war on them so actively and efficaciously
months later it had subdued them in both places. Difficult woul

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produce an example of a more energetic and solemn reproof. If for reasons of state it thought proper in 1873 to seal the national peace with forgiveness for political offenses, no other sovereignty has a right to call her to account for that sovereign act. The state is not liable for what as a political entity it does for the public welfare.

"'In 1883,' says Calvo, 'Alfonso XII. was passing through Paris on his return from Germany, and while going along the streets of the capital hisses and shouts were directed at him, on the ground that he had been named, according to custom, honorary colonel of a German regiment. The authors of this gross demonstration deserved to be punished for the offense to the head of a foreign state, but the complaint of the offended party was necessary in order to prosecute them, and he refrained from lodging it, contenting himself with the apologies of the President of the Republic.'

"'In 1885, because a certain French correspondent had disappeared in upper Egypt, a daily of Paris opened up a violent campaign against the Queen of England and her ambassador. It moreover organized a hostile meeting and a demonstration directed against the house of the English embassy. There was no complaint on the part of those offended on this occasion either, nor, consequently, an application of the eighty-fourth article of the French penal code.'

"'*Apropos* of the subject of the Caroline Islands, the rabble of Madrid allowed itself to be drawn into the most reprehensible excesses against the house of the German minister near the Court of Spain. The offended power did not demand the punishment of the offenders. It was content with the apologies of the Spanish Government and the repairing of the material damages at the expense of Spain.'

"In 1869, Venezuela saw fit to open her internal navigation to the flags of the whole world. The United States alone accepted the offer. Taking advantage of it, the Venezuela Steam Transportation Company established a line between Port of Spain, Trinidad, and Ciudad Bolivar, capital of the State of Guayana, on the Orinoco River, dedicating the steamer *Hero* to this service; and, connecting therewith, another line from Ciudad Bolivar to San Fernando and Nutrias on the Apure, an affluent of the Orinoco, with two other steamers.

"Up to that point of time in the civil war which then afflicted Venezuela, the State of Guayana had had the good fortune to preserve peace, and the company running the two lines aforesaid that of enjoying without interruption all the advantages of that exterior and interior traffic of the Orinoco which its exceptional situation afford.

"On the 28th of August 1871, however, the *Hero* was surprised and detained at Guayana la Vieja, one of the stopping places on her customary route, by forces of the revolutionary party who appeared there suddenly. They appropriated her to their own use and obliged her to transport and tow them to Ciudad Bolivar, which they attacked and took on the 1st of September.

"The *San Fernando*, which was on the way down from Nutrias, on the opposite bank, received on the 29th of August, while in transit, notice of the seizure of the *Hero*, communicated by the captain of the port of Ciudad Bolivar, and a warning to return to the interior to avoid any danger. The officers on board, having considered the matter well, determined the notice to be unadvised, decided to continue the trip, and upon its arrival the vessel was seized. Later on the *Nutrias* cleared at Port of Spain by Mr. Hancox, for Ciudad Bolivar, notwithstanding the admonition of the Venezuelan consul, likewise fell into the power of the enemies of the government, who, from that time and for four consecutive months, held the two steamers in their military service, being run by engineers and machinists of the company, who by its direction remained on board, and without whom the steamers would have been useless, and carrying to San Fernando, to Nutrias, and everywhere, desolation and death.

"At the close of the conflict, or when it was about closing, the United States asked and received permission of Venezuela to send a war vessel to claim the return of the steamers.

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"And in the end the company presents itself, demanding from Venezuela pay for the services rendered by the vessels to its enemies; and indemnity for the damages and injuries thereby incurred.

"Let us suppose, now, that the events thus related had taken place, *mutatis mutandis*, in the United States of America; that in 1859, for example, they had deemed it advisable to open to the world the navigation of their great rivers and lakes; that pursuant to this invitation, if it is wished to so call it, a Venezuelan company had established a line of steamers from Havana to New Orleans, and another from New Orleans, via Memphis, to St. Louis. That a short time thereafter the war of secession breaks out; that Louisiana still for a short while maintains her normal political relations with the Union, and on a day least thought of some resolute companies of secessionists from Mississippi and Alabama take possession of the forts on the river below New Orleans, detain one of the Venezuelan steamers running between Havana and the latter port, which, without knowledge of what has happened, is proceeding to its accustomed destination, impress her into their service and force her to transport and tow them to New Orleans, which city they take, establishing themselves in the name of the Confederate government before the United States have been able to dispose of means necessary to change the condition of things; that in Baton Rouge another of the Venezuelan steamers of the second line is advised by the United States officer in command of the port of the seizure of the steamer from Havana and of the danger she runs of being seized also, in view of which she is warned to return upstream to St. Louis; that the officers of the vessel pay no attention to the notice, continue on to New Orleans, and are there captured; that immediately thereafter another vessel of the same line, lying safe in Havana, is obstinately carried by its owners to New Orleans and likewise seized by the secessionists, who engage the two vessels and the masters, engineers, and machinists furnished by the company, in military operations, which for several months continue to spread devastation from New Orleans to Memphis, Cincinnati, Louisville, St. Louis, etc.; and that finally, after 1865, the Venezuelan company forwards to the Government of the United States a bill for those *services* which their vessels, willingly or unwillingly, had rendered in the destruction of those communities!

"Suppose that this claim, after having been presented through diplomatic channels, and persistently rejected for twenty years by the United States, had eventually been submitted to the arbitrament of this commission, to be decided on the diplomatic correspondence between the two governments and such legal evidence as might be adduced by the contracting parties in accordance with justice and equity and the principles of international law.

"For my part, I should not have considered that I was doing my duty, upon those principles which have always entered into the mutual relations of all civilized governments, had I not held the United States free from every international obligation to indemnify the Venezuelan enterprise for the losses growing out of the acts of the Confederates.

"The imaginary acts in the preceding supposition are a true counterpart of those committed in Venezuela against the steamers of the American company, in whose interest this case has been prosecuted. In the society of nations all are specifically equal. It is the duty of each state to respect the equality of the others, as it is its right to demand that its own be respected. The idea of equality implies that of the application of one and the same law of justice and equity, and of the general principles of international law in like cases. The circumstance that Venezuela is a state of only 2,500,000 of inhabitants, whilst the United States has 70,000,000, is a matter of not the slightest weight in that connection, except, indeed, that it may remind one of that sacred passage in commendation of such as not only '*do justice*,' but also 'LOVE MERCY.' Venezuela, however, in the present case, as can not be too often repeated, has desired nothing but simple '*justice*.'

"This opinion is submitted as a solemn protest against the diametrically opposite rules which animate the present decision.

"I believe that the claims should have been disallowed."

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CHAPTER XLI.

CASE OF THE WHALE SHIP "CANADA": PROTOCOL BETWEEN THE UNITED STATES AND BRAZIL OF MARCH 14, 1870.

Wreck of the "Canada."

On December 20, 1856, Mr. Alex. H. Clements, United States consul at Pernambuco, reported to the Department of State the arrival at that port, on the 18th of the month, of Barton Ricketson, master of the American whaling ship *Canada*, 545 tons burden, owned by Gideon Allen and others, of New Bedford, Massachusetts.[1] Captain Ricketson brought with him all the crew of his ship except Francisco Rosa, the fourth mate; a Portuguese named Pequeno; and the cook, who had died at sea. Immediately on his arrival at Pernambuco Captain Ricketson entered before Mr. Clements a protest, in which he was joined by the members of the crew who accompanied him. In this protest it was stated that the *Canada* sailed from New Bedford for the Northern Pacific by way of the Horn October 16, 1856, and went ashore on the Garças Reef, near the mouth of the Rio del Norte, nine miles from shore, off the coast of Brazil, on the 27th of the following month; that the captain and crew, finding that the ship was making no water, proceeded to lighten her, and after five days' labor had succeeded in hauling her to a place where, in an hour or two, she could have been brought to her moorings outside the reef, when, just as they were attaching the last hawser to haul her to this place of safety, a party of Brazilian soldiers, under the command of an officer whose services had repeatedly been refused, boarded the ship and ordered the men to cease hauling; that the master ordered the men to continue their work, but that they were prevented from doing so by the Brazilians, who took possession

[1] H. Ex. Doc. 13, 41 Cong. 3 sess.

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of the ship; that the master then formally abandoned the ship to the Brazilian authorities and gave notice that he should seek redress through his Government; that subsequently, though the Brazilians had loosened the hawser and caused the ship to set back on the rocks, the master offered to take charge of her and haul her off again, but the Brazilian officer refused to permit the ship to be removed, and, assuming possession of the ship and all the property on board, caused the sails and cargo to be taken ashore. This protest was signed by the master of the ship, by the first, second, and third officers, and by twenty-two men. Not long afterward the vessel became a wreck; the cargo and stores were sold by Brazilian officers, and the proceeds were paid into the Brazilian treasury.

Diplomatic Correspondence.

On January 23, 1867, the minister of the United States at Rio de Janeiro, Mr. Trousdale, brought the protest to the notice of the imperial government, and claimed "full and complete redress for the wrongs" recited in it. Subsequently the owners of the ship presented a claim to the Department of State in which they asked for damages from Brazil to the amount of $212,365. Mr. Trousdale was instructed to press the case. He was informed that items for prospective or speculative profits must be stricken out of the claim; but he was directed to ask indemnity for the personal losses of the officers and crew and for the expenses of their subsistence abroad and their return to the United States. These demands were duly presented June 29, 1857. In reply the Brazilian Government maintained that the ship was wrecked in Brazilian waters; that the Brazilian soldiers went on board of her, at the request of the master, for the purpose of rendering assistance and preventing embezzlement by lightermen from the neighboring shores; that it appeared by an official survey that the ship was lost when the soldiers arrived; that she then had 6 feet of water in her hold, and that she had not been hauled off the reef; that the ship was 30 years old; that the crew were raw and insubordinate, and that the articles on board were of small value. It was also charged that the ship was run ashore purposely. As evidence in support of these allegations the Brazilian Government produced the report of a chief of police, a survey of the waters in which the wreck occurred, an account of the personal property saved, and the deposition of a Brazilian subject residing near the scene of the accident. Besides these things there

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was a paper purporting to contain the examination of Rosa, the fourth mate, dated March 2, 1857, but not signed, and a paper purporting to contain the deposition of the Portuguese sailor, Pequeno.

On the 3d of July 1858 the owners of the *Canada* transmitted to the Department of State an original affidavit of Rosa, taken on the 23d of the preceding month, before the probate judge of Bristol County, Massachusetts, affirming the substantial truth of Captain Ricketson's protest, and declaring that he refused to sign the statement prepared for his signature at the time of the survey, and that he had never given his assent to any statements differing from those in his affidavit.

Agreement of Arbitration.

For a period of ten years the diplomatic correspondence in the case was suspended, chiefly because of the civil war in the United States; and when, in 1868, the correspondence was revived by the United States, the Brazilian Government contended that it had a right to regard the case as closed, and the denial of the claim as acquiesced in, by reason of the lapse of time. This contention did not, however, preclude a long discussion of the merits of the case and of the conflicting evidence produced by the two governments. Convinced that such a discussion was profitless, Mr. Seward, on January 23, 1869, instructed Gen. J. Watson Webb, then minister of the United States at Rio de Janeiro, that the United States were satisfied, from the representations and arguments of Brazil, that the ship went ashore within the jurisdiction of Brazil, though the error of the United States in this regard arose from the use of Brazilian official charts; and that, in order to avoid the necessity of seeking further evidence, the United States would accept, as the smallest admissible amount, the sum of $70,000, in full discharge of the claim, if it should be paid immediately. The Brazilian Government having refused this proposition, the United States proposed arbitration; and this was accepted. By a protocol signed at Rio de Janeiro March 14, 1870, by the envoy of the United States and the minister for foreign affairs of Brazil, the claim of the owners of the ship and cargo was "submitted to the arbitration and award of Edward Thornton, esq., Commander of the Bath, the envoy extraordinary and minister plenipotentiary of Her Britannic Majesty at Washington." Each government was required to lay its "written

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or printed case," with the "documents, correspondence, and evidence" on which it relied, before the arbitrator before June 1, 1870; and the arbitrator was required to "decide the questions submitted to him upon such case, documents, correspondence, and evidence." The Secretary of State of the United States and "the minister or other public representative" of Brazil in the United States were to act as the agents of their governments. The arbitrator was authorized to employ a clerk, at such rate of remuneration as he should think proper. All expenses were to be paid by the two governments in equal portions.

Questions at Issue.

There were, as stated in the case of the United States, but three questions at issue between the two governments:

1. Whether the United States was barred by lapse of time from prosecuting the claim.

2. Whether the vessel was lost and the voyage determined by the illegal interference of the Brazilian officials.

3. What was the amount of the damage which the owners of the vessel had suffered?

As to the first question, the argument lay within a narrow compass. For ten years the United States failed to reply to a note of the Government of Brazil of September 30, 1857, denying the validity of the claim.[1] The explanation given of this circumstance was that "the delay was caused by internal dissensions in the United States." It was furthermore maintained in the case of the United States that no delay could be construed as an admission of the justice of the Brazilian position, since "the acquiescence of a sovereign government can never be assumed from lapse of time;" and in support of this assertion the case of the United States cited the well-known common-law maxim, "*nullum tempus occurrit regi.*" It may be observed, however, that this maxim, which merely expresses the law as between sovereign and subject, possesses no international authority, and that its invocation added little or nothing to the reply of the United States to the suggestion of acquiescence. The case of the United States also referred to the claim of the schooner *John*, which was allowed by the commission under the convention between the United States and Great Britain of February 8, 1853. In respect of that claim

[1] Viscount Maranguape to Mr. Trousdale, September 30, 1857, H. Ex. Doc. 13, 41 Cong. 3 sess. 38.

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the case of the United States observed that "the injury complained of was suffered in 1815; it was first brought to the notice of Her Majesty's government in 1850; and although the length of time since the injury was considered in the discussion, the claim was allowed and paid." In this statement one feature of the case of the *John* was not adverted to. The *John* was captured by a British man-of-war in 1815, at a time when, by the Treaty of Ghent, peace existed at the place of capture. Under these circumstances the treaty required the vessel to be restored; but she was lost by the negligence of the captor, and the owners could only make a claim for compensation. This the owners did in the first instance by a suit against the commander of the man of war in the British court of admiralty. The case was decided against them in 1818, on the ground that the commander was not personally liable for the capture, since notice of the conclusion of peace had not then reached him. The claim was, however, by this means made a matter of judicial record in Great Britain, and the facts on which it rested were fully established; and the failure of the owners of the vessel to prosecute their claim against the British Government at an earlier day was satisfactorily explained by their personal misfortunes. The case, therefore, was not one where the claimant had for years wholly forborne to prosecute his demands till the opposite party, to whom no notice had been given, was deprived of proper means of defense. The principal question involved in the lapse of time was, under the circumstances, that of a failure diligently to prosecute the claim. In the case of the *Canada* the claim was presented to the Brazilian Government at once, and the only question involved in the lapse of time was that of an intermission in the prosecution.[1]

As to the question of the loss of the vessel and the determination of the voyage the two governments were not wholly at variance. It was admitted that the acts complained of were done not only in Brazilian waters, but also by officials who had a right to enter the vessel. It was claimed, however, by the United States that those acts "were beyond the legitimate sphere of the authority of the officials who committed them; were in violation of the courtesy required by the comity of nations to be observed toward a foreign vessel; were done in opposition to the protest of the master of the ship, and were the direct cause of the loss of the vessel and of the necessity

[1] S. Ex. Doc. 103, 34 Cong. 1 sess. 427.

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of landing the cargo." The charge that Captain Ricketson ran the ship aground for the purpose of getting the insurance on her was contradicted by the testimony of the officers and crew and rested solely on the alleged deposition of Rosa, which was not signed by him and which he had repudiated, and the paper purporting to contain the statement of Pequeno, a paper likewise neither signed nor sworn to. On the other hand, apart from the positive testimony of the officers and crew as to the circumstances of the grounding, the character of Captain Ricketson was amply vouched for.

The case of the United States maintained that up to the moment when the Brazilian officers and soldiers were said to have taken possession of the vessel there was no real conflict between the Brazilian and the American testimony. According to the Brazilian statements, during the five days when the master was hauling the ship off the rocks she had water in her hold and the pumps were playing. The protest of the master and crew stated that, in order to lighten the ship, the water in the barrels which were intended for whale oil was let loose and pumped out. The Brazilians stated that the ship when seized had six feet of water in her hold. The master admitted that she had water in her hold from the barrels, but averred that when he saw her the day after the seizure she had bumped upon the rocks and taken in six feet of water. The difference in time, of twelve hours, would reconcile the two accounts. The Brazilians said that the false keel had broken loose. The master, officers, and crew stated the same thing, but said that the loss involved no serious injury. The Brazilians stated that the sides of the ship had been damaged by the rocks. The protest admitted this, but disclosed the fact that a contrivance had been adopted for preventing further collisions. According to the Brazilian statements the master requested the intervention of the soldiers to prevent annoyance and embezzlement by lightermen. The master stated that people came from the shore, annoyed him, and sold liquor to his men; and although the protest denied that any request for assistance was made, the case of the United States conceded that, in the confusion of tongues, the Brazilians might have understood such a request to be made.

Up to this point the case of the United States maintained that there were no serious discrepancies in the testimony; that everything went to show that the ship, after she had gone aground, was found to have sustained only trifling injuries;

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that she was lightened by emptying the oil barrels of water; that she was hauled back 260 feet over the path by which she had grounded; and that another hour or two of labor would have taken her off the reef; that the only positive testimony offered by Brazil adverse to these conclusions was the survey made February 14, 1857; and that the opinions expressed by the officer who conducted the survey, opinions unsupported by contemporaneous evidence, and based on what was observed as to the position and appearance of the ship two months and a half after she had been exposed to the force of the seas, were purely scientific inferences, entitled to no weight as against the positive testimony adduced by the United States.

The case of the United States also contended that beyond this point the testimony on both sides continued to agree in certain particulars. It was conceded that the men who went on board the ship were armed soldiers, under the command of an officer; that the force was sufficient to overcome any concerted hostile movement on the part of the crew; that the soldiers, after they reached the deck, remained on duty under command; that they removed their bayonets from the sheaths by order of the commander, and affixed them to their muskets; that Captain Ricketson then abandoned the ship and went below; and that soon afterward the ship was upon the rocks, which she never left again. As to the character of the intervention, however, the two governments were at variance. The Brazilian Government alleged that it was undertaken at the solicitation of the master, and was friendly, and that the fixing of the bayonets was done without hostile intent and in accordance with a regulation of the Brazilian service. The United States Government, on the other hand, maintained that the intervention was undertaken, not for the protection of the vessel, but in the interest of the Brazilian revenues; and in this relation the case of the United States said:

"The force that occupied the *Canada* was military in form, but was under the direction of the civil service. The *Canada* had been lying in Brazilian waters for several days. She had unladen some of her cargo. She had had frequent communication with the shore through the lightermen, who had brought liquors and other supplies to the crew. It is certain that this visit was a customs visit. The president of the province had sent the force there to aid the customs authorities in enforcing the laws. These officers evidently overestimated the danger of the *Canada*, and underestimated the energy and resources of the captain and crew of a whaler. They regarded the vessel, seen from the shore at a distance of over four miles, as in

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a hopeless condition, and they made their visit in force, to protect the cargo from lightermen, not so much in the interest of the vessel as in the interest of the revenue laws of Brazil. Probably neither party fully understood the other, conversing as they did, at such a critical moment, through the medium of an interpreter. The Brazilian officer could not know what the master had already done, nor what he was capable of doing if left to himself. He reasoned from what he had previously seen, that because other vessels had been lost there before, therefore the *Canada*, too, must be lost. By virtue of his authority, therefore, as an officer of the customs, he, as soon as he got on board, took control of the vessel, which was within the limits of his jurisdiction, and when the captain would have resisted he displayed his force so as to make resistance useless. When he found what serious consequences were likely to flow from his unauthorized interference with Captain Ricketson and his crew, and from his meddling with the windlass, he gave the version of the story which the Government of Brazil presents to the arbiter as the probable truth.

"To the Government of the United States this seems the most probable solution of the question. Whatever motive Captain Ricketson may have had to misrepresent the facts, his officers and crew certainly had none; while on the other hand, the Brazilian officials had a strong inducement to shield themselves from the just indignation of their government, by a distortion of the facts.

"The account which Captain Ricketson and his officers and crew give of the seizure and abandonment is entirely consistent with all the other facts upon which the two governments agree.

"On the other hand, if the story told by the Brazilian officials is correct in all its details, it is difficult to account for the five days of incessant labor on the vessel which undoubtedly took place; or to explain the necessity for the presence of so many armed men on the deck of the vessel; or to understand what they did there, or what took place between them and the master; or why they took such immediate possession of the vessel.

"The Government of Brazil asks the arbiter to believe that Captain Ricketson, his four mates, and twenty-two of his crew were guilty of deliberate perjury.

"The Government of the United States, on the contrary, asks the arbiter to believe that the witnesses on both sides have given an honest account of what took place as they thought that they saw it, until, at the last moment, it became necessary for the Brazilian officials to warp the actual facts in such a way as to protect themselves from the consequences of their own mistakes.

"The Government of the United States confidently claims that it has established that the loss of the vessel and consequent abandonment of the voyage was caused by the illegal

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and arbitrary act of the Brazilian officer, in preventing the master and crew of the *Canada* from saving the vessel when it was within their power to do so; and that, by reason of that illegal and arbitrary act, the Government of Brazil has become responsible to the United States for the amount of injury which their citizens have suffered thereby."

On these grounds the United States claimed of Brazil "compensation to the owners of the *Canada* for the loss of the vessel and cargo and the breaking up of the voyage." As to the amount of the compensation, it was contended that it should "be measured by the amount of capital put into the entreprise, with interest computed at the legal rate at the port of departure from the day of the sailing of the vessel;" that to this sum "should be added the value of the oil actually taken at the time of the loss, with interest at the same rate from the date of the loss;" and that "a proper compensation would also appear to be due to the officers and crew for their loss of time and wages, and for their actual loss of property, so far as the same can be established." More particularly, the case of the United States said:

"The value of the *Canada* has been established at $15,000, and the value of the outfit at $41,000. The Government of the United States claims these amounts, with interest at the rate of 6 per cent per annum from the 16th day of October 1856.

"The *Canada* had taken 75 barrels of oil, of the value of $3,243.15. The Government of the United States claims this amount, with interest at the rate of 6 per cent per annum from December 2, 1856.

"Compensation should also be made for the breaking up of the voyage; for the support of the men in Brazil; and for their return to the United States. It being the custom for the crew of a whaler to ship for a long voyage, and to receive their compensation out of their profits, it is necessary to make an arbitrary rate for this item. It appears, from the memorandum of Mr. Clements, that the sum of $5,378.26 is a reasonable claim for these several items. The Government of the United States claims that amount for six months' wages for the four officers and twenty-two crew, and for their support and clothing in Brazil, and their transportation to the United States, upon which sum interest should be computed at the rate of 6 per cent per annum from the 2d December 1856.

"Mr. Cass instructed Mr. Trousdale in 1857 also to claim for the loss of the personal effects of the officers and crew. The Government of the United States, while convinced that compensation ought to be made for that loss, is without information as to details, and therefore makes no such claim in this reference.

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"The Brazilian Government has intimated that interest on these several sums should not be allowed, because of the delay on the part of the United States in pressing the claim. To this the Government of the United States replies, that if, when the claim was renewed, the Government of Brazil had professed a readiness to pay what might be found due, there would be some justice in the claim to be relieved of interest after the close of the discussion in 1857. But as the liability of Brazil is still denied, the Government of the United States is entitled to claim and receive interest on all the amounts."

Award.

The arbitrator on July 11, 1870, addressed to the Secretary of State of the United States and the minister of Brazil at Washington identic notes containing his award. These notes were as follows:

"WASHINGTON, *July 11, 1870.*

"I have the honor to transmit herewith the decision which I have come to in regard to the claim of the Government of the United States against that of Brazil for compensation to the owners of the whale ship *Canada* and of the cargo thereof, which it was agreed by the protocol signed at Rio de Janeiro on the 14th of March last to submit to my arbitration.

"I beg to assure you that I have examined the evidence and other documents furnished to me with the greatest care and attention, and that I have been unable conscientiously to arrive at any other conclusions than those contained in the inclosed decision.

"I have to add that I have found it unnecessary to incur any expense with regard to the arbitration which the governments above mentioned have done me the honor of confiding to me.

"The Governments of the United States and of Brazil have done the undersigned the honor of submitting to his arbitration a question at issue between them relative to the loss in December 1856 of the United States whaling vessel *Canada*, which loss the owners of that vessel claim was due to the improper interference of the Brazilian authorities.

"Before entering into an examination of the case the umpire may be allowed to observe that in other similar cases of arbitration it has sometimes been agreed that each party should submit to the other, at the same time as to the umpire, a copy of the statement made, and should be allowed time to offer further observations and documents in refutation to the arguments used by the opponent. The protocol signed at Rio de Janeiro on the 14th of March 1870 contains no such provision, and the undersigned therefore considers it incumbent upon him to come to a decision upon the evidence produced, notwithstanding any errors, omissions, or misstatements which may possibly have been made by one party or the other. The undersigned has accordingly, after having given the subject all the

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thought and attention of which he is capable, come to the following conclusions:

"The case on the part of the United States is supported by the protest signed by the captain, three mates, and twenty-two men of the *Canada*, and sworn to before the United States consul at Pernambuco on December 18, 1856, and by affidavits sworn to by the captain, the second mate, and two of the seamen, after their return to New Bedford. The protest is the usual course followed by shipmasters in case of damage to their vessels, and the depositions seem to be straightforward. They can only be refuted by convincing evidence to the contrary, or by the impossibility of the facts recounted.

"In refutation of the contents of the protest there is the evidence of Francisco Rosa, fourth mate of the *Canada*, said to have been sworn to by him on the 2d of March 1857. But although the name of this man, with a cross, was affixed to the report of the survey of February 14, 1857, it is not so affixed to the deposition of March 2. Neither has a copy of it been furnished to the undersigned by the Brazilian Government, making him suppose that the latter attaches little weight to it. On the other hand, the same Rosa on the 23d of June 1858 made affidavit on oath in the United States that he never signed or swore to any statement whatever in Brazil on the occasion of the loss of the *Canada*, and that the sworn depositions of the captain were truthful. This affidavit of Rosa does not seem to have been transmitted to the imperial government. In it Rosa either perjured himself or he did not. If the latter, he never gave any evidence in contradiction to the statements of the crew; and if he perjured himself, such a man's evidence is not to be credited in any case, and the umpire can not consider it at all.

"The statement of Manuel José Pequeno, seaman of the *Canada*, is likewise open to the objection that it is not signed by the deponent, nor is a copy of it even furnished to the undersigned by the Brazilian Government as a part of their case. He is not, therefore, called upon to consider it, although he is of opinion that, even if it had been submitted to him by the imperial government in due form, the declaration of a single seaman who had abandoned his captain before he was regularly discharged could not outweigh the evidence of the remainder of the crew.

"It appears that the *Canada*, being nearly under full sail, went on the reef of the Garças, on the 27th of November 1856, at eleven minutes before 7 p. m. According to the protest the crew used their best efforts to get the ship off the reef during the next four days, and succeeded in doing so to such an extent that at half past 4 p. m. of the 1st of December they were within a very short distance of deep water, and would, as the captain believed, have reached in about an hour's time an anchor which was laid out in five and a half fathoms water.

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"At that hour a Brazilian officer with fourteen armed men came on board. The umpire believes, and the United States Government acknowledges, that the *Canada* was at the time within Brazilian jurisdiction. Therefore it matters little whether this force came at the invitation of the captain or without it. But the officer is charged with having, with the assistance of the men under his command, forcibly prevented the crew from continuing to heave the ship off the reef. It is declared that the captain protested against this act, and finally threw the whole responsibility upon the Brazilian authorities; that the guard subsequently let go the hawsers, so that the ship fell back on the reef; that on the following morning the captain offered again to take charge of the ship and save her; but that the officer refused to allow the ship to be taken off the reef.

"It is possible that the officer thought the ship would have been in danger of sinking if she had got into deep water, and deemed it his duty, in the interest of the Brazilian revenue, to prevent her being exposed to such a danger, but he certainly exceeded his duty; for on board his own ship the captain alone is responsible for its navigation and safety, and should be supreme.

"In contradiction to these statements, the only eyewitnesses whose evidence is produced by the United States Government, though not by that of Brazil, are Rosa and Pequeno, and the undersigned has shown that their evidence can not be taken into consideration. And yet another ocular evidence might have been obtained. Why were not the officer, Fortunato José de Lima, the soldiers under his command, and the custom-house officers who were on board, examined on oath after the receipt by the imperial government of the protest signed by the crew? Their testimony, as of eyewitnesses with respect to the facts stated to have happened, would have been of great value.

"The umpire does not therefore consider that the declarations of the crew of the *Canada* are disproved by evidence.

"As to the possibility that the ship would be and actually was nearly heaved off the reef, the undersigned can not give any weight to the opinion of Senhor Jacinto da Rocha e Silva, or to his statement, not made on oath, that she could not be and had not been moved at all. Hundreds of vessels stranded and in a far worse position than the *Canada* have been saved, in spite of the opinions of experienced seamen, and even naval officers of high rank. And Senhor Jacinto did not remain on board to see with his own eyes whether the *Canada* was moved or not.

"Neither can the umpire take into consideration the position of the vessel when the survey was made upon her on the 14th of February 1857, seventy-four days after the captain and crew left her. Senhor Paranhos himself says, in his note of August 14, 1868, that the waves which break upon those

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reefs are violent, by reason of the currents and ordinary winds; and when it is remembered that everything which was on board on the 1st of December 1856, had been taken out before the 14th of February following, whereby the vessel was much lightened, it is impossible to suppose that she had not been driven much higher upon the reef.

"The *Canada* went upon the reef at eleven minutes before 7 p. m., not at low tide, as the United States minister states, but an hour and a quarter after high tide; for the undersigned is informed by the United States Naval Observatory at Washington that on the 27th of November 1856 it was high water at that place at 5h. 34m. p. m. The reef is of that nature that it is too soft seriously to injure a vessel going upon it in a smooth sea, and yet too hard to allow the vessel to become deeply embedded as in mud or sand. When it is remembered, then, that upward of twelve hundred barrels of water were emptied and pumped out, that heavy anchors and chain cables were taken out, and that all the least valuable articles were thrown overboard, there is no reason why the vessel should not have been lightened from three to four feet, which, even without a little advantage from a higher tide, would have been quite sufficient to have enabled the crew to heave her off the reef.

"The umpire is therefore impelled to give credit to the statements of the officers and crew of the *Canada*, and to believe that the loss of the vessel was owing to the improper interference of the officers of the imperial government, which is therefore responsible for the damage as hereinafter stated.

"It has been urged that the claim is barred because a note of the imperial government was left unanswered for some years. The undersigned can not acquiesce in this opinion. The claiming government may suspend its action from consideration for the other government, in which it sees no disposition to yield to the influence of reason, and with which it has no wish to have recourse to force, or itself may be engaged with other matters and unable to attend to the claim of its citizens. But this is no proof that the claim has been waived, and the undersigned has too much confidence in the justice of the Brazilian Government to suppose that it would avail itself of such an argument; indeed it has itself declared that it does not pretend to do so.

"Neither can the umpire be influenced by the fact that the United States Government at one time offered to accept a reduced sum as a compromise for the claim. Such offers are made for various reasons. It may be that the claimant is much in want of the money to which he is entitled, and desires to obtain compensation at once. His government is perhaps wearied of litigation, and desires not to embitter the relations between two friendly countries by useless discussion. An offer is therefore made, even involving a sacrifice. But once the offer is refused, and the discussion is continued till at length

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arbitration is agreed upon, the duty of the umpire is to calculate the amount of damages in accordance with the evidence submitted to him, and without taking into consideration any proposal which may have been made to accept a reduced sum. Indeed, at the time of making the offer, the rights of the claimants were reserved in case the offer should be rejected.

"It now becomes the duty of the undersigned to consider the amount of indemnity for which the imperial government is liable, and in doing so he will go through the different items which have been claimed.

"The *Canada* was built in New York in 1823 as a first-class vessel, and was employed as a liner from that port to Liverpool. From that time to 1856 she was constantly kept in thorough repair, and impartial persons acquainted with such matters have estimated her value in 1856 at $18,000; the amount claimed, therefore, of $15,000 is, so far, not excessive; but it must be remembered that the imperial government is liable only for her actual value on the 1st of December 1856, after she had been considerably damaged by being on the reef. The undersigned can not conceive that Captain Ricketson would have continued his voyage without docking or beaching and repairing his vessel, and from the undersigned's experience of the country, he believes that the vessel could not have been put into a fit state, including all expenses, for less than $5,000. The umpire therefore fixes the value of the vessel at $10,000.

"He has also made inquiries as to the expense of fitting a vessel of that class for a four years' whaling expedition, and furnishing her with provisions and all other necessaries, and has been assured that the cost would not have been less in 1856 than $45,000. The undersigned has further examined the accounts rendered by the owners, and has found no charge to which he can object; he must therefore admit the sum of $41,000 as the value of the outfits, etc. But he must take into account that, as acknowledged by the officers and crew, several articles, though of little value, were thrown overboard in order to lighten the vessel. The undersigned has no details of these articles, but he supposes that the captain could hardly have replaced them in Brazil under $2,000. He therefore places the value of the outfits, etc., for which the Government of Brazil is liable, at $39,000. The charge of $3,543.75 for the oil which had already been secured, the umpire considers a legitimate claim.

"But the undersigned can in no case admit a right to prospective profits; for the ship and the whole capital might have been lost early in the voyage, or the expedition might have been entirely unsuccessful and without profit. In this particular case the objection is still stronger, because the *Canada* was commanded by a captain who, very little after sunset, when darkness could have hardly set in, ran his vessel upon a reef, with the existence and position of which he ought to have been well acquainted.

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"The undersigned can not, however, admit the validity of any argument which would exempt the imperial government from the payment of interest. If the claim in itself can be sustained, of which the umpire has no doubt, the claimants are entitled to interest.

"Certain expenses incurred for the maintenance and passage home of the crew, as also three months' wages to each of the crew, being the amount which all owners of vessels of the United States are bound to pay to seamen discharged abroad, the undersigned considers to be justly due, but can not allow more than this, on the same principle on which he founds his opinion that prospective profits are inadmissible.

"The undersigned therefore lays down the items as follows:

Value of ship *Canada* on December 1, 1856	$10,000.00
Value of her outfits, etc	39,000.00
75 barrels of oil, at $47.25 per barrel	3,543.75
Transit of crew from Rio Grande do Norte to Pernambuco	227.82
Board and clothing in December and January	432.44
Transit to United States, 26 men at $10 each	260.00
Wages for three months each:	
First mate, at $100 per month	300.00
Second mate, at $75 per month	225.00
Third mate, at $60 per month	180.00
Fourth mate, at $50 per month	150.00
Four men, boat steerers, at $40 per month	480.00
Four men, boat steerers, at $30 per month	360.00
Fourteen men, at 12 per month	504.00
Thirteen and a half years' interest, at 6 per cent, from December 1, 1856, to June 1, 1870	45,077.03
	100,740.04

"The umpire therefore decides that the imperial government of Brazil is liable to that of the United States, as compensation to the owners of the United States whale ship *Canada* and of the cargo thereof, in the sum of $100,740.04, payable in coin.

"EDWARD THORNTON."

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CHAPTER XLII.

CLAIMS OF PELLETIER AND LAZARE: PROTOCOL BETWEEN THE UNITED STATES AND HAYTI OF MAY 24, 1884.

Terms of the Submission.

By a protocol signed at Washington May 24, 1884, by Mr. Frelinghuysen, Secretary of State of the United States, and Mr. Preston, envoy extraordinary and minister plenipotentiary of Hayti, the Governments of the United States and Hayti agreed to refer the claims of Antonio Pelletier and A. H. Lazare, citizens of the United States, against the republic of Hayti, to the Hon. William Strong, formerly a justice of the Supreme Court of the United States, as sole arbitrator.

Though the claims were thus referred together, they were not otherwise connected. They differed both in origin, in character, and in ownership. The grounds on which they rested were summarily stated in the protocol. Those in the case of Pelletier were described as follows:

"That Pelletier was master of the bark *William*, which vessel entered Fort Liberté about the date claimed (31st of March 1861); that the master and crew were arrested and tried on a charge of piracy and attempt at slave trading; that Pelletier, the master, was sentenced to be shot, and the mate and other members of the crew to various terms of imprisonment; that the supreme court of Hayti reversed the judgment as to Pelletier, and sent the case to the court at Cape Haytien, where he was retried and sentenced to five years' imprisonment; and that the vessel, with her tackle, was sold, and the proceeds divided between the Haytian Government and the party who, claiming to have suffered by her acts, proceeded against the vessel in a Haytian tribunal."

The grounds of the claim of A. H. Lazare were described in the protocol as follows:

"That Lazare entered into a written contract with the Haytian Government September 23, 1874, for the establishment of a national bank at Port au Prince, with branches, the capital being fixed first at $3,000,000, and afterward reduced to

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$1,500,000, of which capital the government was to furnish one-third part and Lazare two-thirds; that the bank was to be opened in one year from the date of the contract, and an extension of forty-five days on this time was granted on Lazare's request, and that on the day when the bank was to be opened the Haytian Government, alleging that Lazare had not fulfilled his part of the engagement, declared, in accordance with the stipulations of article 24 of the agreement, the contract null and void, and forfeited on his, Lazare's, part."

Evidence.

The arbitrator was required to "receive and examine all papers and evidence" relating to the foregoing claims, which should be "presented to him on behalf of either government." He was empowered, however, to "request further evidence, whether documentary or by testimony given under oath before him or before any person duly commissioned to that end;" and the two governments engaged jointly or severally "to procure and furnish such further evidence by all the means in their power." It was further provided that "all pertinent papers on file with either government" should "be accessible" to the arbitrator.

Counsel.

By Article III. of the protocol it was provided that both governments might be represented before the arbitrator by counsel. Such counsel were authorized to submit briefs, and, if the arbitrator so desired, to argue their cases orally.

Rule of Decision.

The rule of decision, in accordance with which the arbitrator was to decide both cases, was expressed in the declaration which he was required to subscribe before entering upon the discharge of his duties. This declaration, as prescribed by Article IV. of the protocol, was as follows:

"I do solemnly declare that I will decide impartially the claims of Antonio Pelletier and A. H. Lazare preferred on behalf of the United States against the government of the republic of Hayti; and that all questions laid before me by either government in reference to said claims shall be decided by me according to the rules of international law existing at the time of the transactions complained of."

The arbitrator was required to render his decision in each case separately, within a year from the date of the signature of the protocol; but the time was afterward extended to July 28, 1885.[1]

[1] Mr. Bayard, Sec. of State, to Mr. Strong, April 17, 1885, inclosing an additional protocol to extend the time for the rendition of the awards.

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Beginning of the Arbitration.

The arbitrator held his first session in a room at the Department of State, November 10, 1884. The Government of the United States was represented by Mr. Samuel F. Phillips, then Solicitor-General; the Government of Hayti by the Marquis De Chambrun and Mr. George S. Boutwell. Mr. William S. Peddrick was chosen as joint secretary of the two governments.

The arbitrator stated that he had made the declaration prescribed by the protocol. It was sworn to and subscribed before Chief Justice Waite, October 7, 1884.

November 17 was fixed as the day for taking up of the Pelletier case.

Opening of the Pelletier Case.

On that day the case was proceeded with, Mr. Phillips being assisted by private counsel of the claimant.[1] Various papers were offered in evidence, and, in respect of some of them, questions were raised as to their admissibility. The arbitrator stated that he would receive all papers introduced in the case, but would attach to them only such weight as might seem proper. At the next meeting, which was held November 26, further papers were presented on the part of the claimant.

Order of Proof.

At the opening of the session on December 2, Mr. Phillips suggested that it was the duty of the arbitrator, under the provisions of the protocol, after he should have read the papers already submitted to him, to "propose" to the respective governments what further evidence he might require in order to settle the controversy before him.[2] Mr. Phillips intimated that under the provisions of the protocol the "initiative" would rest upon the arbitrator, and that, in consideration of the "general

[1] Altogether five persons appeared during the proceedings as counsel for Pelletier—Messrs. A. H. Jackson, A. L. Merriman, C. A. Eldredge, T. J. Cason, and F. P. Stanton.

[2] The provisions of the protocol referred to by Mr. Phillips were as follows: "Said arbitrator shall receive and examine all papers and evidence relating to said claims, which may be presented to him on behalf of either government. If, in presence of such papers and evidence so laid before him, the said arbitrator shall request further evidence, whether documentary or by testimony given under oath before him or before any person duly commissioned to that end, the two governments, or either of them, engage to procure and furnish such further evidence by all means within their power, and all pertinent papers on file with either government shall be accessible to the said arbitrator."

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interest" of their "client," counsel were to "take instructions" from the arbitrator as to what was necessary. Mr. Boutwell replied that there was no reason why the claimant in question should depart from the ordinary course, not only in courts of justice but also in international commissions, of stating and proving the facts on which he relied to support his claim. The claimant had knowledge of all the facts and had learned counsel to advise him, and there could scarcely be any doubt as to what he was required to prove. At the next meeting, on the 8th of December, the arbitrator stated that, after looking over all the papers which he had been able to examine, he did not feel disposed to indicate at that time what evidence he desired beyond that contained in the papers before him. He also stated that he did not think the technical common-law rules of evidence were adapted to the circumstances of the case. He would feel disposed to act upon whatever evidence satisfied his mind as to the actual facts. He observed, however, that the evidence before him as to the amount of money which passed into the Haytian treasury as the result of the sale of the vessel and cargo was unsatisfactory. But he did not propose to indicate any further what evidence he needed at the moment. "I must leave the parties," said the arbitrator, "to make out their case." At the meeting of December 16, he substantially repeated this declaration, saying: "I leave the case to the conduct of the counsel of both sides." Mr. Jackson here suggested that, as the United States had presented a *prima facie* case, any further evidence which the arbitrator might call for should be submitted by way of rebuttal. The arbitrator replied that he did not so understand it; that the claimant should present, in the first instance, "all of the case" which he proposed to submit. It was thus finally decided that the provision of the protocol, empowering the arbitrator to "request further evidence," did not impose upon him the duty of conducting the case as well as of deciding it.

The order of proof having been determined, counsel for the claimant proceeded to call witnesses.

Taking of Testimony.

We have seen that the protocol required the arbitrator to "receive and examine all papers and evidence" which might be "presented to him on behalf of either government." Under this provision the arbitrator at the outset admitted various papers which

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were not evidence according to the technical common-law rules, saying that he would receive all papers regularly introduced in the case, but would attach to them only such weight as they might seem to deserve. In respect of this ruling there was nothing unusual, since it is not possible in such proceedings to adhere to strict judicial rules of evidence. But a more difficult question arose in regard to evidence which did not exist in documentary form at the opening of the arbitration, and which it was necessary to take some measures to obtain. At the first session a preliminary discussion took place on this subject, at the conclusion of which the arbitrator observed "that he thought if both sides could agree upon a method [of taking testimony] and he coincided with their views, he would ratify it." The effect of any agreement upon the subject was, however, rendered uncertain by the existence of legal doubts. These doubts were due to the fact that the protocol, being a simple diplomatic agreement, seemed capable of delegating to the arbitrator only such powers as could be conferred by its signers in their character as the diplomatic representatives of their respective countries. Could they in that character confer upon the arbitrator power to administer oaths or to issue commissions? We have seen that the protocol, after requiring the arbitrator to receive and examine all such papers as should be presented to him on behalf of either government, provided: "If, in presence of such papers and evidence so laid before him, the said arbitrator shall request *further* evidence, whether documentary *or by testimony, given under oath before him or before any person duly commissioned to that end*, the two governments, or either of them, engage to procure and furnish such further evidence by all means within their power." Was this stipulation intended to confer on the arbitrator power to administer oaths and to issue commissions?

That it was intended to confer power to administer oaths was assumed from the beginning, and numerous witnesses were produced before the arbitrator and sworn by him. On January 10, 1885, a suggestion was made as to the issuance by the arbitrator of a commission to take testimony. The arbitrator thereupon observed that such commissions "had better issue from the State Department, with the seal of the United States, and with the interrogatories and cross-interrogatories attached," since he had serious doubts whether he was authorized

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to send out a commission;[1] that, while he was authorized to insist upon the production of evidence, it did not seem to him that he had the power to commission anybody abroad to take testimony. Mr. Stanton declared that counsel for the claimant did not desire that any commission should issue; that they had brought their witnesses to Washington and thought it but reasonable that Hayti should do the same, and that they should therefore oppose the issuance of any commissions. The arbitrator stated that he did not insist upon the issuance of commissions. Mr. Cason observed that the Secretary of State had telegraphed to Hayti to ascertain whether the attendance of certain witnesses would be procured. Mr. De Chambrun said that until counsel for the claimant had closed their case and indicated precisely what they expected to prove, counsel for Hayti could not know what it would be necessary for them to do. They expected, however, to be obliged to take the testimony of officers of the United States who resided abroad, and in such cases it would be necessary to issue commissions. At the close of the discussion the arbitrator ordered that the case of the claimant be closed, so far as the examination of witnesses and the submission of evidence was concerned, by January 25, 1885, with the proviso that witnesses or evidence brought from foreign lands might be produced on or before March 1, 1885; and he ordered that the defense should submit all their evidence by March 1. He observed, however, that this order did not extend to evidence which might be offered in the way of rebuttal, and that the order would be open for modification if extraordinary circumstances should arise.

January 15, 1885, the question of commissions to take testimony came up again, in relation to certain interrogatories which had been filed by counsel for Hayti. Mr. Cason observed that counsel for claimant had understood that the arbitrator would not issue any commissions, and that they had understood also that the Secretary of State did not feel authorized to issue any. The arbitrator said that he had perhaps been misunderstood. He had doubted very much whether he had the power to issue a commission, but he would sign one if it was necessary; he would "sign what purports to be a commission" if it was presented to him, "though he had very

[1] Pelletier Record, 726.

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serious doubts" about his power to issue commissions. Mr. Cason stated that counsel for the claimant were to be understood as not consenting to the issuance of a commission to a foreign country, and that they did not care to file any cross-interrogatories. The arbitrator said that he would therefore sign the commission asked for by counsel for Hayti, with the interrogatories on file attached, though it was his impression that there was no law that would make false swearing under such a commission perjury.[1] He then signed a commission to the United States consul in Porto Rico.

At the hearing on February 18 Mr. Stanton stated that counsel for claimant had been unable to bring certain witnesses from Hayti, and had therefore prepared some interrogatories for them, and also for Mr. St. John, the British minister in Mexico, who had formerly represented his government in Hayti. The arbitrator said that he would grant a commission on condition that the case should not be delayed. On March 19 Mr. De Chambrun offered in evidence a deposition of Mr. Hubbard, United States consul in Porto Rico, together with his answers to the interrogatories which were sent to him. The arbitrator admitted the papers in evidence, subject to objection. On April 3 counsel for claimant moved to strike out some of the Haytian testimony, including the answers of Mr. Hubbard, on the ground that the taking of testimony by commission was unauthorized. The arbitrator refused the motion, saying that all the evidence had been admitted with the understanding that he would give it only such weight as it was entitled to. He had not thought it worth while to go into the discussion of the admissibility or inadmissibility of testimony.

The arbitrator on motion made various requests to the contracting parties for the production of papers. On December 17, 1884, counsel for Hayti moved the arbitrator to request the Secretary of State of the United States to procure for the arbitrator's use a duly authenticated copy of any records in the United States consulate at Carthagena, Colombia, relating to the bark *William* during her stay in that port in November and December 1860; and also to obtain, if practicable, from the British Government duly authenticated copies of any minutes made by the officers of the ship *Gladiator* during the same months, in relation to the bark *William*, or to a bark of about 300

[1] Record 806 and 810.

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tons "which may have been spoken or seen by the *Gladiator* at Carthagena, United States of Colombia, or in the waters of the Caribbean Sea, in the vicinity of Carthagena, Rio Hacha, Grand Cayman, or the Island of Jamaica, in either of said months." Counsel for the claimant objected to the request on the ground that it was too general. The arbitrator replied that objection might be made to the evidence when it came in. On subsequent days the arbitrator, on motion of counsel on one side or the other, made various requests to the Secretary of State of the United States to obtain papers in the possession of the United States, Great Britain, or Hayti.

Close of the Pelletier Case.

Numerous sessions were held in the Pelletier case. On April 27, 1885, private counsel for the claimant filed a brief, and on the same day oral argument was begun by Mr. Stanton. He continued and closed on the 29th of April. The next day Mr. Boutwell spoke for the Government of Hayti. He concluded May 1, and was followed on the same day by Mr. De Chambrun, who closed his argument on the 2d of May, when a brief on behalf of Hayti was also submitted. Mr. Cason began the closing argument for the claimant on the 4th of May, and concluded on the following day.

Case of Lazare.

The proceedings in the case of Lazare were begun January 15, 1885. Mr. Phillips appeared for the United States, and Mr. James Thomson, of the firm of Foster & Thomson, for the claimant. Mr. J. Hubley Ashton subsequently appeared in a similar capacity. Hayti was represented by Messrs. Boutwell and De Chambrun.

The case was immediately opened by the reading by Mr. Thomson of a "statement," which was signed by Mr. Phillips and by Messrs. Foster & Thomson. After the reading of this statement, the examination of witnesses for the claimant was proceeded with. Subsequently witnesses were produced and examined on the part of Hayti. Documentary evidence was also introduced.

March 21, 1885, oral argument in behalf of the claimant was begun by Mr. Ashton. Mr. De Chambrun replied, and was followed by Mr. Boutwell on the same side. The oral argument was closed on the 24th of March by Mr. Thomson, who spoke in behalf of the claimant. On the 27th of April briefs were filed on both sides.

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The Awards.

The arbitrator on June 20, 1885, transmitted to Mr. Bayard, then Secretary of State, his awards on both the claims submitted to him. They were as follows:

"AWARD OF THE ARBITRATOR IN THE CLAIM OF ANTONIO PELLETIER AGAINST THE REPUBLIC OF HAYTI.

"THE AMERICAN AND HAYTIAN CLAIMS COMMISSION,
"*Department of State.*

"In pursuance of the protocol, dated May 28, 1884, between the Hon. Frederick T. Frelinghuysen, Secretary of State of the United States, and the Hon. Stephen Preston, envoy extraordinary and minister plenipotentiary of the Republic of Hayti, representing their respective governments, after having taken before the Chief Justice of the United States the oath required by the fourth article of the protocol, I have investigated the claim of Antonio Pelletier against the Republic of Hayti, and I now submit the following statement and award:

"This claim is large, amounting, as presented to me, to the sum of $2,466,480. It is based upon an alleged wrongful arrest, trial, conviction, and imprisonment of the claimant by the Haytian Government, together with the seizure of a bark, of which the claimant was master, its cargo and money on board, their condemnation and confiscation. The principal evidence presented in support of the claim consists of memorials and protests of the claimant, as also his sworn testimony, together with the testimony of one Thomas Collar, who was ship's mate on the bark during the voyage she made from Mobile to Hayti. There is, however, some other evidence of minor importance.

"Pelletier, the claimant, is a native of France, but he was naturalized in New York in 1852. He had acted as sailing master of several small vessels on the coasts of South America and Central America during several years prior to 1851. Between that date and 1859 he appears to have had his residence partly in New York, partly in Chicago, and partly in Troy, some of the time engaged in sailing vessels out of New York. In 1859 he purchased an old bark, named *Ardennes*, at Havana, in Cuba, took her to Jacksonville, Florida, to obtain an American registry, shipped in her a cargo of rum, sugar, etc., and cleared for the Canary Islands, lying in north latitude between the twenty-seventh and twenty-ninth degrees. He did not, however, go to those islands, being driven, as he states, far out of his course by heavy gales. He was discovered at the mouth of the Congo River acting suspiciously. There his bark was seized and sent to New York by an American cruiser. At New York she was libelled for attempted slave dealing, and after a considerable lapse of time the libel was brought to trial. The trial resulted in the dismissal of the libel, but with a certificate that there was probable cause for the seizure.

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"Meanwhile, in 1860, Pelletier, as he states, through the agency of one Parker, bought at the marshal's sale the bark *William*, which had been condemned at Key West as a slaver and ordered to be sold. His memorial to the Secretary of State, made out in 1864, to which he has sworn before me, asserts that 'the price paid to the marshal was, as near as he could recollect, something over $10,000.' He further swears that after the sale some person ran away with the bark and the deputy marshal who was on board, but that she was recovered and brought back in four or five hours by the United States authorities, aided by a schooner, and that the salvage he had to pay, together with commissions to Parker, with some repairs and other expenses, made the aggregate of bills for the purchase, salvage, and expenses some hundreds over $16,000.

"These statements, as well as others respecting the value of the vessel, appear to me to be incredible, and they tend strongly to diminish my confidence in other statements and testimony of the claimant. By the marshal's return it appears that the bark, with her tackle and chronometer, was sold to Parker for $1,605. That sum therefore was all that was paid to the marshal, and not $10,000 as the claimant swears. Parker was the claimant's agent to buy. Of course Pelletier paid to the marshal no more, and he had to pay Parker only commissions. Besides, the reliable evidence in the case satisfies me that the bark was not worth more than from five to seven thousand dollars at most. She was an old vessel of $215\frac{45}{95}$ tons measurement, and she was known as a condemned slaver. So in regard to the $6,000 claimed to have been paid for salvage, commissions, and other small expenses. It appears that the bark was recovered by the United States authorities, who charged nothing, and a schooner, on board of which was the claimant, and that she was brought back within four or five hours. So, when, soon after, the bark was taken to Mobile and some repairs were put upon her there, the claimant's statement is that with those repairs the vessel cost him about $30,000 as near as he could recollect in 1864, when everything must have been fresh in his memory.

"What the repairs at Mobile were, is stated by Thomas Collar, the mate who superintended what was done. The bark was recalked, deck and hold put in order, the cabin was overhauled, and there was some painting. Including the seamen, about fourteen men were employed about two weeks at $3 a day. The total cost was therefore less than $600. Yet the claimant states on oath that including the repairs, the bark cost him about $30,000, and was worth fully $35,000. She was, as I have said, a bark measuring $215\frac{45}{95}$ tons. A respectable witness who was engaged in shipbuilding between 1855 and 1860, has testified that $55 a ton was a high price for new well-built vessels, copper-bottomed and copper-fastened, at that time. At that rate a new vessel of the size of the *William* would not have been worth more than about one-third of what

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this old bark cost the claimant, as he testifies. His testimony in this particular can not be true.

"After the arrival of the bark at Mobile, to which port she was brought from Key West, Pelletier transferred the title he had to one Emile Delaunay, of New Orleans, a member of the firm of Delaunay, Rice & Co., of which, as he alleges, he was a partner, for the purpose, as he states, 'of procuring a New Orleans registry.' The transfer was to Delaunay, and not to the firm. He now alleges that though he made the transfer he retained the actual ownership and had a bill of sale from Delaunay. But in his memorial he did not claim that he had a bill of sale. In that, he asserted only that, retaining the ownership, he took from Delaunay an irrevocable power of attorney to control and dispose of the vessel as he pleased. The statements do not harmonize, and it is difficult to see why a power of attorney was taken if he had a bill of sale. On the faith of the transfer the bark was registered, not, however, at New Orleans, where Delaunay resided, but at Mobile, where she did not belong, and where neither Pelletier nor Delaunay resided. She was registered, not in the name of Delaunay as owner (his name was Emile Delaunay), but as owned by Edward Lee Launde, or Edward Lee Launa, or Edward de Launa, and the person calling himself by that name swore that he was the only owner. It is not quite clear whether the registry was for Edward Lee Launde, as owner, or for Edward Lee Launa, or Edward de Launa. The duplicate certificate of registry, signed by the register and deputy collector, on file at the Treasury Department at Washington, gives the name 'Edward Lee Launde.' The vessel's duplicate has not been presented. The record at Mobile gives the name Edward de Launa or Edward Lee Launa, it is uncertain which. Neither was Delaunay's name. That, as I have said, appears to have been Emile Delaunay.

"Why the register was obtained at Mobile in the name given as owner rather than in Pelletier's name, if he was the owner, when he was in Mobile at the time the registry was made, it would be hard to conjecture, unless it was desired while obtaining a register, at the same time to conceal the true ownership of the bark for some unavowed reason. Delaunay evidently had a very close connection with the bark and with her outfit and voyage, a connection which it is difficult to account for if he was not the real owner of the vessel and of most, if not all, the property on board, and if Pelletier was anything more than the ship's master.

"Though Pelletier claims that he purchased the bark at Key West, in his examination before me he has sworn that Delaunay paid for it. It is proved also that the repairs at Mobile were settled for by Delaunay's clerk. Pelletier paid nothing. It is proved that when the bark sailed for Carthagena, Delaunay came to Mobile and left the ship only when she was in the lower bay, returning in a tug which took her down from the wharf. It is proved also that Pelletier had nothing to do with

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the tug, and that its services, if settled for at all, must have been paid by Delaunay. He also attended to the outgoing manifest, which described Pelletier only as master of the bark. Delaunay furnished and put on board the 5-franc pieces and gold alleged to have been shipped, and if there was any insurance upon either the vessel or its contents, which does not appear, it must have been obtained by Delaunay without instruction. Pelletier swears that he paid no attention to insurance.

"More than this, a witness, Louis Moses, who has been a resident of New Orleans ever since 1852, engaged in exchange brokerage and insurance, has testified before me that in 1860 he was intimately acquainted with the firm of Delaunay, Rice & Co., holding a power of attorney to transact its business; that he furnished to Delaunay money to fit out the bark; that on the 24th day of October 1860, three days before the bark cleared from Mobile, he advanced to Delaunay $15,850, for which he took Delaunay's notes, which he now has unpaid, and exhibited to me, and that he and another man, whom he named, each advanced the further sum of $5,000; that to obtain this money Delaunay told him he had to put money on board the bark; that he expected a great profit from it; that the bark was fitted out to go to some places in Hayti; that Antonio Pelletier was the captain, and was to engage to import some negroes into Louisiana, and that was the reason why money was to be put on board; that the negroes had been already bought, and that Pelletier was to go and pay for them and bring them. The witness testified further that he himself was to have an interest in the venture, and that Delaunay promised that he should have one hundred of the negroes for the money he advanced. He further testified that the scheme was to land the negroes on a desert island west of the Mississippi, near the mainland of Louisiana. This testimony has not been impeached, nor has it been discredited by anything that has appeared before me. I have not been able to discover any inherent contradiction or improbability in it. If believed, it has a direct and potential bearing upon the merits of the claim made on behalf of Pelletier. It bears upon the ownership of the bark, and of the money on board, as well as upon the character of the voyage which the bark made. It accounts for Delaunay's putting the money on board, paying the bills, being present at the bark's departure, taking a registry in the name of Edward Lee Launde, or Edward de Launa, at Mobile instead of New Orleans, where he resided, and when Pelletier was there, and many other things which I shall notice hereafter. It is not to be overlooked, however, that according to his own testimony the witness was a participant in fitting out an illegal voyage to the extent of furnishing a portion of the funds for it, with full knowledge of the uses to which it was planned the money should be devoted. In other words, he was an accomplice. His testimony, therefore, must be weighed with caution,

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and, if relied upon, should find elsewhere, as I think it does, corroboration.

"At Mobile, as the claimant's memorial states, he purchased and put on board the bark a full cargo of about 200,000 feet of pitch-pine lumber, sawed to his order, to fill a contract he had in New Granada, and also took 36 barrels of ship bread to fill an order from Carthagena. The memorial states, also, that he had on board 36,000 5-franc pieces (silver), $3,000 in American gold, and about $2,000 in Spanish-American gold ounces and fractions of ounces, meaning to buy gold dust of Antioquia. He also took on board two kegs of powder and some more; also a large number of pistols and some guns or rifles. Neither the powder nor the guns or pistols were mentioned in the ship's outgoing manifest. On the contrary, the manifest which he signed and delivered to the collector, and which he swore contained a full, just, and true account of all the goods, wares, and merchandise on board the vessel, and that if other goods, wares, or merchandise should be put on board previous to sailing, he would immediately report the same to the collector, mentioned only 118,000 feet of lumber and 29 barrels of bread, marked 'Various, and J. B. & Co.; value, $2,214.40.' The manifest was sworn to by Pelletier on the 27th day of October, 1860. On the same day a shipper's manifest of the cargo of the 'bark *William*, Pelletier, master,' was signed, verified, and filed in the collector's office, exhibiting as shipped on the bark 29 barrels of bread and 118,000 feet of lumber, marked 'J. B. & Co.; value $2,214.40.' Both manifests, doubtless, describe the same property, but the latter declared the articles to have been shipped by M. S. Charlock & Co., and intended to be landed at Carthagena. Of the lumber 34,000 feet were loaded on deck and only 84,000 feet in the hold. Why it was thus loaded for a contemplated voyage of some 3,000 miles, when the capacity of the hold was sufficient for fully twice the whole quantity, is not apparent. It may have been for convenience of loading and unloading, or it may have been to give to the voyage a colorable appearance of legitimate trading.

"At Mobile Pelletier had shipped a crew, consisting of fourteen besides himself, including cook, steward, and clerk. Thomas Collar, the second mate, had been introduced to him at Key West, and had come with him in the bark from Key West to Mobile, where he was given the superintendence of repairs.

"At Key West he was known as Thomas Collar, yet at Mobile he signed the shipping articles with the name Samuel Gerdon, was subsequently addressed by Pelletier as Gerdon, and later, in the following voyage, signed a protest with the same name. At first Collar testified before me that he signed in his true name—Thomas Collar—but afterward, when confronted by his protest, he acknowledged that he had used the name Samuel Gerdon, and accounted for the false personation by saying that the shipping master at Mobile had given him a

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proection paper with that name, alleging that he had no blank to fill otherwise. The seamen, or a portion of them, as Pelletier states, were furnished to him by a shipping master at New Orleans, it may be presumed at the instance of Delaunay, who resided there. They were forwarded from New Orleans to Mobile by steamboat. They were Frenchmen, and they are described by Pelletier 'as rowdies and highbinders, such as are in general only to be found in Southern seaports.' Indeed, in the entire crew, including cook, clerk, and steward, there was but one American. Some other shipments of sailors were afterward made at other ports during the voyage, but they also were Frenchmen or Spaniards.

"The ship cleared for Carthagena on the 27th of October 1860, and arrived in that port late in November. There, as stated by Pelletier, the lumber on deck was unloaded, some gold dust was purchased, with some other articles, and some of the private stores of the captain were sold. There Meyers, the chief mate, deserted and escaped on board a British man-of-war. A revolution then in progress having prevented the sale of the remaining lumber, the bark cleared for Rio Hacha, a port some over one hundred miles east-northeast from Carthagena, having shipped at least one seaman, a Spaniard, and taken on board one Bina, a colored refugee, and Juan Cortez, his wife, child, and servant as passengers for Rio Hacha. Cortez had some freight with him. He and his family were dark, probably mulattoes.

"Finding the winds and currents contrary, and having lost an anchor, the bark bore away to the northward and continued on that course about 700 miles. Collar testifies that when the anchor was lost, a day or two after leaving Carthagena, Cortez, whose wife was sick, desired to be put on shore. Pelletier's testimony on this subject is inconsistent with itself. At first he stated Cortez desired to be landed at the first accessible port. That was Carthagena, within two hours' sail from the place where the anchor was lost. But he did not go thither. He said he wanted to proceed on his voyage. In his later testimony he represents Cortez as asking, when near Grand Cayman, to be landed in Jamaica or some port in that direction. Whether after he had sailed so far away from Rio Hacha he intended to return on a long tack to that port, I do not deem it necessary to inquire. He had passengers on board whom he had contracted to deliver there with their freight.

"But it may well be that Cortez was anxious and alarmed at being carried so far from his place of destination and consented, even desired, to be landed at Grand Cayman. To this Pelletier assented and put into the port of Georgetown, on that island, arriving there December 19, 1860. There he settled with Cortez, taking from him all his freight at a valuation of $1,000 and deducting $500 for his services. I do not find that the settlement was obtained by threats or duress, or that it was any other than amicable, though it was subsequently

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contended that the freight belonged to one Cano, British vice-consul at Carthagena, that Cortez had only the care of it, and that it had been extorted from him by Pelletier. I do not find sufficient evidence to justify such a contention.

"On the 24th of December the bark cleared for Port au Prince in Hayti. It is not quite apparent why she was cleared for Hayti. She had cleared from Carthagena for Rio Hacha, professedly in order to dispose there of the lumber in her hold. If her course afterward to the vicinity of Grand Cayman was really to obtain offing for a long tack to Rio Hacha it is not apparent why she did not clear again for that port. It was little more distant than Port au Prince, and the bark would have been assisted by wind and currents. The voyage to Port au Prince was to the windward, against strong northeast winds and strong currents. No explanation has been given of this, and none appears, except perhaps a purpose to obtain a cargo of guano at the island of Navassa, eighty or one hundred miles west of Hayti. The claimant testifies that at the beginning of his voyage he had an understanding with Delaunay, that if he found it practicable, he should bring back to New Orleans a cargo of guano, and that at the island of Grand Cayman he arranged with a person to show him guano, and further, that when first at Port au Prince, before he had any trouble with the authorities, he applied to one Vil Maximilian for fifty men and a few women to go with him to the island of Navassa, and there load his vessel with guano. It is evident, however, from what subsequently occurred, that there never was any serious purpose to look for such a cargo.

"At Port au Prince, where the bark arrived some time after the middle of January 1861, the remainder of the lumber, or most of it, was sold, but before much of it was delivered several of the crew, alleged to have been disorderly, were sent on shore and imprisoned at Pelletier's instance. Bina, the refugee from Carthagena, also left the ship and denounced it to the Haytian authorities as a slaver. The claimant's testimony is that this charge was made after Bina had demanded $100 from him to pay for a passage back to the Spanish Main, with threats in case of refusal, and that the demand was refused. The imprisoned sailors also preferred accusations. Very naturally and reasonably, the police boarded the vessel and made a partial search. They found arms and ammunition on board, an unusual number of handcuffs, alleged to have been twenty pairs, but which, as Pelletier and Collar testify, were only eight in number, and they found a large number of water casks. Pelletier and Collar swear there were only eight such casks, but the former admits that he had in addition from twenty to twenty-five barrels, which he filled with salt water for ballast. All these things are acknowledged accompaniments of slave trading. The police did not find the kegs of powder, nor any of the pistols that had been on board. These may have been sold before the search was made or have escaped

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observation. The search does not appear to have been very thorough. In view of the accusation of Bina and the imprisoned sailors, and of the results of the search, as well as of his application to Maximilian for laborers to go to Navassa, the Haytian authorities evidently had strong suspicions, and I think, with much reason, that the bark was a slaver out on an illegitimate cruise. Yet, after a short delay, they gave up the vessel to the claimant, and at his request gave him a clearance for New Orleans. Their suspicions, however, were not wholly allayed. When the bark sailed, the latter part of February, she was followed a considerable distance by an armed vessel, apparently to observe what course she would take. She did not go westward on the most direct course to New Orleans. Had she taken that course she would have had favoring winds and assisting currents, and she might have taken in her course the guano islands of Navassa. Had there been any real design to take a cargo of guano she must have taken that course. There was nothing to hinder it. The bark was in good order. The islands were in possession of an American company, and laborers were doubtless there to assist in loading vessels. There could have been no need of laborers taken from Hayti. But instead of taking that course the bark turned eastward around Mole St. Nicole, and continued her course, on the north side of Hayti, against fresh breezes and swift currents, on one route, indeed, toward New Orleans, but obviously not the best at that season of the year.

"According to Pelletier's statement, finding he had not sufficient ballast, though he had more than 50 tons, he put into Man-of-War Bay, in the island of Grand Inagua, to obtain more. There, by drifting on a reef, the fastenings of his rudder were broken, and it hung only on the forward pintle. It needed two new pintles to replace those which were broken. They might, doubtless, have been supplied by any blacksmith at Inagua, but after lashing the rudder with chains the bark put to sea. Still, not steering well, Pelletier, as he states, endeavored to make a port (La Plata) in San Domingo, in an opposite direction from the course to New Orleans, in order in that port to make repairs. He was soon found on the banks of Caicos, east of Inagua, and soon after far to the southwest, off the coast of Hayti, near Mole St. Nicole, where he was endeavoring to beat to the windward. Several days he was in sight from Cape Haytien, where there was a good harbor open to commerce, which he could easily have entered in a few hours, and where he might have obtained all needed repairs, but he made no attempt to enter there. Even if his chronometer were out of order, as he alleges, he must have known where he was. He claims to have been a good sailor. He had in his hands the Coast Pilot directions. He was all the while in sight of the coast, and it is incredible that he did not recognize his vicinity to Cape Haytien. Instead of entering it he kept along the coast, saluted with a French flag a passing vessel, and

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entered Fort Liberté, an obscure port of Hayti, not open to commerce and only about twenty miles from Cape Haytien, mistaking it, as he says, for the harbor of La Plata, in San Domingo. I am unable to see how his entrance into Fort Liberté could have been due to any such mistake. The distance from Cape Haytien was too short, only about twenty miles. La Plata is nearly one hundred miles east. The approaches to the two ports, as described in the sailing directions, are notably unlike, and as the land all the way from Cape Haytien must have been in sight, he must have known he was far from La Plata.

"At Fort Liberté he floated a French flag, never an American; proclaimed his vessel to be the *Guillaume Tell* from Havana, bound to Havre; ordered his men to speak only the French language, and asserted that his own name was Jules Letellier. He even caused a letter to be written to the French consul repeating these false statements, signed Jules Letellier. The excuse given for this attempted deception is that when on entering the port he saw the Haytian flag he was terrified, remembering his trouble at Port au Prince. I think that is a very insufficient excuse. There was no cause for any such scare, and it is difficult to believe that it existed. The bark had been given a clearance from Port au Prince, and, if she was in distress, that accounted fully for her being again in a Haytian port for repairs.

"The falsehoods mentioned were not all he told. He said he had been at Guadaloupe, had been obliged to throw part of his cargo overboard, and that he had been aground on those banks. False statements, when attempts to mislead, very naturally awaken the suspicion of those to whom they are made, and they are in some measure evidence of guilt. Pelletier's attempted deception was soon discovered by the French consul and the Haytian authorities, and his arrest and the seizure of the bark followed.

"In view of the facts thus mentioned, which I think are established by the evidence, I can hardly escape from the conviction that the voyage of the bark *William* was an illegal voyage; that its paramount purpose was to obtain a cargo of negroes, either by purchase or kidnapping, and bring them into slavery in the State of Louisiana, and that the load of lumber and the profession of a purpose to go for a cargo of guano were mere covers to conceal the true character of the enterprise. In my opinion, it is beyond doubt that had the bark been captured and brought into an American port, when she was seized at Fort Liberté, she would have been condemned by the United States courts as an intended slaver. And I think the Haytian authorities had such reasons for suspecting, even believing, that she was a slaver, with evil designs against their people; that they were justified in seizing her in one of their ports, and arresting the master, at least for examination. If the uncontradicted testimony of Mr. Moses is to be believed,

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the voyage was concocted between Delaunay and Pelletier; the bark was procured for the illicit use; it was manned and supplied suitably for such a purpose, and its subsequent conduct down to its hovering along the coast and entering an obscure and private harbor of Hayti under false colors when a better one was easily accessible are all consistent with such a purpose. The suspicious circumstances begin at the beginning. The transfer of the title to Delaunay, as stated by Pelletier, in order to obtain registry *at New Orleans;* the registry *at Mobile,* in the name of Lee Launda, or Edward De Launa, or Edward Lee Launa; the taking powder, pistols, and guns in quantities on board without mentioning them in the manifest; the loading of about one-third of the lumber on deck when the hold was more than sufficient for it all, the assumption of a false name by the mate; the character of the crew, all foreigners and roughs; the obviously fallacious pretense that a cargo of guano was sought; the concealing the name of the ship, and false representations respecting her nationality, the port from which she sailed, and her destination; the change of the name of the master; the unusual number of manacles on board, the large number of watercasks, including barrels capable of holding water—all speak with one voice. They all tend in the same direction, and collectively they almost force to the conclusion that the voyage was illicit, and that slave trading was its object. Add to these the fact that Pelletier had applied to a Haytian to obtain fifty men and some women (blacks, of course,) to assist him in obtaining guano, and I can not avoid thinking the Haytian Government, though all these facts may not have been known at the time, had ample reason for suspecting, if not believing, that the bark was a slaver, and that the design of Pelletier was to obtain a cargo of blacks from their country. Even the representatives of foreign governments then present in Hayti unanimously expressed to the government their opinion that Pelletier had been guilty of piracy, and that the government was authorized to put in force against him judicial proceedings. And Mr. Lewis, commercial agent of the United States, joined Mr. Byron, consul-general and acting chargé d'affaires of Great Britain, in asking that the captain and bark, then under arrest, should not be set at liberty.

"Having now reviewed and stated what, in my judgment, the evidence exhibits respecting the character and conduct of the voyage down to the entrance of the bark into Fort Liberté, and noticed also the false pretenses of the claimant there, I proceed to examine the action of the Haytian Government, of which he complains. Shortly after the bark's arrival, and while the falsity of the assertion that she was a French vessel on a voyage from Havana to Havre was still undiscovered, one Miranda, who had shipped at Port au Prince on the bark as boatswain, escaped to the shore and denounced to the authorities the vessel and the master. What the charge he made

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was, whether it was of piracy or slave trading, or a false pretense of nationality, does not distinctly appear, though from his subsequent testimony it seems probable that it was an accusation of all those offenses. It led to the discovery that the vessel and the master were not what had been pretended, but that the vessel was the *William*, which had been suspected at Port au Prince, and that her master was Pelletier. He was therefore ordered to come on shore and to bring the ship's papers. This he refused to do. The French consul also sent a similar order, which Pelletier disregarded, and, having obtained the pintles he desired, he endeavored to escape at night out of the harbor. He was then arrested and taken on shore with the ship's papers. The bark and the crew were also seized. The consul then examined the papers, and, finding that the vessel was American, turned it, together with Pelletier and the crew, over to the Haytian authorities, who committed the master and crew to jail in irons. Some time afterward they were sent to Cape Haytien and imprisoned there, still in irons, and within a few days they were sent to Port au Prince and marched in irons to the criminal prison there. The statements made by Pelletier and Collar, the mate, of abuse and cruelties inflicted upon them during their transfer from Fort Liberté to Port au Prince are extremely sensational, and if they are true they reveal barbarous treatment by the populace and needless severity of the government officers. But the testimony of these two persons, I think, is very highly colored and in many particulars quite unreliable. Doubtless the populace was much excited, and not without reason. They probably did insult and abuse the captives. There is other evidence to show it. But both Pelletier and Collar assert unqualifiedly as positive facts many things of which they could have had no knowledge, even if they existed, and they assert some things which are proved to have had no existence. One illustration will suffice: Pelletier states that during the march from the landing at Port au Prince to the prison, Louis Legallin, one of his boys, being weak, fainted from fatigue and loss of blood, and fell, when the Haytian officers put a stick through his shackles and dragged him over the pavements and rough stones, so that his skull was worn through and he was dead on arrival at the prison, when his body was thrown into the yard and some small boys were allowed to beat out his eyes with sticks for their amusement. This was horrible, if true; but the statement is not true, and it was known by Pelletier to be false when he made it. Legallin was subsequently indicted, tried, and acquitted in Pelletier's presence. Many other assertions of sensational facts have been made by this witness which have been disproved or which were beyond his possible knowledge. The same thing may be said of the testimony of Collar. They tend greatly to impair my confidence in any portion of their testimony where it is not corroborated. Soon after they had been taken to Port au Prince Pelletier

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and Collar, with ten of the crew, were indicted for piracy and attempted slave dealing on the coast of Hayti. The indictment charged also that Pelletier had at sea extorted from Cortez a promise to pay a large sum of money for consenting to land him on the nearest land, and that at Grand Cayman he had compelled Cortez, by threats of murder, to give him a deed for all the merchandise intrusted to his (Cortez's) care by one Antonio Cano, amounting to more than $3,000. Prior to the presentation of this indictment the accused had been severally subjected to an examination according to the criminal practice of Hayti.

"Meanwhile, Cortez and Cano had come to Port au Prince, and the question arose whether they could join in the criminal prosecution in order to recover thereby compensation for the injuries they alleged they had sustained at the hands of Pelletier.

"This question came before a court consisting of Judge Boco and two others, and the court decided that Cortez and Cano could not join in the prosecution; that the courts of Hayti had no jurisdiction over their claims, but that the criminal courts of the country had jurisdiction of the prosecution for piracy and slave trading. Pelletier states that the court decided to release him. This was not so. The decision was directly to the contrary. But as it was decided that the claim of Cortez and Cano could not be joined with the criminal proceeding, an appeal was taken to the court of cassation, where that decision was reversed. The judgment that the Haytian courts had jurisdiction of the criminal proceeding was left undisturbed, and the prosecution was sent down for trial. Pelletier further asserts that the three judges who made the first decision were sent to jail. Of that there is no proof beyond his assertion. The records show no such thing, and the statement is altogether improbable. Allowance should doubtless be made for mistaken assertions of a witness indicted and tried in a foreign country before strange judges, and in accordance with a course of criminal procedure not familiar to him, but positive misrepresentations respecting the trial are hardly excusable.

"The court building and the records of judicial proceedings at Port au Prince have been destroyed by fire since 1861, but official reports of the trial of Pelletier and the others indicted, attested, and signed by the judges, and published at the time in the government official journal, are before me. I think them entitled to credit. They reveal a very different conduct of the judicial proceedings anterior to and during the trial from that testified to by him. Waiving, for the present, consideration of the question whether the Haytian courts had jurisdiction, to which I shall return hereafter, I can discover in those proceedings, including the trial, no satisfactory evidence that they were oppressive or unfair, or that they were not conducted temperately and according to the ordinary course

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of criminal trials. There are statements of Pelletier to the contrary, but I think them unsustained.

"The main trial commenced on the 26th of August 1861, and continued five days. It was at no time hurried. At its beginning the court provided an interpreter for Thomas Collar, the only defendant who did not understand the French language, the language of Hayti. Indeed, all the defendants except Collar were natives of France.

"Pelletier declined his right to select six of the jury, denying the jurisdiction of the court, though that had previously been decided against him. Counsel were offered to him by the court, but he declined them because he had counsel of his own selection. Very soon, however, he refused to make any defense and requested his counsel to withdraw. Of this he gives two accounts, not quite harmonious. One is that the pilot he had taken from Carthagena, the seaman Lobos he had shipped there, and whom he had caused to be imprisoned, and the boy he had left at Port au Prince were seized without any charge and imprisoned, so that he was unable to procure their attendance, and that he declared, as his defense was thus gagged, he should make no defense, but deny the jurisdiction of the court, and begged his counsel to withdraw.

"But the facts were that he had left the pilot he took at Carthagena at Georgetown, in Grand Cayman. He was not, therefore, seized and imprisoned by the Haytian authorities, and Lobos was a witness and testified during the trial in Pelletier's presence. At another time Pelletier testifies that he refused to make any defense, and dismissed his counsel because the ship's papers were refused to him. Of this hereafter.

"He makes another statement. It is that Mr. Laveau, one of his counsel, was sent to jail for alluding to the extraordinary means resorted to to produce a conviction, and to the abstraction of his papers so that they could not be used in his defense. But the official report gives a different account.

"It is that 'the acting government attorney again requested the court to appoint a lawyer to defend Pelletier, whereupon the latter arose and reiterated the declaration which he had already made, viz, that he would not accept the services of any lawyer for his defense. "I shall offer no defense," said he; "I have resolved not to defend myself in view of the base intrigues that have been resorted to in order to gag my defense." The judge of the criminal court requested the accused to be more moderate, and told him he must retract the words "base intrigues." Mr. Laveau then proceeded to create a disturbance, and was called to order. He again interrupted, whereupon the judge ordered him to be led out of the court room.' It thus appears that he was led out for a contempt. He had been dismissed as counsel previously. There was no order for imprisonment.

"Pelletier also states that he was shut up in a box having only a small aperture, through which he could see the court

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proceedings only imperfectly. There is no other evidence to sustain this statement, and a witness resident in Port au Prince at the time, familiar with the court-room, and who had served as a juror, has testified that there was no such box or close dock in it.

"The trial proceeded, numerous witnesses were examined, each in the absence of all others, and at the close of each one's testimony the accused were severally asked whether what had been testified was true. To these questions they all, except Pelletier, gave affirmative answers. He refused to make any answers. Among the witnesses was Miranda, the boatswain. He testified, *inter alia*, that Pelletier had told him he intended to take from Hayti 150 men to sell as slaves. There was also evidence that Pelletier had said he intended to give a ball on the bark at Fort Liberté and carry off a number of young men and women. To this Pelletier made no denial, though asked what he had to say in reply to the charge.

"His application to Maximilian at Port au Prince was also proved. This was but a part of the evidence. After a trial, lasting five days, the jury returned a verdict convicting Pelletier of piracy, of the fraudulent abstraction of goods at sea, or Grand Cayman Island, and convicting him also of an attempt at piracy and the slave trade committed on the coast of Hayti. Three others of the accused, Collar, Brown, and the captain's clerk, were convicted as accomplices, and the remainder of the accused were acquitted. On this conviction Pelletier was sentenced to death, and the bark and its contents were adjudged to be confiscated. On appeal to the court of cassation the judgment of the criminal court was in all respects affirmed, except so far as it adjudged death to Pelletier.

"That was set aside, for the reason that the statutes of Hayti imposed the penalty of death for piracy only in cases when murder has been committed, and the case was sent to the criminal court, sitting at Cape Haytien, that 'without the assistance of a jury, basing its judgment upon the verdict already rendered,' it might enforce the penal law of Hayti according to the Haytian statutes of 1815 against piracy. The criminal court thereupon sentenced the claimant to five years' imprisonment, and the court of cassation on a second appeal confirmed the judgment.

"There are some other averments of Pelletier impugning the fairness of the judicial proceedings against him that require notice. The principal one is that copies of the ship's papers needed for his defense, and to which he was entitled by the Haytian law, were withheld from him. He asserts that application had been made for them before the trial; that the minister of foreign affairs promised he should be present when the package containing them should be opened, and should see them and take what would be necessary; that his lawyers took every means to get the papers, even applying to Judge Boco for an order on the clerk to exhibit them; that on the presenta-

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tion of the order to the clerk, and his going into another room to get them, a subordinate officer seized them and carried them away. All this, if it occurred, he could have known only through the report of his counsel. It may be true, but it does not prove that at another time the copies could not have been obtained. There may have been some reason for the officers taking the papers at that time. Certainly no application for them to a judge or to the minister of foreign affairs was ever refused. Permission to have them was always granted, and it was not of this that Pelletier's counsel complained, although they did complain that the papers were withheld from them while the trial was proceeding.

"It should require clear evidence to prove that an inferior officer causelessly interfered to defeat the order of the judge, and the ready offer made by the Secretary of State and the minister of foreign affairs. Mr. Linstant, the leading counsel for Pelletier, complained of the action of the court respecting the papers at the trial. But the report shows that when the papers were demanded the demand was coupled with an application for delay. The latter application the court refused, *but ordered the papers to be produced forthwith.* This seems not to have been satisfactory. It was then that Pelletier declared, by the advice of his counsel, that his defense was gagged, declined to defend himself, and dismissed his counsel. The papers were not withheld, but a postponement of the trial was denied. Mr. Linstant in a letter to his client, reviewing the trial, says: 'We were offered the communication of the documents while the court was sitting, as if, while we were attending to the debates and while our attention was riveted upon the testimony of the witnesses we could withdraw ourselves from these important cases to read papers of such importance.' That is a complaint without much substance, intended perhaps as an excuse for having advised his client to make no defense.

"Pelletier also asserts that attempts were made to bribe witnesses to testify falsely against him. The charge is a serious one, but I think it wholly unsustained by any reliable evidence. It rests upon two *ex parte* affidavits made in 1868 by two of the sailors, who had been indicted and tried with the captain and mate of the bark, and upon testimony of the mate, Collar. The affidavits are loose. They speak of attempted bribery at Port au Prince during the trouble there before the bark cleared for New Orleans, not of efforts to obtain testimony for the trial, and Brown's affidavit is principally, if not wholly, a hearsay statement. Collar has testified before me that the American consul came to see him in the hospital, to which he had been removed from the prison, and told him if he would testify falsely against Pelletier he would receive considerable money and get his liberty. If so, it was not the act of the Haytian Government. But the story is too improbable to be believed. The consul must have been Mr. Lewis,

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who was the only consul at that time, and it is inconceivable that he attempted bribery. Besides, Collar, when pressed by repeated inquiries whether the consul asked him to testify *falsely*, equivocated, and after some hesitation said 'he wanted me to testify Pelletier had done an injury there.'

"There are other statements made by Pelletier respecting alleged wrongs of which he could have had no knowledge beyond hearsay, statements entirely uncorroborated. I do not think it necessary to review them.

"After his conviction, and some time in May 1862 he was removed to Cape Haytian—marched, as he says, about 250 miles. (The distance from Port au Prince to Cape Haytien is only ninety miles.) At Cape Haytien he was confined in prison until in the following November or December, when, at the request of Mr. Whidden, then American consul, he was sent back by sea to Port au Prince, where for a time he was confined, and then transferred to a hospital, from which he made his escape on the 11th day of November 1863 and succeeded in reaching Kingston in Jamaica.

"I now come to consider the question which I have thus far waived. It is whether, in view of the law of nations as it was in 1861, the Haytian Government had jurisdiction to try, condemn, and punish the master and to confiscate the bark and other property. The bark was a vessel of the United States, duly registered as such, and the master was a naturalized American citizen. The ship's papers showed this, and they were in the possession of the Haytian authorities. They knew, therefore, that the bark was American. It is true that on the 3d of May 1861 Mr. Lewis, then commercial agent of the United States, joined the British consul-general in a request to the government that the bark and the captain, then under arrest, should not be set at liberty. It is also true that on the 15th of May 1861, upon being consulted by the secretary of state for foreign relations of the republic, the representatives of the foreign governments then present at Port au Prince, including the English, French, and six others, unanimously expressed their opinion that the Haytian Government had authority to take jurisdiction and proceed against Pelletier for the crime of piracy, though the bark was American. But this, while it tends to show that the government acted cautiously, without intention to violate the law of nations, was an insufficient warrant for taking jurisdiction, if in fact that law disallowed it. Later, on the 6th of August 1861, after the indictment had been presented, Mr. Lewis protested against the exercise of jurisdiction in the case by Hayti, and demanded that, in accordance with the laws of nations and those of Hayti, Captain Pelletier, his vessel, and effects should be delivered over to him, in order that they might be sent to the United States, there to be tried. This protest and demand, however, did not avail. The Haytian courts had on that day

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decided, after a protracted discussion, that they had jurisdiction, overruling pleadings to the contrary.

"In this judgment, I think, the Haytian courts were mistaken. They seem to have been guided by the statute law of Hayti rather than by the law of nations, which should have been the rule of decision. I do not deem it necessary to inquire what the municipal law of Hayti was respecting piracy or slave trading.

"What constitutes piracy by the municipal law of a state may not be piracy as understood by the law of nations. The slave trade has been declared to be piracy by the statutes of several nations. But the slave trade was not piracy in the view of that law in 1861, nor is it now, though repeated efforts have been made to have it so regarded.

"It is the general rule of the law of nations that offenses committed by a vessel at sea or on board while in a port of a foreign country are justiciable, or triable, only in the courts of the country to which the vessel belongs.[1] The rule is founded upon the accepted principle that the vessel is regarded as part of the territory of the country to which it belongs, and criminal laws do not extend outside of the country which has enacted them. There are, it is true, some exceptions to this rule. One is to its applicability to offenses committed in foreign ports. If they are committed against the peace of the country where the vessel lies, disturbing it, they are cognizable in the courts of that country. Not so if they are offenses committed by persons attached to the vessel upon others likewise attached and committed on board. But crimes and offenses committed even on board by persons not belonging to the ship are thus cognizable. So also offenses committed on shore, no matter who may be the offender. And piracy, as understood by the law of nations, is also an exception to the general rule. That is regarded as a crime against all mankind, and it is punishable wherever the offender is found, no matter where the offense was committed and no matter what was the nationality of the vessel. These are exceptional cases. The present is not within the description of either. It is the general rule which must now be applied. I am of opinion, therefore, that under the law of nations the courts of Hayti had no jurisdiction to try and punish the master of the bark *William* for any of the offenses he had committed, or to condemn and confiscate the vessel. The offenses charged in the indictment were piracy, misuse of a passenger at sea, extortion by threats from Cortez, at Grand Cayman, a British island, and attempted slave dealing at Fort Liberté, Hayti. The indictment set forth the acts alleged to have been done at sea and at Grand Cayman, which constituted the piracy charged, if there was any. But it is undeniable that none of them were piratical in view of the law of

[1] See the rule of law as to offenses committed in port laid down to the opposite effect, *infra*, p. 1797.

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nations. It may be admitted that had any act been done which the law of nations regarded as piratical the Haytian courts would have had jurisdiction, though the bark was American, for the reason I have stated above. But though acts may have been done which by the Haytian law constitute piracy, those courts could have no jurisdiction over a foreign vessel or its master who had committed them, unless the acts were also piratical under the law of nations, or unless the offense had been committed on Haytian territory. Let it be conceded that a government may lawfully seize in its own ports a vessel and her master when there is probable cause for believing that they are piratical or have piratical intentions, yet, if they belong to another nation, they must be sent home for trial, for the courts of the country where they belong have, by the law of nations, the exclusive right to try them. I speak only of cases where no piratical act has been done within the port or territory in which the arrest is made. For an infraterritorial outrage, the vessel and master may be treated as having forfeited their nationality.

"There has been one decision made by the court of cassation of France in 1832 that at first sight may appear to be in conflict with some of the opinions I have expressed, but a careful examination of it will reveal that it is in entire harmony with them. I refer to the case of the *Carlo Alberto*, reported in Devilleneuve's General Collection of Laws and Judgments for 1832.

"The facts of the case as they appear in the report were as follows: A conspiracy had been formed between persons in Italy and others in France, principally in Marseilles, to execute a plot against the French Government. A commencement had been made by the Italian conspirators in the charter of the steamer *Carlo Alberto* at Leghorn for a pretended voyage to Barcelona. The steamer took on board clandestinely at night the Duchess de Berri and others, in number twelve, who assumed false names, and clandestinely landed the Duchess and six of her suite at night of April 28 or 29, with the aid of a fishing boat, which had watched the passage of the steamer, on the west side of Marseilles, following which and in consequence of it the plot broke out at Marseilles on the morning of the 30th of April. The steamer, with the other conspirators, subsequently put into the French port, claiming to be in distress, when they were arrested. It is apparent that an offense had been committed on French territory by landing a part of the conspirators. This was more than an unexecuted intention to perpetrate a crime. The plot broke out almost immediately in consequence of what was done, and what was done was the act of all the conspirators, for they were acting in pursuance of a common design. What the court of cassation decided was that 'the principle of the law of nations, according to which a foreign vessel, allied or neutral, is considered as forming a part of the territory of the nation to which it belongs, and, conse-

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quently, entitled to the privilege of the same inviolability with the territory itself, ceases to protect a vessel which commits acts of hostility in the French territory inconsistent with its character of ally or neutral; as if, for example, such vessel be chartered as an instrument of conspiracy against the safety of the state, and, after having landed some of the persons concerned in these acts, still continues to hover near the coast with the rest of the conspirators on board, and at last puts into port under pretense of distress.' (Wheaton, part 2, section 104.)

"This case is not at all inconsistent with what I have said, viz, that to justify the courts of a nation in taking jurisdiction of offenses committed by vessels of other nations the offenses must have been committed in whole or in part (not merely planned to be committed) within the territory of that nation. To this rule I find no exception beyond those I have mentioned. Slave trading being not rated as piracy by the law of nations, is not one.

"Such, without enlargement, I understand to be the uiversally acknowledged rule of the laws of nations, and they, I think, determine that the Haytian courts were without jurisdiction. Whatever may have been Pelletier's intentions, or the design of the voyage, it is undeniable that there was no piratical act committed, no act recognized as piratical by the laws of nations, and none was attempted. Evil intentions not carried out are not piracy. No law punishes mere intentions without acts. Abuse of a passenger by the master is not piracy, and if it be admitted that Pelletier extorted by threats property from Cortez at Grand Cayman, it was an offense against British authority there, but it was not piracy.

Nor was there anything done by him in the ports of Hayti that amounted to piracy recognized as such by law of nations. As I have said, I do not care to inquire what the law of Hayti defining piracy may have been. It is another law which is to be the rule of decision in this case; so it is stipulated in the protocol. The false personation by Pelletier at Fort Liberté, the change of the name of the bark, the unwarranted use of the French flag, the false assertions respecting the port of clearance and the port of destination, and the other deceptions practiced there, censurable and wicked as they were and indicative of evil intent, were still not *acts* of piracy. Nor was Pelletier's inquiry of Maximilian at Port au Prince whether he could obtain men and women from Hayti to load his bark with guano at the guano islands an act of piracy, though reasonably awakening suspicions that his intent was slave kidnapping. Nor was his later project (if he entertained it) of giving a ball on his vessel at Fort Liberté and carrying off those invited, unexecuted and unattempted as it was, an *act* of piracy or even slave trading. At most, these were evil intentions not carried out. There was in truth no overt act of piracy, amounting to

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piracy as understood in the law of nations or of slave trading, and none was charged. There was therefore, in my judgment, plainly no jurisdiction in the Haytian courts over the bark or over the master. It follows that having suffered in consequence of the unauthorized and wrongful assumption of jurisdiction by those courts to try and punish him, the Republic of Hayti may be justly required to make reparation to Pelletier for the wrongs he has suffered.

"It remains then to consider what sum should be regarded [as] just reparation. The claims submitted on behalf of Pelletier are primarily three. He claims the value of the bark and her tackle and furniture confiscated, the value of the cargo and money alleged to have been on board when the bark was seized, and compensation for the personal wrongs inflicted upon him, including oppression and unfairness in the judicial proceedings, and his imprisonment.

"He claims also compensation for the losses which he alleges he sustained in consequence of his detention in Hayti. I notice each of these in their order.

"In regard to the first, the claim for the value of the bark and its furniture, I am of the opinion that the claim ought not to be allowed. The evidence satisfies me the claimant was not the owner of the bark. According to his own testimony, though at Key West he took the title in his own name, he afterward, at Mobile, transferred it to Delaunay, in order, as he says, that it might be registered at New Orleans. His memorial, to which he has sworn, made in 1864, states that though he made the transfer to Delaunay, he retained the ownership and took a power of attorney from Delaunay to do with the vessel what he thought proper. He did not then assert that he took a bill of sale, though the memorial was evidently intended to set forth every claim he had in the fullest and largest manner. That assertion was not made until more than twenty years afterward, and not until after Delaunay's death.

"It may be conceded that ordinarily a register in which it is asserted that the person named in it as owner had taken an oath that he was the only owner, is not conclusive or evidence in a contest between that person and another claimant of the ownership. Generally, it has reference to the legal title only. There may be a trust, or an equitable ownership, and the true equitable owner may not know that the vessel has been registered by some other person. But in this case the registry was obtained by Delaunay at Pelletier's instance and substantially in his presence. Delaunay had the legal title, for the bark had been transferred to him by Pelletier. He had also the equitable title, for he had paid all that was paid for it, Pelletier having paid nothing, and therefore had no equitable claim. Under these circumstances I do not see how he could have successfully claimed the ownership as against Delaunay. It is a significant fact that the registry, the manifest, and the clearance were all made on the same day, October 27, 1860, the

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day the ship sailed. Pelletier and Delaunay were together at Mobile on that day. The ship might then have been registered as owned by Pelletier, if he was in fact the owner. There is no conceivable reason why it was not, except that Delaunay owned her.

"Moreover, the great body of evidence tends to prove, as I have already noticed, that Delaunay was the true and only owner and that Pelletier was only the master. Before the transfer Delaunay paid whatever was paid at Key West. Pelletier paid not a cent. Afterward Delaunay settled for repairs at Mobile. He attended to the insurance, if there was any. He attended to the manifest and to the towing of the bark out to sea. He came from New Orleans to Mobile to see the vessel off. All these are indications of ownership. On the other hand, there is not a particle of proof that Pelletier did anything that owners ordinarily do or anything more than appertained to his duty as master. And more than this, he never asserted any ownership in himself until he sent his memorial to Mr. Seward in July 1864, in which, in order to obtain governmental interference, he magnified his alleged wrongs and claimed compensation.

"In his outgoing manifest he styled himself simply master, not master and owner. In his protest at Grand Cayman, December 20, 1860, he denominated himself as 'master' simply. In his letter to Mr. Hubbard, commercial agent of the United States, complaining of the seizure of the bark, dated April 6, 1861, he described himself 'master of the bark *William*, of New Orleans,' and signed 'Antonio Pelletier, master,' only. In his protest of June 21, 1861, while in prison at Port au Prince, he claimed only to have been master, and signed it 'Antonio Pelletier, master of the bark *William*.' And in his letter to Mr. Lewis of August 26, 1861, the day his trial commenced, he signed 'Pelletier, master.' And finally, in his protest of August 31, 1861, written after his trial and conviction, he made only the same claim. Not until the 16th of July, 1864, when he prepared his memorial to Mr. Seward, Secretary of State, and claimed therein nearly two million and a half of dollars for the wrongs he alleged he had sustained, did he ever assert (so far as appears) that he was the owner of the bark, or anything more than the master. It is impossible, in view of this state of the proofs, to come to any other conclusion than that he was not the owner, and, therefore, that he is not entitled to compensation for the loss of the bark.

"And I think, also, he is not entitled to compensation for the loss of the cargo or the money on board. I am convinced that the whole venture was Delaunay's. The lumber that was shipped by Charlock & Co. Pelletier states that he paid for. It may be so, but if he did it is a fair presumption that it was bought for Delaunay and paid for with Delaunay's money. Delaunay certainly paid for everything else. As Pelletier stated, he paid for the bark, when it appears that he did not,

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but that Delaunay did. So it may well be with the lumber, Pelletier being but the agent for the purchase. If the lumber was his, there is nothing to explain its being shipped by Charlock & Co.

"In regard to the money, principally 5-franc pieces, the evidence is quite remarkable. Pelletier's first statement was that he had the money on board, not that it was his. In his testimony before me he has stated that the 5-franc pieces were sent from Paris; that they were consigned to him from Paris. This was manifestly not so. He states that when in New York, some time before the bark *William* was bought, he gave an order for them through Delaunay & Co., and that the purpose in ordering them was to exchange them at Carthagena for gold dust of Antioquia, and that for cut money. But when the order was given, if given at all, it was not known that the bark would be obtained, or that there would be any voyage to Carthagena.

"Later Pelletier testified that Delaunay got the 5-franc pieces and put them on board the ship. To this statement he added: 'I paid for them in money.' When asked in what manner, he replied: 'By the general transactions between the firm and myself,' explaining that 'the firm were cotton brokers, and collected a pretty large share of money, and his share of the profits they used to pay themselves.' This is a singular explanation. The firm of Delaunay, Rice & Co. as such had no interest in the bark or in the voyage, and it was under no liability for any debt due from Pelletier to Delaunay. It is quite unlikely that such a debt, if it existed, was paid by the firm. The firm could not pay it rightfully. Pelletier himself does not profess to have any knowledge or information that the 5-franc pieces were thus paid for. He does not state that he was informed he had been or would be charged by the firm with the money paid for him. He gave no directions for such a charge, and there is not a particle of evidence of any arrangement or understanding that the firm would pay. Yet this he swears was paying for the 5-franc pieces in money. In truth, he never paid anything for them, either directly or indirectly. Now, if this be considered in connection with the other evidence, that Delaunay owned the vessel, and that the claimant was only the master; that Delaunay obtained whatever money was put on board at New Orleans, not from Paris, only three days before the vessel cleared, and himself put it on board late in the day on which she sailed, and that he insured it, if any insurance was taken, without direction or request from Pelletier, it is difficult to believe that the money was not his. Pelletier's giving no attention to insurance is unexplainable if he was the owner of the large sum of money he claims was on board an old vessel partially loaded with lumber, and destined for a voyage of some 3,000 miles over stormy seas, and at a season of the year when storms may be expected. Such is not the conduct of an owner acquainted with shipping and navigation, as Pelletier asserts he was. And then the source from which

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the money was obtained by Delaunay and the uses for which he said it was intended, if the testimony of Moses is to be believed, contribute to show that Pelletier had no interest other than that of a master.

"Reviewing the whole evidence bearing upon the subject, the preponderance appears to me to be greatly in favor of the conclusion that the money on board, whatever its amount was, as well as the bark itself, belonged to Delaunay. I do not therefore feel at liberty to award to the complainant compensation for the loss of either.

"But I think he is justly entitled to compensation for the personal injuries inflicted upon him; for his trial by a court that had no jurisdiction; for his condemnation and imprisonment, and his consequent sufferings. I do not overlook the fact that his conduct had given rise to reasonable suspicions that he was a slaver, and that he had evil designs against the negroes of Hayti. It is no wonder that the populace was excited and that he was treated with insults and buffetings during his marches to the prisons at Cape Haytien and Port au Prince, as he undoubtedly was. But his treatment by the inferior officers of the government was harsh. His being marched in irons was unnecessary severity.

"His imprisonment was severe, even cruel, and his food was scanty and unsuited to his condition.

"The cells in which he was confined were small, damp, and unhealthy. For a considerable time before his removal to the hospital he was kept in irons in his cell. It matters not that he was treated as it was the habit of the Haytian Government to treat its prisoners. His sufferings were none the less on that account, and they were sufferings that the government had no right to inflict. For all this compensation is due.

"And I do not forget that a long time has elapsed since it was due. For all that I make allowance. Pelletier claims also on account of alleged losses of investments of real estate, and claims in consequence of his imprisonment. These are not proved, and if they were, they were too remote consequences, if consequences at all.

"Upon the whole, I award to Antonio Pelletier and against the Republic of Hayti, for the claims of the former, the sum of *fifty-seven thousand and two hundred and fifty dollars.*

"Witness my hand the thirteenth day of June 1885, at the city of Washington.

"WILLIAN STRONG, *Arbitrator.*"

"AWARD OF THE ARBITRATOR IN THE CLAIM OF A. H. LAZARE AGAINST THE REPUBLIC OF HAYTI.

"THE AMERICAN AND HAYTIAN CLAIMS COMMISSION,
"*Department of State.*

"In pursuance of the protocol, dated May 28, 1884, between the Hon. Frederick T. Frelinghuysen, Secretary of State of the

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United States, and the Hon. Stephen Preston, envoy extraordinary and minister plenipotentiary of the Republic of Hayti, representing their respective governments, after having taken before the Chief Justice of the United States the oath required by the fourth article of the protocol, I have investigated the claim of A. H. Lazare against the Republic of Hayti, and I now make the following statement and *award:*

"This claim grows out of a contract between the Government of Hayti and Mr. A. H. Lazare (made in September 1874, and amended in some particulars on the 11th of May 1875), which the claimant alleges that the government wrongfully violated and declared annulled. The formation of the contract is admitted by the protocol. The third article of that instrument contains the following:

"'The following facts as to the claim of A. H. Lazare are admitted by the Haytian Government:

"'That Lazare entered into a written contract with the Haytian Government September 23, 1874, for the establishment of a national bank at Port au Prince with branches, the capital being fixed at first at $3,000,000, and afterward reduced to $1,500,000, of which capital the government was to furnish one-third part and Lazare two-thirds; that the bank was to be opened in one year from the date of the contract, and an extension of forty-five days on this time was granted on Lazare's request, and that on the day on which the bank was to be opened the Haytian Government, alleging that Lazare had not fulfilled his part of the contract, declared, in accordance with the stipulations of article 24, the contract null and void and forfeited on his, Lazare's, part.'

"Such is the extent of the admission. The entire contract is before me. Its leading purpose was, as stated, to secure, through the agency of Mr. Lazare, united with the action of the government, the establishment of a national bank at Port au Prince, with branches in other cities of Hayti. By its first article a concession was made to Lazare of an exclusive right for thirty full and consecutive years, commencing at the expiration of the twelve months specified in article 23, to establish in the republic a bank styled Banque Nationale d'Haïti.

"The twenty-third article described the twelve months as beginning at the time of the signature of the contract, which was in September 1874. The right granted to establish the bank became operative, therefore, only in September 1875. In this particular the concession was thus of a future right. The contract, however, made provision for various things to be done preparatory to the establishment of the bank. Hence, it is necessary to examine these, which are set forth in several articles. Some of them imposed obligations upon the grantee of the concession; others required from the government the performance of particular duties, and others still described the privileges to be enjoyed by the bank when established and the duties it should be required to perform.

"Though it was not contemplated or allowed that the bank

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should be established until the expiration of a year from the signature of the contract, it was necessary that preparation should be made for its establishment. For this, several articles made provision. A bank building with outbuildings and buildings for the branches were necessary. Accordingly, Mr. Lazare undertook the duty of procuring the necessary materials, forwarding them to Port au Prince and having the bank building and warehouse erected on ground to be furnished by the government.

"The government assumed the obligation to pay the regular bills for the articles he would require for the construction of the bank building and warehouse at Port au Prince, and its branches at two other places, to the amount of 200,000 piasters (dollars), which amount, however, was to be carried to the credit of the republic and to be repaid with interest. The contract imposed upon Mr. Lazare the further duty of having all the articles required for building the bank and warehouse arrive at Port au Prince within seven months from the signing of the contract, and having the buildings finished within four months thereafter; that at the expiration of the last of the twelve months, 'these establishments being finished should be in full operation.'

"Such was the requirement of the twenty-third article. By the eighteenth article, as amended, Mr. Lazare was required to pay all the preliminary expenses connected with the creation and establishment of the bank, and at the end of the thirty years the establishments constructed for the bank and its branches, including the warehouses, were required to be delivered to the Government of Hayti in good repair. Such were the principal duties assumed by Mr. Lazare, to be performed by him preparatory to the opening of the bank, except such as related to providing the necessary capital.

"In relation to the capital, the thirtieth and thirty-first articles are important. By the thirtieth the government, acting by Mr. Rameau, its authorized agent, engaged to subscribe to the bank as shareholder for the sum of 1,000,000 piasters (dollars), which amount it bound itself to pay at the office and deliver into the vaults of the main bank 'as soon as the complete organization of the establishment was effected and duly ascertained or lawfully declared' (*dument constatée*).

"By the thirty-first article Mr. Lazare bound himself to pay at the office of the main bank, in order to be deposited into the vaults, the sum of 2,000,000 piasters (*p.* 2,000,000), '*so as to complete the amount of stock of bullion,*' *which was fixed at* '*three millions of piasters*' (*p.* 3,000,000).

"(By an amendment of the thirtieth and thirty-first articles, made May 11, 1875, it was agreed that the government and Mr. Lazare should be obliged to deposit in the vaults of the bank only half of the sum subscribed, the other half to be called for at such dates as should be fixed by the *direction générale* of the bank.)

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"It is to be observed the thirtieth article fixed the time when the government was required to make its payment into the vaults of the bank. The thirty-first did not expressly declare when Mr. Lazare's payment should be made. I think, however, it may be fairly inferred from the whole contract that it was required to be made before the bank should go into operation—that is, before or at the expiration of twelve months from the signing of the contract or before or at the expiration of the forty-five days to which the time for opening the bank was subsequently extended. But it is manifest that Mr. Lazare was not bound to pay in his share of the capital before the government paid in its share.

"His share was to be paid '*to complete*' the capital partially supplied by the government.

"It is material also to observe that the contract required all the capital to be paid in metallic currency. In regard to this there is no controversy. The payments are described as bullion, and the twenty-first article declared that the stock of bullion of the bank should consist of coins of gold and American silver and fractions of the same, preference, however, being given to English and French gold and silver, subject to suitable agreement, and no agreement to the contrary appears to have been made.

"Thus far, I have noticed principally the obligations which Mr. Lazare assumed and to which he was bound by the contract. Before considering other provisions, it may be well to review what he did toward meeting those obligations. Soon after the contract was signed he returned to New York, abandoned other occupations in which he had been employed, and devoted himself to the preparations necessary for the establishment of the bank. He had been prominently connected with a railroad company and had been president of a steamship line. These positions he appears to have given up. He procured the materials needed for the bank buildings, shipped them to Port au Prince, employed an architect, made arrangements with a builder for the erection of the buildings, commenced the work of putting them up and had the main building completed within the time limited by the contract. He also made arrangement for the engraving of the currency needed by the bank. In fact, he appears to have done all that the contract required him to do before opening the bank for business at the expiration of the year and forty-five days from September 1, 1874, when the contract was signed, unless his not paying into the office of the bank his stipulated share of the capital on or before that day was a default. In December 1874, he went to England and there made arrangements with the house of Benson & Co., then bankers of high standing, that they should furnish the $2,000,000, the sum he had agreed to pay in for his share of the capital of the bank. Mr. Benson, however, thought the capital too large and advised him to return to Hayti and obtain a modification of the contract in

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relation to the capital. He did, therefore, go again to Hayti in the beginning of May 1875, and soon after (May 11, 1875) several amendments of the contract, among them the one reducing one-half the amount of the capital required to be paid in, were agreed to, thus making the government's share *p.* 500,000 and Mr. Lazare's *p.* 1,000,000 (dollars). At the same time the statutes or by-laws for the government of the bank when established were adopted by the contracting parties. Mr. Lazare then returned to London. On his arrival he found that the firm of Benson & Co. had failed.

"He then opened negotiations with two other banking houses of London and one of Liverpool and obtained from them an agreement that they would furnish what he needed for his share of the bank capital. Having secured this he engaged a secretary for the bank and a manager, went to Paris, purchased books for the installation of the bank, paper and blank forms in the French language, and all the furniture needed, and shipped them to Hayti. In the latter part of July 1875 he returned to Port au Prince, taking with him his family and also Mr. Verdereau, whom he had engaged as secretary for the bank. When in Paris during the summer he had learned, as it appears, for the first time that the Haytian Government had effected loans and was effecting others, for the payment of which the customs of Hayti had been and were being pledged. These customs were by the fourteenth and fifteenth articles of the contract pledged to secure repayment of the sums which by those articles the bank was required to advance from time to time to the government. This pledge to the bank was a matter of great importance. It might have been of vital importance. By the fourteenth article the bank was bound to furnish the annual budget voted by the legislative chambers of the republic (*à bureaux ouverts*) with open doors, or, as I understand it, at once, promptly, on demand, but to be reimbursed out of the amount (*sur le montant*) or sum total (as the the phrase is defined in the dictionary of the French Academy), with interest to be fixed by the bank, but never to exceed 12 per cent per annum.

"True that by the amendment of May 11, 1875, it was agreed that the bank should not be compelled to deliver to the government, in pursuance of article 14, any sum that, added to the sums already advanced, should exceed $1,000,000. But even this sum was two-thirds of the proposed paid-in capital of the bank, and, in addition to this, the fifteenth article bound the bank, in case the government should find itself in difficulties demanding extraordinary expenses, apart from those voted for the budget, to furnish the government with the amount it might require, at the same time reserving sufficient capital to carry on its operations, on condition of reimbursement, with interest, in the conditions before mentioned; that is, out of the total of the customs. The article made no other limitation of the amount the government was given the right to require.

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It need not be said that such obligations resting on the bank might have proved, and probably would have proved ruinous, unless it was assured of ability to obtain prompt reimbursement of its advances out of the customs. The bank could not afford to wait until other creditors of the government were satisfied. These articles, the fourteenth and fifteenth, raise at least a strong implication that the bank should have the security of the amount or totality of the customs. They practically represented that the government had such security to give; that it still had an unrestricted right to pledge them, as it undertook to do, to the bank.[1]

"But the fact was that the government had granted away this right. I think it appears that the customs were then pledged for the payment of what is called the French 'double debt,' in amount 80,000,000 of francs, though this is not very distinctly proved. But it is certain that after the contract was made the government pledged the customs, in fact, all the general revenues of the republic, to secure the payment of two other loans negotiated, agreeing in the one case that the amount of duties collected should be paid at Port au Prince into the hands of the representatives of the creditors up to the sums required for the payment of the loan, and in the other binding itself to appropriate to no other use the proceeds of 45 per cent of all the customs duties of the republic given in security of the loan until a complete payment. I can not but regard these pledges as violations of the contract with Mr. Lazare.

"They impaired the value of the concession made to him. They endangered the credit and safety of the bank he was authorized to establish, and in which he and his associates were expected to invest a large capital. It is no wonder that he and those who had agreed with him to take two-thirds of the stock of the bank, and pay for it $1,000,000, were disturbed by the ascertainment of these pledges and led to distrust the good faith of the Haytian Government. As I have said, I

[1] The text of the articles referred to by the arbitrator was as follows:

"ART. 14. In return, the bank formally binds itself to furnish the annual budget voted by the legislative chambers with open doors, to be reimbursed out of the proceeds of custom duties, in a fixed proportion, with interest fixed by the bank, and which, in no case, should ever exceed 12 per cent per annum. The above-mentioned payment of the budget shall be made by the bank in gold, silver, or currency, in the proportion desired by the government. All surplus to the credit of the government shall bear reciprocal interest.

"ART. 15. In case the government should find itself in presence of difficulties demanding extraordinary expenses, apart from those for the budget, the 'Banque Nationale d'Haïti' binds itself to furnish the government with the amount it may require, at the same time reserving sufficient capital to carry on its operations, and on condition of reimbursement, with interest, in the conditions above mentioned."

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do not find that Mr. Lazare had any knowledge of this action of the government until the summer of 1875. His return to Hayti in July was to endeavor to obtain some arrangement of this matter. In this he was unsuccessful. Mr. Rameau, the high officer of the government and its authorized agent in making the contract, received him coolly. The evidence convinces me that he (Rameau) was no longer desirous that the bank should be opened.

"When Mr. Lazare desired to have some arrangements made respecting the customs and to have the government's share of the capital paid in, in order that the good faith of the government might be assured, Mr. Rameau replied, 'I will see to it when I have time.' He never did see to it. He made no denial that the pledge of the customs for other loans of the government was a breach of faith with the bank and Mr. Lazare. He did not deny that it was the duty of the government to give that subject its immediate attention. For some reasons, into which it is not necessary to inquire at length, Mr. Rameau was not at the time friendly to Americans, and Mr. Lazare was a citizen of the United States. Moreover, the Haytian merchants were opposed to the bank. They were doing for the Haytian Government a kind of banking business. Whatever may have been the cause, I think it manifest that there was then no longer any desire of the government that the contract with Mr. Lazare should be carried out. There was rather a purpose to avoid its consummation, if possible. If Mr. Monsanto, who by the statutes of the proposed bank had been appointed to act on the part of the government, is to be believed, Rameau said he had changed his mind and did not want Mr. Lazare to open the bank; that the merchants were opposed to it, and that he wanted the keys of the bank building. Of these there were two, one of which the government had, and Mr. Lazare had the other. It was then—about the last day of September—Rameau sent a government messenger for Mr. Lazare's key. When it was refused, he sent again, the messenger saying, 'You had better not have any trouble. You had better give me the key.' From prudent motives it was surrendered, and thus Mr. Lazare was wrongfully excluded from the bank building.

"Thus matters remained till the 15th of October 1875, the day upon which, by the provisions of the contract as amended, the bank was to be ready for going into operation, and when the capital was required to be in the vaults. Then the government ostentatiously made a pretense of paying in its share of capital, and immediately instituted an *ex parte* proceeding (*procès-verbal*) to declare that it had performed its part of the contract. This payment was a mere pretense, an attempted fraud upon Lazare.

"What was deposited in the vaults was $235,000 only in coin. The remainder of the $500,000 (the government's quota, what it was bound to deposit) consisted of bonds, I. O. U.'s,

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and promises of individuals to pay certain sums. It can not be admitted that such a deposit was a fulfillment of the government's obligation imposed by the thirtieth article of the contract. Yet, because Mr. Lazare did not then pay in his share of the capital in specie, though he was ready and able to pay in drafts on reputable English bankers, who had agreed to pay his drafts, the Haytian Government immediately declared the contract null and void, and notified Lazare of the annulment.

"It is impossible for me to regard this action of the Haytian Government as either just or warranted by any provisions of the contract. The government had no right to declare the contract at an end, and its action in this particular was a great wrong to the claimant. It was itself in default. It had not performed its part of the contract. Beyond the breach of the agreement in regard to the customs duties, it had not paid into the vaults of the bank its share of the capital, as it had covenanted to pay it. I can not read the contract as allowing one party to it to declare it void if the failure to carry out its provisions was due, either in whole or in part, to that party. It has been contended before me that the action of the government was justified by the twenty-third and twenty-fourth articles of the agreement. They were as follows:

"'ART. 23. Twelve months are allowed to Mr. Lazare, dating from the time these presents will be signed, for the (*fonctionnement*) working, or working order of the main bank; that is to say, that within seven months from the same date the whole of the materials necessary for the construction of the said bank and warehouse shall be delivered at Port au Prince; that within four months afterward the aforesaid buildings shall be finished, and that at the expiration of the last month, those establishments being finished shall be in full operation.

"'ART. 24. The nonperformance of this last condition within the twelve months prescribed, even in the case the work should be commenced, would involve of full right the nullity of the present contract and leave the government free to act as it might please.'

"The condition referred to in the twenty-fourth article is the one described in the twenty-third. It is not clear to my mind that the subject of that, in contemplation of the parties, was anything more than the bank building, its completion, furniture, and readiness for banking operations. Those were all in working order before the expiration of the twelve months. It is to be observed, as already noticed in the provisions of the first article, the concession to establish the bank did not come into operation until after the expiration of twelve months. But if it be conceded that the twenty-third article was intended to make it a condition not merely that the bank buildings, called establishments, should be finished and furnished, but that the bank itself should be in operation, doing business immediately at the expiration of the twelfth month, it was a condition im-

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posed upon both parties of (*sic*) the contract. The bank as such could not go into operation—that is, commence business—until its capital was paid in. The condition therefore required the government to pay as certainly as it required Mr. Lazare to pay, and if the condition was broken, it was broken by the government.

"I can not but think it would be unreasonable to construe the twenty-third article as meaning that if the government of Hayti declined or neglected to perform its part of the contract it should be at liberty to annul the whole agreement and thus release itself without performance. If such be its meaning the contract was no contract at all. Either party could dissolve it at will by simply neglecting to meet its engagements. Such a construction would, in my opinion, be absurd.

"The Government of Hayti has, therefore, in my judgment, no justification for its action declaring the contract null and refusing to acknowledge any obligations under it. Of that action Mr. Lazare has a just right to complain. This is especially true, in view of the twenty-sixth article of the contract, which stipulated that 'in case of any difficulties arising in regard to the present contract, or from any other unforeseen cause which might arise in regard to it, arbitration will be the only means of settlement acceptable by the two parties.' That article provided further for the selection of arbitrators, and declared that their decision should be binding and obeyed without appeal. But if the government could lawfully annul the contract, or declare it void, its action annulled that article with the others, and took away from Mr. Lazare his right to have the differences between himself and the government passed upon by an arbitration. That difficulties had arisen has already been shown, particularly that arising from the pledges of the customs. There were others proper to be submitted to the arbitrators. Mr. Lazare had claimed that the government was bound to pay its share of the capital before the expiration of the twelve months, and he insisted that the payment should be made when he returned to Port au Prince, after he had discovered that the government had made other pledges of the customs. And it has been strenuously argued before me that the government was at that time in default, in that it had not deposited in the bank vaults its part of the capital in the preceding May (1875), when it is alleged that the complete organization of the bank was effected and duly ascertained, as contemplated by the thirtieth article, to which reference has heretofore been made. It was on the 11th day of May 1875 that the statutes, as they are called, or by-laws for the bank were framed and agreed to, and on the 22d of that month the government published a notice in the official paper of the state declaring *inter alia* that the joint stock company with the name of the National Bank of Hayti was formed. The notice stated also the amount of the capital of the company, the number of

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its shares, the mode of transfer, the sum to be paid on subscribing for shares, the location of the main office; that A. H. Lazare and C. E. Monsanto, jr., were appointed administrators, the latter chosen by the government; that the local directors would be appointed subsequently; that persons skilled in the business would be sent from Europe to direct the operations of the bank, and that a subsequent announcement would fix the time for opening subscriptions.

"I can not agree that all this, although claimed by Mr. Lazare, was such an effecting and ascertaining the complete organization of the establishment as was contemplated by the thirteenth article, and upon which the government was bound to pay in its share of the capital, and I see no evidence that it was so understood by the parties. The formation of the company and the organization of the bank were two entirely distinct things. The statutes, or by laws, agreed upon May 11, 1875, were intended to operate preparatory to the organization of the bank, as well as to govern its operations after it should come into existence. They, as well as the notice of May 22, contemplated that many things should be done before the bank could be in a condition to commence business or could be regarded as organized. The banking company had then no capital; not a piaster had been paid in; there was not a shareholder; the directors were yet to be chosen, and persons to be sent from Europe to direct the operations of the bank. More than this, the bank had no right to exist until the expiration of a year from September 1875, and the bank building was not erected or required to be erected until after May of that year.

"It can not, therefore, be maintained that the claim of Mr. Lazare in this particular is sound, namely, that the government was bound to deliver in May 1875 into the vaults of the bank any part of the capital it had agreed to furnish. In this particular the government was not in default. It had an entire year from the signing of the contract—afterward extended to October 15, 1875—within which to make the deposit. But within that period it was bound to deposit in the vaults $500,000 in specie, and I think it was under obligation to make that deposit before Mr. Lazare was required to pay in his one million—the remainder of the capital. There is a very observable difference between the thirtieth and the thirty-first articles of the contract. By the thirtieth, which prescribed the duty of the government in that regard, it (the government) bound itself to pay at the office and deliver into the vaults of the main bank, the seat of which is at Port au Prince, the sum of one million of piasters (*p.* 1,000,000) 'as soon as the complete organization of the establishment is effected and duly ascertained.' Thus the time for the government's payment was expressly fixed. But the language of the thirty-first article, which relates to Mr. Lazare's obligation to pay, is noticeably different. It fixed no time for his payment, except by implication. It commenced thus: 'In consequence' (*en conséquence*)

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(as I understand it, following the deposit by the government). The entire article I quote:

"'In consequence, Mr. A. H. Lazare, upon his own special guaranty, assumes charge and responsibility, as in fact he has personal charge and responsibility, for the balance of shares or bonds to be issued by himself on his own account or his copartners conformably with article second of the present additional contract, and binds himself for his part to pay at the office of the main bank, in order to be deposited in the vaults, the sum of two million of piasters (*p.* 2,000,000) *so as to complete the amount of stock of bullion, which is fixed at three millions of piasters* (*p.* 3,000,000).'

"(As heretofore seen, these payments were arranged to be reduced one-half.) No doubt, though no time was designated for his payment, it is a fair construction of this article that Mr. Lazare was bound to pay his share of the capital immediately after the government paid its share; or at least in season for the opening of the bank on the 15th of October. But he was not bound to pay until the government paid. It was the '*balance*' of shares he covenanted to care for. His payment was required to be made to *complete* the stock of bullion in the vaults, to fill up or complete an aggregate, of which the government's payment was a part. There was a substantial reason for this difference in the covenants of the parties. The bank was intended, primarily, for the convenience of the government. The bank buildings were to be owned by the government, though it was to pay, and did pay, for the materials used in their construction. Mr. Lazare was to attend to procuring and forwarding the materials, and to have the buildings completed and furnished. He was to furnish two-thirds of the capital of the bank. Had he been required to pay it in at any fixed time, or before the government was required to pay its quota, it could not have been withdrawn unless at the government's pleasure, even though the government neglected to pay its share. That was a hazard it could not have been expected a sane man would have run. It was no more than reasonable security to ask or to give that the government should first pay in its one-third of the capital, and its reasonableness becomes additionally evident when the government demanded and obtained both the keys of the bank building, and thus denied to Lazare all access to it except at its will. But if this construction of the thirty-first article be not maintainable, it is still certain that Lazare was not bound to pay before the government paid. Admit that the covenants required contemporaneous payment, the government never paid, as it was required to pay, and therefore Lazare can not be adjudged to have been in such default as to justify the government for declaring the contract null. Considering what Mr. Lazare had done and expended in preparation for the establishment of the bank, having done everything that he had engaged to do up to the last, and considering the extent of his readiness to meet the

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only remaining requirement of the contract from him, I think it would be rank injustice in the government to deprive him of the advantages of what he had done and expended, and of the value of the concession, by making a semblance of performance of its engagements and declaring the contract annulled because he did not pay what he was not bound to pay before the government discharged its covenanted duty. Nor can I overlook the fact proven that what the government did in making its pretended payment, and what it claimed to be full performance of its part, was precisely what it refused to accept as performance by Mr. Lazare. The largest part of its deposit consisted of credits.

"For the losses and injury sustained by him in consequence of the unjustifiable action of the Haytian Government in annulling the contract and thus revoking its concession, I think the Government of the United States may properly demand that Mr. Lazare shall be compensated. I agree that both at common and in the civil law one of the two parties to an executory contract containing mutual and concurrent engagements can not generally recover damages against the other for a breach of that other's engagements without full performance on his own part. But a violator of such contract can not defend himself against responsibility for his violation by pleading that the other party has failed to perform fully his part of the contract, if the failure was caused by the conduct of the defendant. In this case if Mr. Lazare was not bound to pay his share of the capital until the government paid or deposited its share, there was no default on his part, and if he was bound to pay his share regardless of the fact that the government made no payment, or made only a pretense of payment, depositing most of its share in credits, a mode of payment it denied to him, I can not but think his default was excusable, because caused by the government's conduct. In either case he is, in my judgment, justly entitled to claim compensation for the wrongful annulment of the contract, and his claim is one which the United States may properly assert in his behalf in full accordance with the rules of international law as they existed at the time and as they exist now.

"It remains, therefore, to inquire what should be the compensation awarded. The value of the concession made by the contract to Mr. Lazare, and lost by him in consequence of the wrongful action of the Haytian Government, it is difficult to estimate, though it must have been large. The expenditure of time and money he made in procuring and forwarding the materials for the buildings and providing for their erection, the cost and time required in Europe in making arrangements there, as well as in procuring and forwarding the furniture and forms for the bank, the expense of removing his family to Port au Prince and maintaining it there, are all to be considered. Even in regard to these it would be difficult to reach a reliable conclusion.

"But, happily, the Government of Hayti, subsequent to its repudiation of the contract, made its own estimate of what was

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reasonable compensation to Mr. Lazare. Mr. Rameau was a leading officer of the Haytian Government. He was vice-president of the council of secretaries, a nephew of President Domingue, and, according to the evidence before me, in fact more the acting President of Hayti than Domingue himself. As stated by a very intelligent Haytian, a senator of the republic at the time and one who had been treasurer-general and minister of finance, 'he was the ruling spirit of the whole government.' He signed the original contract made with Lazare in the presence of the secretary of state and the secretary of the interior, and the contract was sanctioned by the legislative assembly. He, in conjunction with Lazare, attended to the matters preparatory to the proposed establishment of the bank. The statutes, or by-laws, were framed by him and Lazare, and he appears to have acted throughout and unquestioned on behalf of the government. I can not doubt that all his acts in relation to the contract must be regarded as acts of the government.[1]

"On the 18th of October 1875, after the government had notified Mr. Lazare the contract was void or at an end, practically that it would no longer be bound by its engagements, Mr. Lazare made out a protest against the action of the government, in which he complained that more than half of the deposit made in the vaults of the bank on the 15th consisted of bonds, drafts, and other papers, a mode of payment denied to him, but which he was ready to make. The protest also denied the right of either contracting party to appoint itself judge and, without the consent of the other contracting party, to annul the contract, which right it asserted belonged only to a third party (evidently referring to the provision in the contract for arbitration). This protest was sent to the government. Soon after, before the end of October, Mr. Rameau sent for Lazare, and an interview took place. Rameau then said he was sorry for what had happened; that he would like to have opened the bank, but he could not do it. Pressure was brought to bear, so that he was obliged to break the contract. The merchants were against it, and there was fear that revolution might break out, and the merchants would help the enemies of the government. Such were Mr. Rameau's statements. He made no charge that Mr. Lazare had been in default; none that Mr. Lazare had broken the contract or done anything that justified

[1] During the examination of Lazare, at the hearing of his case, questions were asked by his counsel with a view to show that Rameau was substantially the Government of Hayti. In regard to these questions the arbitrator remarked: "He [Rameau] acted in making this contract. But it would seem, from the admission in the protocol, that he had power to act in making the contracts. But it does not seem to me, by the testimony of the witness who made the contract, that he had power to release the government, or that he had power to bind the government in any other way than to make that contract."

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its annulment. He never afterward made any such charge. On the contrary, he admitted that *he* had broken the contract, and he desired to make reparation. It was to agree upon this that he had sent for Mr. Lazare. Negotiation ensued. Lazare claimed $500,000. Mr. Rameau offered less, and it was finally agreed that Lazare should be paid $117,500; that he should be appointed consul-general at New York, and be given also two small orders for the purchase of vessels for the government. To induce the acceptance of these it was promised that he should have a contract for building a national palace, and also that the government would purchase an equestrian statue of Domingue at the price of $20,000. To this settlement Lazare agreed and Domingue expressed his assent. The arrangement was partially carried out. The appointment to the consul-generalship was made, and, though it was revoked afterward on the incoming of the new revolutionary government, the revocation was not inconsistent with anything that had been agreed. The two orders were given. The contract for the palace does not appear even to have been desired by Lazare, though it was arranged for him. It certainly was not denied to him. The $117,500, however, was not paid, though promised to be paid soon, and I think the sum probably would have been paid had not a revolution soon followed the arrangement. The new government repudiated the acts of its predecessor.

"I regard this arrangement between Mr. Lazare and Mr. Rameau (who, I think, under the circumstances, had authority to make it) as very significant and of much importance. At least it was practically an acknowledgment that the government owed reparation to Mr. Lazare; that its annulment of the contract for the concession was unjustifiable, and that Mr. Lazare was not in fault, and I think it is fair to regard it as evidence of the government's estimate of the extent of the reparation due. Throwing out the promise to give a contract for building the national palace, the profits upon which, if any, are too speculative to be capable of estimation, and throwing out also the promise to pay for the statute (that having never been delivered) I can not resist the conclusion that the agreement to pay $117,500 was, in view of what was said at the time, an acknowledgment that to that extent Mr. Lazare had been injured by the wrongful annulment of the contract. Moreover, I am much inclined to think that the agreement to pay $117,500 should be regarded as a contract and enforceable as such, a compromise of an acknowledged obligation or at least of a doubtful right. It is true that the civil code of Hayti existing in 1875, after defining a compromise as a contract by means of which the parties interested foreclose an existing dispute or prevent a dispute from arising, declared that the contract should be in writing. But the civil code is the law for private parties. It is not clear that the provision referred to is binding upon the government, not mentioned in the statute. This, however, [it] is not now necessary to consider

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at length. It is enough for the present case that what occurred or was said when the agreement was made may reasonably be regarded as an admission by the Government of Hayti of the measure of reparation due to Mr. Lazare.

"It matters not that Rameau was shortly afterward killed, and that Domingue, the President, fled the country. Boisrond Canal succeeded to the administration. But no change of admistration could release the government from obligations binding upon it when the change took place.

"I am, therefore, of opinion that A. H. Lazare has a just claim upon the Republic of Hayti to the extent of one hundred and seventeen thousand five hundred dollars, with interest from November 1, 1875, at six per cent, and I award that sum for the claim against the said republic.

"Witness my hand the 13th day of June 1885, at the city of Washington.

"WILLIAM STRONG, *Arbitrator*."

Impugnment of the Awards.

By Article VI. of the protocol the contracting parties bound themselves to give effect to the arbitrator's decision, but no period was prescribed within which the awards, if in favor of the claimants, should be paid. Soon after the awards were rendered, counsel for Hayti endeavored to obtain from Judge Strong a rehearing of the Lazare case, on the ground of alleged newly discovered evidence, but he declined to grant their application, "solely for the reason," as he afterward stated, that in his judgment his "power over the award was at an end" when it "had passed from his hands and been filed in the State Department."[1] Counsel then appealed to the Department of State, and an effort was made to have the award in the case of Pelletier, as well as that in the case of Lazare, opened and set aside. Indeed, in the case of Pelletier the Haytian minister filed a formal protest, in which he maintained that the award was induced by a clear mistake by the arbitrator as to his jurisdiction under the protocol.[2]

Mr. Bayard's Report.

December 8, 1886, a resolution was adopted by the Senate, requesting the President to communicate to that body, "if not inconsistent with the public interests, copies of the awards made by the arbitrator in the case of Antonio Pelletier and in the case of A. H. Lazare against the Republic of Hayti, under

[1] Mr. Strong to Mr. Preston, February 18, 1886, S. Ex. Doc. 64, 49 Cong. 2 sess. 43.

[2] Mr. Preston to Mr. Bayard, November 18, 1886, For. Rel. 1887, p. 630.

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a protocol made by and between the Secretary of State of the United States and the minister plenipotentiary for the Republic of Hayti, dated 24th May 1884, together with such action as may have been had in relation thereto."[1] This resolution was referred to the Secretary of State, Mr. Bayard, who, on January 20, 1887, submitted to the President a report, which the latter communicated to the Senate, holding that neither the award in the case of Pelletier nor that in the case of Lazare should be enforced. The reasons for this conclusion were set forth, those in the case of Pelletier being stated first.[2]

Pelletier Case.

Mr. Bayard stated that the case of Pelletier was first brought to the attention of the Department of State by a dispatch dated April 13, 1861, from Mr. G. E. Hubbard, commercial agent of the United States at Cape Haytien, who reported that Pelletier was under arrest in Hayti on the charge of attempted enslavement in Haytian waters of Haytian citizens. Mr. Seward, then Secretary of State, after a prolonged correspondence, finally refused, on November 30, 1863, to interfere with the action of Hayti in the matter, taking the position, in an instruction to Mr. Whidden, then United States commissioner in Hayti, that "his [Pelletier's] conduct in Hayti and on its coasts is conceived to have afforded the reasonable ground of suspicion against him on the part of the authorities of that republic which led to his arrest, trial, and conviction in the regular course of law, with which result it is not deemed expedient to interfere."

Mr. Bayard further stated that early in 1864 Pelletier escaped from Hayti, and on July 16 of that year presented to the Department of State a long memorial. This memorial, with other papers in the case, was sent to the House of Representatives, in compliance with a resolution of that body, on April 3, 1868. No further action was taken upon it by the Department of State, nor was further action taken upon it by the House. In 1871 Pelletier made another application to the Department of State, with the result that he was informed by Mr. Bancroft Davis, Acting Secretary, September 26, 1871, that the Department had "found no reason to dissent from the opinion of Mr. Seward in regard to the case in his instruction to Mr. Whidden, United States minister to Hayti, of the 30th

[1] S. Ex. Doc. 64, 49 Cong. 2 sess.

[2] Ibid.

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of November 1863." Pelletier next applied to the Senate, where his case was referred to the Committee on Foreign Relations. On June 9, 1874, Mr. McCreery presented from that committee a unanimous report sustaining the views of Mr. Seward. In this report the opinion was expressed, after an examination of the facts, that if, as the claimant contended, the Haytian courts had no jurisdiction of the charges against him, the citizens of Hayti might "be said to hold their lives, their persons, and their property at the mercy of any corsair who may choose to deprive them of either." The claimant then applied once more to the House of Representatives, securing the presentation to that body on January 11, 1878, of a further memorial and documents; but a resolution was adopted by which the House declined to make any recommendation in regard to the claim.

Having thus detailed Pelletier's failures to obtain favorable action by the Executive or by Congress upon his claim, Mr. Bayard stated that the claimant on January 22, 1878, again appeared before the Department of State "with a series of *ex parte* statements which were referred to Mr. O'Connor, then examiner of claims," who made two reports, one on February 9, 1878, and the other on March 29, 1878, in the latter of which he maintained that there was ground for a demand on Hayti for redress. On the basis of this report instructions were sent to Mr. Langston, then minister to Hayti, who, in presenting the matter, declared that he was instructed to propose "a prompt and impartial arbitration" of the claim, and to state that in default of such an arrangement the Government of the United States would "require its satisfaction." "Under this pressure," said Mr. Bayard, "the Government of Hayti, which had at first peremptorily refused to arbitrate, ultimately consented to an arbitration."

Mr. Bayard then referred to the remonstrance of Hayti of November 18, 1886, against the execution of the award, and, after narrating the circumstances in which the claim originated, cited Judge Strong's declaration as arbitrator that the voyage of the bark *William* was, in his opinion, "illegal;" that "its paramount purpose was to obtain a cargo of negroes, either by purchase or kidnapping, and bring them into slavery in the State of Louisiana;" and that, "beyond doubt," "had the bark been captured and brought into an American port, when she was seized at Fort Liberté, she would have been condemned

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by the United States courts as an intended slaver." Upon the facts, as established in the record and admitted in these declarations of the arbitrator, Mr. Bayard stated that he was constrained to come, on the question of Hayti's jurisdiction, "to a conclusion in direct conflict with that reached by the learned arbitrator." In this relation Mr. Bayard maintained (1) that Pelletier, as held by the Haytian courts, by the Senate Committee on Foreign Relations in 1874, and by Judge Strong in 1885, visited Hayti in 1861 for the purpose of abducting and enslaving Haytian citizens; (2) that he made, when in Haytian waters, such preparations for carrying out this plan as would, if he had not been arrested, have ended in its accomplishment; (3) that such action on his part in Haytian waters constituted, both by the common law and by the French law in force in Hayti, a criminal attempt, subject to public prosecution; (4) that the attempt thus made was within Haytian jurisdiction; and (5) that the trial was, so far as could be learned, decorous and fair, and that the punishment ultimately imposed was, in view of the atrocity of the offense, singularly lenient. In regard to the third proposition, that the acts of Pelletier in Haytian territorial waters constituted an attempt at slave trading, Mr. Bayard said:

"It is important to remember that both by our common law and by the French law a punishable attempt is an intended, unfinished crime. It requires four constituents: First, intent; secondly, incompleteness; thirdly, apparent adaptation of means to end, and fourthly, such progress as to justify the inference that it would be consummated unless interrupted by circumstances independent of the will of the attemptor. Nowhere are these distinctions laid down more authoritatively than by Rossi, Ortolan, and Lelièvre, when commenting on Article I. of the French penal code, which declares that '*toute tentative de crime * * * est considérée comme le crime même.*' I cite these high authorities in French jurisprudence because it is important to show that the Haytian courts, when laying down the law in this respect, did so in accordance with the law accepted in Hayti as part of the jurisprudence of France. But I do not cite the numerous cases in which the same law had been laid down in England and in the United States. It is enough to say that it is an accepted principle in our jurisprudence that an attempt, as thus defined, is as indictable in our courts as is the consummated crime of which it was intended to be a part, and that under the indictment for the consummated crime, there may be now, both in England and in most of our States, a conviction of the attempt. * * * It seems a mockery to assert that the guilty parties are to

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elude Haytian jurisdiction on the pretense that anchoring a slave ship in Haytian waters, with every contrivance to entrap and enslave Haytian citizens, is not disturbing the tranquillity of those waters, even though, on the discovery of the conspiracy, on the eve of its consummation, the slaver, in seeking to escape, fired on its pursuers. Such firing was part of one and the same outrage. I can conceive of no more flagrant disturbance of the tranquillity of territorial waters than these facts disclose.

"The views here maintained, of the jurisdiction of the sovereign of territorial waters of offenses committed in such waters, when of a character calculated to disturb the peace of the port, is sustained in the case of Mali *v.* Keéper of Jail, decided this week by the Supreme Court of the United States.[1] From the opinion in this case of Chief Justice Waite, which I am permitted to cite in advance of publication, occurs the following: 'It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purpose of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement: for, as was said by Chief Justice Marshall in The Exchange, 7 Cranch, 144, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. United States *v.* Diekelman, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, sec. cccli.; Twiss's Law of Nations in Time of Peace, 229, sec. 159; Creasy's Int. Law, 167, sec. 176; Halleck's Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. Regina *v.* Cunningham, Bell C. C. 72; s. c. 8 Cox C. C. 104; Regina *v.* Keyn, 13 Cox C. C. 403, 486, 525; s. c. 2 Ex. Div. 63, 161, 213. As the owner had voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.'"

Having thus discussed the question of jurisdiction, Mr. Bayard proceeded to point out that the arbitrator, while proclaiming in the strongest terms the turpitude of the claimant's conduct, appeared, in consequence of an erroneous construction of the protocol, to have considered himself bound to make an award in his favor. In the course of the oral

[1] Reported as Wildenhus's Case, 120 U. S. 1.

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argument in behalf of Hayti, the arbitrator was reported to have said: "The question whether the United States Government ought to have made a reclamation in his [Pelletier's] behalf is another question, outside of this case. If reclamation has been made, then it becomes a question of legal right."[1] Counsel for Hayti replied: "These questions were left by the two governments to your honor to pass upon after the evidence on both sides was submitted to you; therefore Pelletier did not acquire any legal right prior to this hearing." Again, counsel for Hayti, in another part of their oral argument, submitted the proposition that, "If the court had no jurisdiction over the facts that transpired at Grand Cayman, according to the principles of international law, it did have jurisdiction over the acts of Pelletier alongside the coast of Hayti."[2] The arbitrator replied: "If the acts of Pelletier constituted piracy under international law, the courts of Hayti had a right to try and condemn him, and if they made a mistake in the evidence that is an immaterial matter. If it was not piracy under international law, then another question arises. The question whether it was piracy under the Haytian statute is not questioned in this case." Again, though the arbitrator declared, as has been seen, that if the bark "had been captured and brought into an American port, when she was seized at Fort Liberté, she would have been condemned by the United States courts as an intended slaver," he also, in the course of his opinion, declared: "Nor was there anything done by him [Pelletier] in the ports of Hayti that amounted to piracy, recognized as such by the law of nations. As I have said, I do not care to inquire what the law of Hayti defining piracy may have been. *It is another law which is to be the rule of decision in this case, so it is stipulated in the protocol.*"

From these passages it appears that the arbitrator considered (1) that, as a claim had been made, he was restricted to the decision of a pure question of law; and (2) that the protocol, by requiring him to decide "according to the rules of international law existing at the time of the transactions complained of," restricted him to the decision of the sole question whether Pelletier had been guilty of piracy by law of nations, as distinguished from piracy by municipal statute, and compelled him to award damages in case he should find that piracy by law of

[1] Pelletier Record, 1781.
[2] Record, 1779.

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nations had not been committed. Mr. Bayard, on the other hand, maintained that the protocol was not designed in any way to limit the arbitrator's inquiries into the merits of the claim before him, but was intended "merely to insure the investigation of those merits upon principles of international law contemporaneous with the alleged wrongs, undoubtedly the true test of Hayti's liability." Mr. Bayard was "unable to see why the fact that the Government of the United States had made a reclamation in Pelletier's behalf excluded consideration of the question whether that government 'ought to have made a reclamation in his behalf.'" In his opinion the question of "legal right" was "vitally connected with the question whether a reclamation ought to have been made," since both those questions involved the application of the rules of international law to the facts of the case. Those facts were to be ascertained by the arbitrator. The government of the United States, in submitting the claim to arbitration, had acted on a *prima facie* case, and one of the expressed objects of submission was to obtain a full investigation of the facts. The previous action of the government on *ex parte* information should not be regarded as a prejudgment of the case submitted. Nor was there anything in the protocol that prevented the consideration of the question whether Pelletier was guilty of piracy under the Haytian statute. "If the bark," said Mr. Bayard,

"when she entered the harbor of Fort Liberté, within the unquestioned territorial jurisdiction of Hayti, loaded with the implements of her nefarious errand, and, as the evidence led the arbitrator to conclude, intending there to consummate her unlawful enterprise, could have been condemned by the courts of the United States as an intended slaver, why could not the Haytian courts condemn her and try and imprison her commander on the same ground, if, as is not questioned, Haytian law made provision therefor? It matters not what the Haytian law may have called the offense, whether it described it as piracy, or as attempted piracy, or as attempted slave trading, or whether, as is the case, it punished attempted slave trading within Haytian jurisdiction as piracy. * * * It was a rule of international law in 1861, and is a rule of that law now, that offenses committed in the territorial jurisdiction of a nation may be tried and punished there, according to the definitions and penalties of its municipal law, which becomes for the particular purpose the international law of the case. It matters not what the offense may be termed if it appear that a violation of the municipal law was committed and punished. The municipal law of Hayti is not alone in defining the slave

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trade as piracy. It is so denominated by the laws of the United States (Revised Statutes, sec. 5376), and is punishable with death; and if the Government of the United States, like that of Hayti, were to make attempts at slave trading equivalent to the consummated act and equally punishable therewith, it is not supposed that the rules of international law would thereby be violated. I can not presume that the Government of the United States by stipulating for the decision of the Pelletier claim according to the rules of international law existing in 1861 intended to deny to Hayti the right at that time to execute within her territorial jurisdiction her laws against slave trading or piracy therein attempted, and I am compelled to declare that had such been this government's expressed intention I could not recommend that it should now be executed in the light of the facts developed in the arbitration."

Mr. Bayard further maintained (1) that it was the duty of the Executive to refuse to enforce an unconscionable award;[1] (2) that, assuming the claimant's naturalization to be proved, his right, being a tort-feasor, to claim compensation for the consequences of this tort must be denied; (3) that, upon the general question of turpitude, the claim was one that could not be pressed by the United States "either as a matter of honor or as a matter of law;[2] (4) that the principle that a sovereign could not in honor press an unconscionable and unjust award, even though it was made by an international tribunal invested by law or treaty with the power of swearing witnesses and receiving or rejecting testimony, applied with still greater force to the award of an arbitrator whose acts in administering oaths to witnesses, issuing commissions, and determining what questions were to be put, must, if sanctioned only by the Executive, be regarded as *ultra vires*.[3]

Lazare Case.

In the case of Lazare, as well as in that of Pelletier, Mr. Bayard reported in favor of opening the award. His recommendation in the Lazare case rested (1) on certain papers in the Department of State which were not shown to have been laid before

[1] Citing Frelinghuysen *v.* Key, 110 U. S. 63; Mr. Frelinghuysen, Sec. of State, to Messrs. Mullan and King, February 11, 1884, MS. Dom. Let.; cases of Gardiner and Atocha, 13 Stats. at L. 259, 16 Id. 633; cases under the Chinese claims convention, 15 Stats. at L. 440, 20 Id. 171; case of the *Caroline*, S. Rep. 1376, 40 Cong. 1 sess.

[2] Citing Holman *v.* Johnston, Cowper, 343, in which Lord Mansfield said: "The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

[3] Citing Miller, J., Great West. Ins. Co. *v.* W. S., 112 U. S. 197.

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the arbitrator; (2) on irregularities in the arbitrator's proceedings; (3) on errors in the award; (4) on the alleged newly discovered evidence, and (5) on a letter of Judge Strong to Mr. Preston, the Haytian minister, of February 18, 1886. The irregularities alleged to exist in the arbitrator's proceedings were the same as those pointed out in the case of Pelletier, in respect of the swearing of witnesses, the issuing of commissions, and the admission and rejection of testimony. The letter of Judge Strong to Mr. Preston related to the "newly discovered" evidence. In that letter Judge Strong stated that, after his functions as arbitrator had ceased, the newly discovered evidence was laid before him by counsel for Hayti with an application for a rehearing; that he denied the application verbally on the ground that his power over the award was extinct; but that the newly discovered evidence was of such a character that it would "materially have affected" his decision had it been presented to him pending the hearing of the case, and before his powers under the protocol had terminated. The evidence in question tended to show (1) that Lazare was, at the time of his transactions in Hayti, insolvent; (2) that his connections with the steamship and railway business in New York, prior to his going to Hayti, were wholly unremunerative; (3) that the firms with which he negotiated in London, after the failure of Benson & Co., had little or no standing, and were lacking in ability to obtain the money which he required; and (4) that in fact he was wholly unprepared to furnish in any form the funds which he had engaged to provide for the opening of the bank.

The papers in the Department of State which were not shown to have been brought to the arbitrator's attention were (1) a dispatch from Mr. E. D. Bassett, United States minister at Port au Prince, to Mr. Evarts, of April 24, 1877, in relation to Lazare's dealings with the Haytian Government; (2) a statement by Lazare, of February 1877, accompanying the dispatch; and (3) a statement by Lazare's counsel to the Department of State of October 23, 1877. Comparing these papers with the statement of Lazare's case before the arbitrator on January 15, 1885, and with the testimony subsequently given before the arbitrator, the report maintained (1) that there was a conflict between the statement of January 15, 1885, and the statement of February 1877 in regard to the official ratification of the bank contract by Hayti; (2) that the grants of pledges of the Haytian customs duties, which Mr. Lazare, according to the statement of

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January 15, 1885, discovered in Paris, were made prior to the contract, and were matters of public notoriety of which he was cognizant; (3) that the alleged bills of exchange which were set up as constituting the equivalent of the "metallic currency" Lazare was to contribute to the bank, but which were not exhibited before the arbitrator, either in original or in verified copy, never in fact existed, and that all the claimant obtained in Europe was credits to be used only *when the bank was started with adequate capital*, and even then not in sums above $5,000, unless provided for by prior deposits; (4) that Lazare in his statement of February 1877 never claimed to have made a legal tender of bills or drafts to the Haytian Government in fulfillment of his part of the contract, but admitted that he refused to attend the meeting on October 15, 1875, for the making and verification of deposits of funds, on the ground that he "believed that nothing could be done without his presence," thus practically confessing his incompetency to comply with his contract and precluding himself from maintaining an action against Hayti for a breach of the contract; (5) that the hostility which the statement of January 15, 1885, represented as having been shown to the bank by Haytian agents in Paris in June and July 1875 was nowhere mentioned in the statement of February 1877, was unsustained by contemporaneous proof, and was inconsistent with the claimant's allegation of success in Europe in obtaining funds; (6) that the assertion in the statement of January 15, 1885, that the claimant incurred "considerable expense" in securing in Europe the services of "a gentleman prominent as a practical banker," was controverted by the affidavit of the "practical banker" himself to the effect that all he received was a draft for £500, which was protested for nonpayment; (7) that the assertion in the statement of January 15, 1885, that the Haytian Government, about September 1, 1875, obtained Lazare's key to the bank and thereafter excluded him from it, was not supported, but was on the other hand inferentially contradicted by his statement of February 1877; (8) that the assertion in the statement of January 15, 1885, that Lazare had no notice of the meeting of October 15, 1875, for the making and verification of deposits, was directly contradicted by his statement of February 1877, as well as by other evidence, by which it appeared that, though notified to attend, he deliberately refused to do so in order to subserve purposes of his own; (9) that the claimant, when he went to Hayti, "was insolvent and out of employment, seeking

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a new field of enterprise in place of those he had been compelled to abandon;" (10) that the protest alleged in the statements of 1877 and 1885 to have been addressed by Mr. Lazare to the Haytian secretary of finance on October 18, 1875, was, in the form in which it was produced by the claimant, apocryphal, and that its alleged date was a mistake.

On these grounds the report concluded (1) that there was no satisfactory evidence that the Haytian Government interfered with Lazare's obtaining funds in Europe, but that it was, on the contrary, to be inferred that it was deeply interested in his success and did all it could to further his movements; (2) that there was no evidence of any diversion by the Haytian Government, subsequent to the contract, of revenues which were to have gone to the bank, and that whatever hypothecation of them previously existed was affected by public acts of which Lazare, if it were possible to suppose that he was ignorant of them, was bound to take notice; (3) that the deposit by the Haytian Government on October 15, 1875, of $235,000 in coin, and of the rest in specie drafts of merchants who were able to supply the bullion at call, was a sufficient fulfillment of its stipulation to deposit $500,000 in gold and silver; (4) that Lazare had at the time no means of fulfilling his part of the contract, and that his failure in this respect was not induced by any action on the part of Hayti of which he had not notice or ought not to have taken notice when he entered into the contract; (5) that Lazare by his conduct ratified the Haytian Government's rescission of the contract, and that he was therefore precluded from taking the ground that the government was bound, instead of rescinding the contract, to propose to arbitrate; (6) that his claim for "enormous damages," made after the fall of the Rameau government and after the consulship at New York was at an end, was an afterthought, and that the utmost that he could properly have claimed was his expenses and salary as the agent of Hayti under the contract; (7) that it was the duty of counsel for the United States to have produced before the arbitrator the dispatch of Mr. Bassett and the claimant's statement of 1877, and that if through inadvertence, as no doubt was the case, they were withheld, the United States could not do otherwise than decline to enforce the award; (8) that, even if the claim had been proved, the transaction was of such a speculative character and so destitute of all the elements of success that the Government of the United States could have taken no action in regard to it,

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beyond the tendering of good offices, without departing from its settled policy; (9) that the announcement by the President in his annual message of 1885 that the arbitration had been closed and a final award given, could not preclude a reexamination of the case; and (10) that whenever it was discovered that a claim against a foreign government could not be honorably and honestly pressed, such claim should, no matter what the period of procedure, be dropped.

In the course of these conclusions the report stated that when a copy of Mr. Bassett's dispatch, together with a memorandum of Mr. Lazare's statement of 1877 as to his receipt of the Haytian Government's notice of deposit, was given to Judge Strong, he made, on June 23, 1886, an oral statement to the Department of State as follows:

"In view of these documents, which were not exhibited to me, I am clearly of the opinion that the award ought to be opened; that the government can not afford to press [a] claim not clearly founded in honesty; that if these documents had been presented to me, together with the other affidavits presented to me on the motion to open the award, they would have made a vast difference in the award which I did make. These papers tend to show that the only fault of Hayti was the failure to propose arbitration instead of at once declaring the contract void, the contract having stated that differences should be referred to arbitrators. That not having been done, resort may be had to law to recover such injuries as the claimant may have sustained. Under the circumstances it would seem to me that he could only claim for expenses necessarily incurred by him."

Gratification of Hayti.

A copy of the executive document containing the foregoing report was sent to Mr. Thompson, then minister of the United States at Port au Prince, for his information.[1] Subsequently, Mr. Thompson inclosed to the Department of State an extract from a message to the national assembly of Hayti, published in the *Le Moniteur* of May 12, 1887, in which President Salomon quoted several passages from the report, commented upon the "spirit of justice" which they manifested, and declared that Hayti stood, in respect of the claims in question, "disengaged from all responsibilities." He declared that he would like to see the report in the hands of every Haytian, and that orders had been given for its translation and the printing of a large number of copies.[2]

[1] Mr. Bayard to Mr. Thompson, March 8, 1887, For. Rel. 1887, p. 593.

[2] Mr. Thompson to Mr. Bayard, For. Rel. 1887, p. 628.

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Subsequent Action.

On February 18 and 19, 1896, the Senate adopted resolutions of inquiry in regard to the case of Lazare. The President answered them on the 28th of the same month, transmitting a report of Mr. Olney, Secretary of State, which was as follows:

"(1) The republic of Hayti has not paid the amount found due by the said republic to A. H. Lazare by the Hon. William Strong in his award as arbitrator.

"(2) The attention of the Senate is called to the message of the President of the United States, dated January 20, 1887, transmitting a report of the Secretary of State upon the claims of Antonio Pelletier and A. H. Lazare against the Republic of Hayti. This message and report are contained in Senate Ex. Doc. No. 64, Forty-ninth Congress, second session. The report of the Secretary of State, Hon. Thomas F. Bayard, sets forth the facts and reasons upon which Judge Strong's award in favor of Lazare was set aside.

"The records of the Department of State do not show that any subsequent action was formally taken in regard to the claim, but a memorandum is on file bearing indorsements which indicate that it was in the Secretary of State's hands in 1892 and in 1893, and that a copy of it was given to the counsel for Lazare September 29, 1892. This memorandum recites the award and Mr. Bayard's report above referred to, and closes as follows:

"'This report of Mr. Bayard was formally transmitted by the President of Hayti to the Haytian National Assembly and accepted as a final dispostion of the matter. Since March, 1889, the case has been several times fully presented to the Department by Mr. Lazare, and by different counsel in his behalf with a view to a reconsideration of Mr. Bayard's decision, but the department, without expressing any opinion upon the original merits of the claim, has not felt at liberty to reverse his deliberate action with respect thereto.'[1]

"The disposition of the case as reported by the Secretary of State in 1887 has not been disturbed by any subsequent action of the government."

[1] Counsel for Lazare, in support of their application for reconsideration, filed arguments in which they contested the validity of the alleged after-discovered evidence, of the narrations contained in Mr. Bassett's dispatches, and of the statements made by Judge Strong after he became *functus officio*.

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CHAPTER XLIII.

THE CASE OF CHARLES ADRIAN VAN BOKKELEN: PROTOCOL BETWEEN THE UNITED STATES AND HAYTI OF MAY 24, 1888:

Origin of the Case.

On April 21, 1884, Mr. Frelinghuysen, Secretary of State, inclosed to Mr. Langston, then minister of the United States to Hayti, a letter dated at Port au Prince, March 19, 1884, from C. A. Van Bokkelen, a citizen of the United States, who represented that he had been in jail since the 6th of March in consequence of his inability to meet some of his obligations. He inquired as to his rights under the treaties between the United States and Hayti, saying that he had duly filed with the civil court of Port au Prince an assignment of his assets for the benefit of his creditors, and that the real cause of his misfortunes was the failure of the Haytian Government to pay its bonds, which he held to an amount far exceeding his debts. Mr. Frelinghuysen instructed Mr. Langston to make a detailed report of the case.[1] In obedience to this instruction Mr. Langston reported that the cause of Mr. Van Bokkelen's arrest and imprisonment was a judgment for $3,000 rendered against him in favor of a firm in New York; that the suit in which the judgment was rendered was begun in the court of commerce, and was finally passed upon by the court of cassation; that, although the judgment was set aside for irregularity, Van Bokkelen was still kept in jail on the claims of other creditors; that after the judgment of $3,000 was entered against him he sought to make an assignment of all his property for the benefit of his creditors and thus secure his release, as might be done by Haytian debtors; that by the Haytian code

[1] For. Rel. 1884, p. 306.

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foreigners were excluded from the benefit of this process, but that Van Bokkelen had claimed it on the strength of Articles VI. and IX. of the treaty between the United States and Hayti of November 3, 1864; that the civil tribunal of Port au Prince had decided against him, but that an appeal had been taken to the court of cassation; that this appeal was still pending and that Van Bokkelen had in the meanwhile, owing to the state of his health, been permitted to occupy quarters in the military hospital at Port au Prince.[1]

The Department of State decided before taking further action to await the result of Van Bokkelen's appeal.[2] Subsequently, however, Mr. Langston was instructed, owing to the prisoner's ill health, to take every proper step to obtain his immediate release.[3] The Haytian Government refused to grant it, and on March 4, 1885, Mr. Langston transmitted to the Department of State a copy of the decision of the court of cassation, rendered on the 26th of February, in which it was held that the right to make a judicial assignment was a civil right belonging only to Haytians, and that the sixth and ninth articles of the treaty of November 3, 1864, did not confer the privilege on citizens of the United States residing in Hayti or upon Haytians residing in the United States.[4] The following is a translation of the decree of the court:

"Whereas the judicial assignment of property is an institution of civil right, the articles 769 (794) of the code of civil procedure and 569 of the code of commerce, excepting foreigners from the benefit of this institution, since they do not exercise in Hayti all rights, they can only enjoy privileges derived from natural rights or [rights] of mankind, and not those which are derived from purely civil law.

[1] Mr. Langston to Mr. Frelinghuysen, July 7, 1884, For. Rel. 1884, p. 307.

[2] Mr. Davis, Acting Sec. of State, to Mr. Langston, August 15, 1884, For. Rel. 1884, p. 320.

[3] Mr. Frelinghuysen to Mr. Langston, October 1, 1884, For. Rel. 1884, p. 329; Mr. Davis, Acting Sec. of State, to Mr. Langston, November 19, 1884, Id. 335; Mr. Langston to Mr. Frelinghuysen, December 4, 1884, For. Rel. 1885, p. 477; Mr. Frelinghuysen to Mr. Langston, December 9, 1884, Id. 478; Mr. Frelinghuysen to Mr. Langston, January 2, 1885, Id. 481; Mr. Langston to Mr. Frelinghuysen, January 14, 1885, Id. 482; Mr. Langston to Mr. Frelinghuysen, January 21, 1885, Id. 490; Mr. Langston to Mr. Frelinghuysen, January 24, 1885, Id. 492; Mr. Frelinghuysen to Mr. Langston, February 2, 1885, Id. 492.

[4] Mr. Langston to Mr. Frelinghuysen, March 4, 1885, For. Rel. 1885, p. 498.

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"Whereas nowhere in the treaty of friendship, of commerce, of navigation, and of the extradition of fugitive criminals, concluded November 3, 1864, between the United States of America and the republic of Hayti, is it to be found that it confers upon the citizens of these two countries the right to exercise the judicial assignment of property, there can be deduced from the terms of articles 6 and 9 of the treaty nothing which would authorize the opinion that this right could be invoked in the United States by a Haytian, or in Hayti by an American. In consequence thereof, Americans can not enjoy in Hayti such civil right, the enjoyment of which is attached exclusively to the quality of a Haytian. That in stipulating that 'the citizens of the contracting parties should have free access to the courts of justice, in all cases wherein they may be interested on the same conditions that the laws and usages of the country give to their citizens, furnishing security required in the case,' this provision of article 6 was not intended to grant to the citizens of these two nations the enjoyment of civil rights which do not attach (except) to citizens.

"Therefore it follows from that which precedes that the judgment denounced has made a good and just application of article 769 (794) of the code of civil procedure and 569 of the code of commerce, and a sound interpretation of the articles 6 and 9 of the treaty above cited.

"For such reasons, and without there being any necessity of passing on the result of nonacceptance raised by the parties, the court rejects the appeal made by Mr. Charles Adrian Van Bokkelen against the judgment rendered May 27, 1884, by the civil court of Port au Prince, orders, in consequence, the confiscation of the fine deposited, and condemns the said Mr. Van Bokkelen to pay the expenses, liquidated at the sum of ———, not including the cost of the present decrees.

"Given and pronounced by us, B. Lallemand, president; J. Martineau, E. Valles, M. Fremont, and F. Nazon, judges, at the palace of justice of the court of appeals, in public session, on the 26th of February 1885.

"Signed as follows on the minutes: B. Lallemand, E. Valles, M. Fremont, J. Martineau, F. Nazon, and P. Lerebours.

"A true copy.

"P. LESPES, *Lawyer.*"

Request for Release.

On the 28th of March 1885 the Department of State, with the text of this decision before it, asked for Mr. Van Bokkelen's release.[1] The Department of State took the ground that the decision of the court of cassation was not only irreconcilable with accepted principles of international law, but that it could not be regarded

[1] Mr. Bayard, Sec. of State, to Mr. Langston, March 28, 1885, For. Rel. 1885, p. 507.

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as defining the duties of Hayti as a sovereign state. The liabilities of Hayti to the United States were, said the Department of State, determined by the principals of international law as well as by the treaty stipulations which formed the supreme law of the land, both in Hayti and in the United States. The provisions of Articles VI. and IX. of the treaty of 1864 are as follows:

"ART. VI. The citizens of each of the contracting parties shall be permitted to enter, sojourn, settle, and reside in all parts of the territories of the other, engage in business, hire and occupy warehouses, provided they submit to the laws, as well general as special, relative to the rights of traveling, residing, or trading. While they conform to the laws and regulations in force, they shall be at liberty to manage, themselves, their own business, subject to the jurisdiction of either party, respectively, as well as (*sic*) in respect to the consignment and sale of their goods as with respect to the loading, unloading, and sending off their vessels. They may also employ such agents or brokers as they may deem proper, it being distinctly understood that they are subject also to the same laws.

"The citizens of the contracting parties shall have free access to the tribunals of justice, in all cases to which they may be a party, on the same terms which are granted by the laws and usage of the country to native citizens, furnishing security in the cases required, for which purpose they may employ in the defense of their interests and rights such advocates, solicitors, attorneys, and other agents as they may think proper, agreeably to the laws and usage of the country.

"ART. IX. The citizens of each of the high contracting parties, within the jurisdiction of the other, shall have power to dispose of their personal property by sale, donation, testament, or otherwise; and their personal representatives, being citizens of the other contracting party, shall succeed to their personal property, whether by testament, or *ab intestato*.

"They may take possession thereof, either by themselves or by others acting for them, at their pleasure, and dispose of the same, paying such duty only as the citizens of the country wherein the said personal property is situated shall be subject to pay in like cases. In the absence of a personal representative, the same care shall be taken of the property as by law would be taken of the property of a native in a similar case, while the lawful owner may take measures for securing it.

"If a question as to the rightful ownership of the property should arise among claimants, the same shall be determined by the judicial tribunals of the country in which it is situated."

The Department of State maintained that under the second paragraph of Article VI. Van Bokkelen was entitled to the same rights in the tribunals of justice of Hayti as citizens of that country; that under the right secured by Article IX. to

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the citizens of the contracting parties "to dispose of their personal property by sale, donation, testament, or otherwise," he was entitled to dispose of his goods by means of a general assignment for the benefit of his creditors; and that as, by the law of Hayti, the right to be released after an assignment for the benefit of creditors was an incident of the imprisonment for debt of a Haytian debtor, so, under the treaty, it was an incident of the imprisonment for debt of an American debtor. There was, said the Department of State, no jurisdiction in the United States in which a Haytian would not be permitted to make an assignment of his entire estate on the same basis as a citizen of the United States, or in which he would not be entitled to a discharge on such an assignment on the same footing as a citizen of the United States. In conclusion, Van Bokkelen's release was asked for on the following grounds:

1. That continuous imprisonment for debt, where no criminal offense was imputed, was contrary to the generally recognized principles of international law.

2. That the imprisonment of Van Bokkelen contravened Articles VI. and IX. of the treaty of 1864.[1]

Haytian Response.

Mr. Langston communicated a copy of his instruction to Mr. Prophète, the Haytian minister of foreign affairs, April 17, 1885.[2] On the 29th of the same month Mr. Prophète replied that the Department of State, in examining the judgment of the court of cassation, seemed to have omitted the real reason of the decision. The decision of the court did not, said Mr. Prophète, rest on the denial of the right to make a judicial assignment to Haytians in the United States, but on the fact that the benefit of the insolvent act was a provision of the Haytian civil law, from which foreigners were excluded. As to the provisions of the treaty, Mr. Prophète argued that nations were never to be presumed to intend to injure their rights, and that the judges ought not to prefer an interpretation which would abrogate the common law. Moreover, it would require an express stipulation of the treaty to abrogate the formal text of the law. The courts of Hayti had acted within the limits

[1] In the course of its instructions the Department of State took the ground that "furnishing security in the cases required" meant security for costs, and that in Van Bokkelen's case there was no pretense that he was obliged to furnish security in any case in which the term could be properly used.

[2] For. Rel. 1885, p. 514.

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of their authority in interpreting the treaty of 1865. The executive authority would transcend its powers and expose itself to the demands of the private creditors if it were to release Mr. Van Bokkelen.[1]

On May 28, 1885, Mr. Langston reported that at 5 o'clock on the afternoon of the preceding day Van Bokkelen was conducted to the legation by an attorney of the government and set at liberty. No explanation of the act was given, but it was said that President Salomon would explain it.[2] Mr. Langston assumed that the release was the result of his representations to Mr. Prophète. Mr. Prophète, however, repelled the suggestion and maintained the positions previously assumed by him, at the same time disclaiming all official knowledge of what had been done. He had "understood" that Mr. Van Bokkelen had been set at liberty, but observed that his release doubtless was due to some arrangement which he had made with his creditors. Mr. Langston expressed surprise at these statements.[3]

Claim for Redress.

On the 2d of October 1885 Mr. Bayard transmitted to Mr. Thompson, Mr. Langston's successor, a claim for damages for Van Bokkelen's imprisonment, with instructions to press the matter, and if the amount to be paid could not be immediately agreed upon, to propose the reference of that question to an arbitrator. In his memorial Mr. Van Bokkelen stated that he was imprisoned for fourteen months and twenty-two days. He claimed $200 a day for his imprisonment prior to the demand for his release and $500 for each day after the demand was made.[4] On the 1st of November 1885 he died; but prior to that time a claim had been presented in his behalf to the Haytian Government for $113,600.[5]

Arbitration.

On May 24, 1888, an agreement was signed for the arbitration of the claim.[6] Mr. Alexander Porter Morse was chosen as referee. The position was offered to him on the 7th of June and was accepted by him on the 8th, on which day he subscribed a declaration in

[1] For. Rel. 1885, p. 515.

[2] For. Rel. 1885, p. 521.

[3] Mr. Prophète to Mr. Langston, June 5, 1885, For. Rel. 1885, p. 524; Mr. Langston to Mr. Prophète, June 6, 1885, ibid.

[4] For. Rel. 1885, pp. 537-539.

[5] For. Rel. 1885, p. 542.

[6] For. Rel. 1888, pt. 1, p. 984.

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writing that he would impartially and carefully examine and decide the case submitted to him, in good faith, to the best of his judgment, and conformably with the principles of law applicable thereto.[1]

Messrs. C. A. De Chambrun, George S. Boutwell, and James G. Berret appeared as counsel for the Haytian Government. The claimant was represented by Messrs. Kennedy and Shellabarger, of Washington, and Marston Niles, of New York.

Opinion of the Arbitrator.

Mr. Morse rendered his decision December 4, 1888, awarding claimant the sum of $60,000. The full text of the award was as follows:

"In pursuance of the protocol, dated May 24, 1888, between Hon. Thomas F. Bayard, Secretary of State of the United States, and the Hon. Stephen Preston, envoy extraordinary and minister plenipotentiary of the Republic of Hayti, representing their respective governments, after having made a declaration that I would impartially and carefully examine and decide the case submitted to me, in good faith, to the best of my judgment, and conformably to the principles of law applicable thereto, I have investigated the claim of Charles Adrian Van Bokkelen, a citizen of the United States, against the Republic of Hayti, and I now make the following statement and award:

Statement of Claim.

"This claim grows out of the imprisonment, during the years 1884 and 1885, at Port au Prince, of Charles Adrian Van Bokkelen, a citizen of the United States, by the authorities of the Republic of Hayti. The imprisonment continued for a period of nearly fifteen (15) months, and the claim made on behalf of Van Bokkelen is in the form of a demand upon Hayti for pecuniary indemnity in the sum of one hundred and thirteen thousand six hundred dollars ($113,600).

"Although the essential facts are within a small compass, and the question submitted for decision to the referee is single and explicit,[2] the case has been the subject of a multiplicity of proceedings and pleadings, judicial, executive, and diplomatic, and has given rise to voluminous correspondence and elaborate argumentation on the part of the two governments.

Proceedings and Pleadings.

"In the disposition of this case I shall confine myself as closely as may be practicable to a presentation of the essential matters, and to the determination of the single and explicit issue suggested by the terms of the protocol. It is proper, however, to state here that at an early stage of the submission of this case to me as referee a demurrer was interposed by the defendant government, and an elaborate brief was presented in support of said demurrer. After consideration of this brief, I notified counsel

[1] For. Rel. 1888, pt. 1, pp. 985-987.

[2] Protocol, May 24, 1888, Articles I. and II.

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for the defendant government that there was no provision under the submission for special pleading, and that the protocol specified and indicated in express terms the subject-matter and the question submitted for determination. As a matter of fact, the argument which was entitled, 'Brief on behalf of the defendant government in support of demurrer,' is a full and exhaustive exposition of the material points relied on by the defense, and covers fifty-five (55) type-written folios.

"In addition, the limitation of time within which the referee was required to render his decision precludes the idea of the interposition of special pleading.

"And further as to the propriety of a demurrer, general or special, under this arbitration, it is to be said that a state, like an individual, accused of having inflicted wrong upon another, may shape its defense against the charge with reference to the facts, or to the law.[1] Under the terms of the protocol, as well as from the correspondence heretofore passed between the contracting parties, it seems clear that there is not now and never was any denial by the defendant government of the substantive facts which give rise to this claim.

"Subsequently complainant government and the counsel for the respective governments were notified that I desired briefs on the subject of the measure of damages. These additional briefs were duly filed and have been considered.

"The defense set up by the defendant government is rested upon a collision between the treaty and certain articles in the municipal codes of Hayti. And this issue may only be determined by reference to the treaty stipulations and to the provisions contained in the municipal statutes.

Statement of Facts.

"Charles Adrian Van Bokkelen was a citizen of the United States, who, prior to the year 1872, resided in Brooklyn, New York. In that or the following year he went to Hayti and established himself in business at Port au Prince. In 1880 he married a Haytian lady, the widow of Gen. P. Lorquet, an owner of real estate in Hayti in her own right. There were two children of this marriage, who, with their mother, reside at Port au Prince.

"On the 15th of February 1883, having sustained severe losses in his business, and a judgment against him having been affirmed in the court of cassation, which he was unable to pay, and under which he was liable to be imprisoned for one year, he filed a schedule of his assets and liabilities in the civil court of Port au Prince, preparatory to applying for the benefit of judicial assigument, under which, in Hayti, an honest but unfortunate debtor is allowed to surrender all his property for the benefit of his creditors, and is entitled to be discharged from prison, if he has been arrested, and to be free from arrest thereafter on account of his existing indebtedness. At that time, in Hayti, imprisonment for mere debt had not been abolished.

[1] Phillimore, Int. Law, Vol. III. 3d ed., p. 64.

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"Three other judgments were subsequently recovered against Van Bokkelen, two in favor of the Bank of Hayti and one in favor of J. Archin, under each of which he was liable to three years' imprisonment in default of payment, making ten years in all. A fifth judgment was rendered against him in favor of St. Aude, jr., which does not seem to have decreed any imprisonment. These judgments are enumerated in Mr. Langston's dispatch, of January 14, 1885, to Mr. Frelinghuysen, and it is there stated that the terms of imprisonment fixed in three of the judgments are twice as long as would have been imposed in the case of a Haytian.

"After the filing of Van Bokkelen's schedule, which was duly recorded by the clerk of the civil court in Port au Prince, on the 15th of February 1883, the proceedings seem to have been postponed by notices or writs until the following year.

Arrest and Imprisonment.

"On or about the 5th of March 1884 Van Bokkelen was arrested on the judgment of Toeplitz & Co., and confined in the common jail of Port au Prince. Although imprisonment for debts, irrespective of fraud in contracting them or evading their payment, was then lawful in Hayti, there seems to have been no separate prison for debtors. The character of the common jail, and of the military hospital in which Van Bokkelen was confined, and the state of his health when he was incarcerated, will be noticed hereafter in connection with the question of damages.

"Van Bokkelen protested against his arrest as illegal, on the ground that by an order of the Haytian authorities, published in the official journal, 'it was made obligatory that before a foreigner could be placed in jail the complaint should first be submitted to the attorney for the government for his examination and approval, and (should be) signed with his signature, with seal attached.' On the 18th of the same month it was judicially determined that Van Bokkelen's arrest was illegal. But before he was discharged other creditors, availing themselves of a provision of Haytian law under which, when a debtor is imprisoned, they can keep him in jail by 'recommending' him, recommended him accordingly, and the jailer refused to discharge him.

"It is to be noted that these creditors took advantage of Van Bokkelen's illegal imprisonment to keep him from getting out of jail by a method which would not have enabled them to put him in.

"Van Bokkelen thereupon, through his counsel, applied to the civil court of Port au Prince for the benefit of judicial assignment.

"He had been advised that under the treaty of 1864 between the United States and Hayti he was entitled to the benefit of judicial assignment the same as if he were a citizen of that country.

"In the proceedings upon Van Bokkelen's petition to the

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civil court of Port au Prince for the benefit of judicial assignment, twelve of his creditors appeared, and all but two assented.

"These opposing creditors raised various objections, but insisted mostly on article 794 of the code of civil procedure and article 569 of the code of commerce, which expressly exclude foreigners (*les étrangers*) from the benefit of this provision of Haytian law.

"All the objections of the opposing creditors were traversed by the petitioner. His counsel argued that the schedule of his assets and liabilities was sufficient; that his misfortunes and good faith were manifest; that the treaty of 1864 between Hayti and the United States repealed article 794 of the code of civil procedure and article 569 of the code of commerce, so far as the disability attaching to the petitioner in his character of American citizen or foreigner was concerned. This he argued at length, and also claimed that inasmuch as the petitioner had established himself at Port au Prince in business and married a Haytian wife, who owned real property in the city and had borne him children, having thus fixed his home, as well as his commercial interests, in Hayti with the knowledge of the government, a just construction of the term '*les étrangers*' required that he should not be treated as a foreigner or a stranger, but as a domiciled merchant entitled to all civil rights and privileges as distinguished from those that are political; and in support of the proposition that the exercise of civil rights is independent of the exercise of political rights, and that 'the capacity of a citizen resides in the combination of civil and political rights,' he cited Article II. of the civil code of Hayti.

"The opposing creditors (Toeplitz & Co.) rejoined that they had no knowledge of the treaty and had not been served with a copy, and therefore moved for information in that regard at the cost of the petitioner. Petitioner's counsel replied that the treaty was not a document, but a law of which no one was supposed to be ignorant.

"It appears also that the Government of Hayti, as well as all the parties to these proceedings, was represented by counsel and heard by the court.

Decision of the Civil Court.

"The first question that the court decided was 'whether the petitioner should be condemned to furnish to Toeplitz & Co. information regarding the treaty concluded between Hayti and the United States of America, and whether such information should likewise be furnished to Louis Nadal.' That question the court decided in favor of Van Bokkelen, as follows:

"'Whereas a treaty, concluded between Hayti and the United States of America, November 3, 1864, sanctioned by the Senate, and promulgated by the executive branch of the government, is a law of the state;

"'Whereas article 75 of the code of civil procedure renders it obligatory upon the petitioner to furnish a copy of the

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documents or of that part thereof upon which the petition is based; but it does not provide that a copy of the law or of the provision of the law on which the petition is based shall be furnished;

"'Whereas, thus, Mr. C. A. Van Bokkelen is not obliged to furnish information of the treaty to Louis Nadal, and can not be condemned to furnish such information to Toeplitz & Co., who are under obligations, just as C. A. Van Bokkelen is, to have knowledge of the law.'

"On the main question, involving the rights of Van Bokkelen under the treaty, and deciding upon the objection of his alienage based upon article 794 of the code of civil procedure and article 569 of the code of commerce, interposed by L. Toeplitz & Co. and by Louis Nadal, the court, after having deliberated, denied Van Bokkelen's application.

Decision of Court of Cassation.

"His application to make the judicial assignment having been denied by the civil court of Port au Prince, Van Bokkelen was kept in jail. He appealed to the court of cassation—the court of last resort—which rendered its decision, affirming the judgment of the civil court on the 26th of February 1885, almost a year from the time when Van Bokkelen was first imprisoned. It seems that pending his appeal the time within which further objections could be made by his creditors to his petition expired on the 21st of October 1884, and that no one, not even the parties upon whose application he had been illegally arrested the previous March, made any opposition. This fact is stated in a letter from Van Bokkelen's father to Mr. Frelinghuysen, who was then Secretary of State, dated November 15, 1884, a copy of which was transmitted by Mr. Davis, Acting Secretary, to Mr. Langston, United States minister at Port au Prince November 19, 1884.

Diplomatic Intervention.

"The Secretary of State of the United States was informed of this decision on the 21st of March 1885, and on the 28th of the same month he sent a dispatch to the United States minister at Port au Prince, in which, after reviewing the facts and the law, he claimed that there had been a denial of justice in Van Bokkelen's case, and that he should be released from jail forthwith, in the following terms:

"'The release of Mr. Van Bokkelen is now asked on independent grounds. It is maintained, first, that continuous imprisonment for debt, when there is no criminal offense imputed, is contrary to what are now generally recognized principles of international law. It is maintained, secondly, that the imprisonment of Mr. Van Bokkelen is a contravention of articles 6 and 9 of the treaty of 1865 between the United States and the Republic of Hayti.

"'The Haytian Government has a clear and ample opportunity to relieve this case from all difficulty by recognizing the error of their courts in supposing that the privilege of

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release of an imprisoned debtor would be denied to a Haytian citizen by the United States courts upon making assignment of his property for the benefit of his creditors.

"'You are now instructed to earnestly press the views of this government, as outlined in this instruction, on the early attention of the Government of Hayti by leaving a copy thereof with the minister of foreign affairs.

"'The response of the Government of Hayti should be promptly communicated to this department.'

"On the 17th of April 1885 Mr. Langston sent a copy of this dispatch to the Haytian Government and urged the prisoner's immediate release, inviting attention also to his 'feeble and failing health.' The reply of the Haytian Government, twelve days later, was an elaborate defense of Van Bokkelen's imprisonment—solely, however, upon the ground that he was an alien.

Prisoner's Release.

"Meanwhile, and shortly after the decision of the court of cassation, the prisoner, who, at the request of the United States minister, had been removed to the military hospital on account of his infirm condition, was sent back again to the common jail. On the 15th of May the United States minister sent another note to the Haytian Government, insisting on Van Bokkelen's immediate release, and on the afternoon of the 27th of that month Van Bokkelen was conducted to the United States legation by an attorney of the Haytian Government, 'on its order, as stated, and thus given his release and liberty.' On the 5th of the following June Mr. Langston received a note from the Haytian secretary of state for foreign affairs, maintaining the position which had been held throughout by the Haytian Government, and closing as follows:

"'I understand that Mr. Van Bokkelen has been put at liberty. This result, happy for him, is due, doubtless, to some arrangement made with his creditors. This, besides, to which I will not address myself further, as it is not proper, has itself, as you will understand, been accomplished without interference of the executive power; it comes to pass without saying that it annuls in no wise the considerations which this department has plead relative to the case of Van Bokkelen.'

"Pending Van Bokkelen's appeal to the court of cassation, the Department of State, upon representations of the United States minister at Port au Prince in regard to the adjudged illegality of the arrest in the first instance, and the prisoner's unquestionable right under the treaty to make the judicial cession and obtain his release, had instructed the minister to use every proper effort with the Haytian Government to that end.

Demand for Damages.

"Mr. Van Bokkelen sailed for the United States shortly after his release, and on his arrival made a statement of his case to the Secretary of State and an appeal for his good offices in collecting indemnity from the Haytian Government. In response,

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Mr. Bayard addressed a note to the United States minister at Port au Prince, dated October 2, 1885, instructing him as follows:

"'DEPARTMENT OF STATE,
"'*Washington, October 2, 1885.*

"'SIR: I herewith inclose a copy of a letter from Mr. C. A. Van Bokkelen, of the 19th ultimo, in reference to his illegal imprisonment at Port au Prince and his claim for damages in consequence thereof.

"'In view of Mr. Van Bokkelen's present statement of facts and those already before your legation in regard to his case, I desire that you will call the attention of the government of Hayti to his claim. There can be no doubt that Mr. Van Bokkelen was wrongfully imprisoned by the Haytian authorities, and that great damage accrued to him thereby.

"'Under these circumstances, therefore, you are directed to ask and to press for the redress claimed by Mr. Van Bokkelen, or, if the amount to be paid can not be immediately agreed upon, for a reference of the question to an arbitrator, so that the case may be disposed of without unnecessary delay.

"'I am, etc.,

"'T. F. BAYARD.'

"To this Mr. Thompson, who had succeeded Mr. Langston, made the following reply:

"'LEGATION OF THE UNITED STATES,
"'*Port au Prince, Hayti, November 3, 1888.*

"'SIR: I have to inform you of the death of Mr. Charles A. Van Bokkelen, who died on the 1st instant, at 2 o'clock in the afternoon, aged 37 years. He was buried on the 2d instant, many Americans and foreigners following the remains to their last resting place. I attended the funeral, and it was a fact worthy of note that a sincere feeling of sadness at his death and sympathy for his wife and two small children seemed to pervade all present.

"'I had entered his claim against the Haytian Government to the sum of $113,000 some time before his death, and will continue to press the same, as advised by the department.

"'I am, etc.,

"'JOHN E. W. THOMPSON.'

"Subsequent negotiations between the two governments have resulted in an agreement to submit the claim to arbitration.

Questions to be Arbitrated.

"Two questions arise on the facts:

"1. Was Van Bokkelen entitled by the terms of the treaty between the Republic of Hayti and the United States, concluded November 3, 1864, to be discharged from prison on the same terms as a citizen of Hayti imprisoned for the same cause?

"2. If there has been a violation by Hayti of the treaty rights of Van Bokkelen, what should Hayti pay to the United

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States, by way of damages, for the benefit of the representatives of the deceased?

"The first question submitted by the two governments for the decision of the referee is contained in the first article of the protocol of May 24, 1888, and is in the following words:

"'It having been claimed on the part of the United States that the imprisonment of Charles Adrian Van Bokkelen, a citizen of the United States, in Hayti, was in derogation of the rights to which he was entitled as a citizen of the United States under the treaties between the United States and Hayti, which the government of the latter country denies, it is agreed that the questions raised in the correspondence between the two governments in regard to the imprisonment of the said Van Bokkelen shall be referred to the decision of a person to be agreed upon, etc.' (English text, article 1.)

"'Comme il a été soutenu de la part des États-Unis que l'emprisonnement de Charles Adrian Van Bokkelen, citoyen des États-Unis, en Haïti, a eu lieu en dérogation des droits qui lui appartenaient comme citoyen des États Unis, d'après les traités entre les États-Unis et Haïti, ce qui nie le Gouvernement du dernier État, il est convenu que les questions soulevées dans la correspondance entre les deux Gouvernements au sujet de l'emprisonnement du dit Van Bokkelen, seront référées à la décision d'une personne qui sera désignee, etc.' (French text, article 1.)

"It appears clearly from the language of article 1 that the subject-matter of this arbitration is the imprisonment in Hayti of Charles Adrian Van Bokkelen, a citizen of the United States, by the authorities of Hayti.

"The contention of the complainant government is that said imprisonment was in derogation of Van Bokkelen's rights as a citizen of the United States under the treaties, and the answer of the defendant government, while admitting the American citizenship and the fact of imprisonment of Van Bokkelen by the authorities of Hayti, denies that his imprisonment was in derogation of treaty rights. The contention of the complainant government is based upon the language of articles 6 and 9 of the treaty between the United States and Hayti, concluded November 3, 1864.

"The defendant government does not deny the existence of the treaty or the guaranty of the rights and privileges which it solemnly announces. But the substance of the contention on the part of the defendant government is that this right or privilege of free access to the tribunals of justice in Hayti is defeated and nullified by the language and force of article 794, code of civil procedure, and article 569, section 2, code of commerce. This contention has been sustained by the courts of first and last resort of Hayti, and has been proclaimed by the executive of Hayti.[1] Under this decision of the courts and executive of Hayti, Van Bokkelen was imprisoned in the common jail for nearly fifteen months.

"Counsel on behalf of defendant government submit various propositions of fact and law, from which they proceed to argue,

[1] Exhibit No. 4, pp. 32–34; For. Rel. 1885, pp. 449, 535–536.

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which are founded upon or connected with the preliminary proceedings and pleadings in the courts of Hayti anterior to the judgment and decrees of the Haytian courts. These propositions refer to a multitude of defenses, nearly all of which were regularly interposed in defense in the court of first instance and the court of last resort. But all these several defenses have been withdrawn from the referee as a result of the action of the courts of Hayti, resting their decisions upon a single specific ground (which has been accepted by the contracting parties as the sole question now at issue), and which has been submitted to the decision of the referee. (Protocol, May 24, 1888.)

"In this view of the case the referee is not at liberty to go behind the situation and enter upon an original inquiry as to whether the schedule (*bilan*) was regularly prepared and submitted; whether the circumstances of the case indicated fraud on Van Bokkelen's part; whether a Haytian citizen, under similar circumstances, would have been discharged from imprisonment upon making a judicial assignment, etc. And if, at any time, I shall incidentally advert to such matters, it will be because it seemed unavoidable in the particular connection in which it occurs.

Contentions of the Haytian Government.

"I proceed now to consider various contentions of counsel for the defendant government.

"The first brief, which is entitled a 'Brief on behalf of the defendant government in support of demurrer,' insists:

"1. That the language employed by Van Bokkelen in the proceedings before the tribunals at Port au Prince in April 1884, in which he describes himself as an American citizen by birth, 'residing at Port au Prince and domiciled at New York, United States of America,' 'defines exactly the international status of claimant.'[1] In answer to this suggestion it may be admitted that the general proposition is substantially correct. It is taken to mean that Van Bokkelen was a citizen of the United States at the time of the occurrence out of which his claim against Hayti arose; but it is not understood that Van Bokkelen's description of himself as 'residing at Port au Prince and domiciled at New York,' has any other or further significance than to place him within the guaranties of protection of articles 6 and 9 of the treaty of November 3, 1864. It is to be observed, however, that 'the international status of claimant' must be determined not by description, but by the facts of his case. As a matter of fact, the American citizenship of Van Bokkelen has never been questioned.

"2. The contention of counsel for defendant government that Van Bokkelen, during the years 1882 and 1883, was a merchant doing brokerage business at Port au Prince may be conceded. And the recital of the details of the litigation in preliminary

[1] First brief of counsel for defendant government, p. 3.

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suits between Van Bokkelen and his various creditors may be accepted as correct without having any controlling influence upon the determination of the claim now submitted to the referee.[1]

"3. Counsel for the defendant government argue 'that only one ground of error was assigned and passed' by Van Bokkelen on his appeal upon the judgment of the civil court to the court of cassation, while the judgment of the lower court disclosed the fact that 'at least twelve questions of law or fact were raised by the various pleadings of the parties.'[2] And counsel say that Van Bokkelen 'sought to reverse the said judgment upon one sole ground, namely, that article 794 of the code of civil procedure and article 569 of the code of commerce excluded aliens from the operation of the laws regulating the *cessio bonorum;* and that said articles were contrary to articles 6 and 9 of the treaty between the United States and Hayti.'[3]

"In answer to this suggestion, it seems only necessary to say that the court of first instance and the court of last resort based their final decision on the single ground stated by them.

"It may be added that by the very language of the protocol, the single ground upon which Van Bokkelen 'assigned and pressed' his appeal to the court of cassation has been adopted as the very question constituting the subject-matter of this arbitration. In this view the anterior and intermediary proceedings, whether by way of diplomatic intervention, or as the result of the various procedures of the local courts of Hayti, can not be held to have any controlling influence so far as the result of the present arbitration is concerned.

"In a word, the protocol—which must be the guide and grant of jurisdiction for the referee—crystallizes and formulates the substantial grounds of past discussion and controversy in a single, definite issue, and furnishes the rule of decision. The issue presented by the protocol is whether the acts of the authorities of Hayti in respect to Van Bokkelen, a citizen of the United States, were in derogation of his rights as such citizen; and the rule furnished for the decision of the question raised by the issue are the treaties between Hayti and the United States.[4]

"4. The contention of counsel for defendant government is that 'full faith and credit must be given to the tribunals of Port au Prince.'[5]

"In answer to this point reference is made to what has just been said in reply to the first point. It may be added that the ground of complaint made by the complainant government is

[1] First brief of counsel for defendant government, pp. 4–6.

[2] Id. 6, 7.

[3] Id. 7.

[4] Protocol, May 24 1888, article 1.

[5] First brief of counsel for defendant government, p. 8.

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that the judgment of the Haytian courts is in contravention of treaty stipulation, which the defendant government denies. And to decide this very issue the question has been, by consent of the contracting parties, referred to international arbitration.

"The position of the defendant government as to this point would, if admitted, preclude any examination or decision by the referee, and would result in making the referee simply the register or recorder of the acts and decrees of the local courts of Hayti. Th s may not be, for the reason that the protocol imposes upon the referee the decision of the question raised in the correspondence[1] and found in the record. For a rule and guide for his decision he is referred to the treaties between Hayti and the United States; and for the interpretation of treaty language and intention, whenever controversy arises, reference must be had to the law of nations and to international jurisprudence. It is a general maxim, when it is a question of international controversy, that neither of the contracting parties has a right to interpret a treaty according to its own fancy.[2]

"5. Another argument of counsel for defendant government is that a citizen of Hayti who intends to avail himself of the benefit of judicial assignment (*cession de biens*) must establish affirmatively that he has been unfortunate, and that he has acted in good faith. This point is elaborated with much detail, both in the brief accompanying the note of the Haytian minister[3] addressed to the Secretary of State of the United States, August 15, 1887, as well as in the brief now under consideration. The answer to this proposition and argument is that all this may be conceded without its having any influence upon the present controversy, and for this reason: The acts of the judicial tribunals and of the executive of Hayti of which the complainant government complains are rested upon different and independent grounds, and these grounds are that Van Bokkelen was not permitted free access to the tribunals of Hayti on the same terms as citizens of Hayti; and, as has been before stated, the referee is confined to the decision of the single specific question presented by the terms of the protocol.

"6. The further contention of counsel for the defendant government[4] is that the jurisprudence of France, Belgium, and Hayti has constantly 'maintained a distinction as between aliens and citizens, and have held that aliens have enjoyed natural rights, but that they were excluded from civil rights.' The answer to this proposition is that if any such distinction between what are here styled 'natural' rights and 'civil' rights existed in Hayti they were abolished in respect to citizens of

[1] Protocol, May 24, 1888, article 1.

[2] Vattel, book 2, Chapter XVI. p. 265.

[3] Hon. Stephen Preston.

[4] First brief, p. 16.

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the United States commorant in Hayti at the time of the occurrences herein complained of by virtue of articles 6 and 9 of the treaty of November 3, 1864. It is not, therefore, necessary to enter into any consideration as to the nice distinction between natural, civil, and political rights. These terms, however, have a well-understood meaning in the law of nations and in modern international jurisprudence. In addition to protection to life, liberty, and property, the class which exercises political rights in a community participates in the governing power either by themselves or representatives. The class which enjoys civil rights is equally entitled to protection to life, liberty, and property, but the individuals composing it can not exercise political rights under any claim founded simply upon possession of civil rights. But the record and correspondence clearly show that the extent of Van Bokkelen's claim was a demand, formally and regularly submitted to the tribunals and to the executive power of Hayti, that he might be admitted to the enjoyment of those strictly civil rights guaranteed to him by the treaty of November 3, 1864; and it would appear that even in Hayti the exercise of 'civil' rights is independent of the exercise of 'political' rights, and that the capacity of a citizen resides in the combination of civil and political rights.[1]

"7. The counsel for defendant government submit that, 'under the civil law nothing short of a clear, positive treaty stipulation can enable an alien to claim the exercise of civil rights.' All this may be admitted, and yet the concession would not avail the defendant government upon the case under consideration, and for the following reasons:

"(*a*) It is here a question of international and not civil law.

"(*b*) And a 'clear, positive treaty stipulation' does by express language enable an alien, if he be a citizen of the United States and within the jurisdiction of Hayti, to claim the exercise of civil rights.[2]

"8. Counsel for defendant government make a point that at one time Van Bokkelen described himself as 'domiciled in New York.'[3] It can not be perceived how that fact, although it should be conceded—which it is not—could be held to except him from the guaranties contained in the treaty. The American citizenship of Van Bokkelen being conceded by the terms of the protocol, the question of domicil cuts no figure in the case.

"9. Counsel for defendant government insist that the true meaning of the second section of article 6 of the treaty of November 3, 1864, is disclosed by 'careful examination of article 794 of the code of civil procedure and article 569, section 2, of the code of commerce.'

[1] Civil code of Hayti, article 2.

[2] Articles 6 and 9, treaty of November 3, 1864.

[3] First brief of defendant government, p. 18.

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"Counsel say that the second section of article 6 of the treaty is simply intended to secure to Americans, against any possible repeal, the rights guaranteed them by said articles of the codes and the construction given them by the Haytian courts.[1] The answer to this suggestion is obvious. It is negatived by the very language of article 1 of the protocol of May 24, 1888. And the guaranty of enjoyment of civil rights (i. e., the admission to the tribunals of justice) by citizens of the United States resident or domiciled in Hayti on the same terms with native citizens was not limited to time, but was to avail them during the existence and operation of the treaty.

"By provisions of article 42, treaty of November 3, 1864, the treaty was to 'remain in force for the term of eight years, dating from the exchange of ratifications; and if one year before the expiration of that period neither of the contracting parties shall have given notice to the other of its intention to terminate the same, it shall continue in force, from year to year, until one year after an official notification to terminate the same as aforesaid.' It is not denied that this treaty is still in force.

"Counsel for defendant government seek to restrain and confine the treaty guaranty of 'free access to the tribunals of justice' to very narrow limits; and it is insisted that this clause could work no change in the laws of Hayti, either general or special; and it is said that 'the meaning of the words free access, used in the treaty,' constituted a guaranty of free access to courts '*upon the same terms as the civil law and a constant practice provided for them.*'[2] But the answer and denial to that proposition is contained in the language of the treaty itself, which provides the conditions, namely, '*on the same terms which are granted by the laws and usage of the country to native citizens.*' And the connection in which this language occurs makes the inference irresistible that it included all the steps and processes of the judicial tribunals of either of the contracting parties.

"10. Counsel for defendant government lay great stress upon the declaration that 'American citizens sojourning, residing, or trading in Hayti,' must be held to conform to the municipal laws of Hayti.[3] There can be no question but that such an obligation was imposed upon all citizens of the United States in Hayti. But, in this case, there is no complaint that Van Bokkelen, in respect to this matter, did not yield obedience to the municipal laws in operation in Hayti, except as they were modified or repealed by treaty stipulations. And the converse of the proposition is equally true, namely, that American citizens sojourning, residing, or trading in Hayti

[1] First brief of counsel for defendant government, p. 19.

[2] Id. 21.

[3] Id. 23.

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are under the protection of public law, and the treaty stipulations to which Hayti and the United States are the contracting parties.

"11. Counsel for defendant government devote much space to the consideration of the nature and character of the proceeding known as judicial *cessio bonorum*.[1] And it is submitted 'that the application made to the court, to be admitted to the benefit of *cession de biens* can not be regarded in the light of a suit to enforce a right.' To this it may be replied that no such contention is presented in this controversy. In the view of the referee, the judicial *cessio bonorum* does not appear to be in the nature of an independent suit. On the contrary, it is, as I shall further on indicate, a dependent process or step in the ordinary procedure.

"12. It is further submitted on behalf of defendant government that at the utmost 'argument that the second section of article 6 of the treaty has repealed the provisions of civil law discriminating against aliens in the matter of judicial *cession de biens*, rests upon a repeal by implication of the aforestated articles of the code of civil procedure and of the code of commerce.'[2]

"It may be conceded that the cases agree in saying that repeals by implication are not favored. But the very authorities cited by counsel hold that in case of positive repugnancy between the provisions of new laws and those of the old, the former operate to repeal the latter.[3]

"In the case under consideration, the provisions of the municipal codes of Hayti, or rather the interpretation sought to be put upon them by counsel for defendant government, are absolutely repugnant to the stipulations in the treaty of a later date.

"13. It is further contended that if the subdivision of paragraph 2 of article 6 implies the repeal of articles 794 and 569 of the code of civil procedure and the code of commerce, 'it would just as well mean that the fundamental distinction underlying the whole system of civil law, as it exists in France or Hayti, has been repealed by implication, and that at best a few obscure words, which referred exclusively to remedies and not to rights, inserted in the treaty stipulation, operate as a repeal of important parts of the whole municipal legislation of Hayti.'[4]

"It is not perceived that such a result would follow, and it is not understood that the contention of complainant government extends to make any such claim or demand that would result in revolutionizing the judicial system of Hayti. On the

[1] First brief of counsel for defendant government, p. 25.

[2] Id. 27.

[3] State *v.* Hall, 17 Wall. U. S. 425-430; Crow Dog, 109 U. S. 555-570; Arthur *v.* Homer, 96 U. S. 137, 140; Hartford . U. S., 3 Cranch, 109.

[4] First brief of counsel for defendant government, p. 29.

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contrary, as has been indicated, the whole scope and effect of the guaranty clauses in articles 6 and 9 of the treaty of November 3, 1864, stipulating for 'free access to the tribunals of justice' of the respective states, is to place the citizens of Hayti and the citizens of the United States, as to the administration of justice, upon the same footing. It is not clear what force there is in the suggestion that the guaranties in the treaty stipulations must be confined to 'remedies' and not to 'rights.' For, whether free access to the tribunals of a country for the purpose of prosecuting or defending a suit be described as a remedy or as a right, is unimportant. It is in this relation a matter of description rather than of substance. It is the proceeding with which we are concerned, and not the name of it. The right or privilege to make a judicial assignment, under appropriate circumstances, involves the application of a remedy recognized by the law of Hayti.

"'Remedies,' says Mr. Justice Story, 'are part of the consequences of contracts."[1] It is laid down by the same author as a general rule, 'that all foreigners, *sui juris*, and not otherwise specially disabled by the law of the place where the suit is brought, may there maintain suits to vindicate their rights and redress their wrongs.'[2] It is true that until the treaty of November 3, 1864, went into operation, citizens of the United States, in common with other aliens, were excluded by the letter of the municipal law from the benefits of the judicial assignment. But from the date of the exchange of ratifications of that treaty the benefit of the right or the remedy of judicial assignment was accorded to citizens of the United States. 'Free access to the tribunals of justice, etc.,' means a right to stand in court, either voluntarily as plaintiff, or involuntarily as defendant; and after appearance the suitors or parties litigant must have a right to invoke all the usual, ordinary, and necessary processes of the tribunal, whether it be for purposes of prosecution or by way of defense. In the case under consideration Van Bokkelen was arraigned before the local courts of Hayti, in some of the suits at least, *in invitum;* and as an incident of compulsory process, he was imprisoned. Being within the jurisdiction and power of the Haytian court, the treaty stipulations were intended to secure to him, a citizen of the United States, the right to avail himself of all the instrumentalities and processes of the tribunals of justice.

"14. It is further contended on behalf of defendant government that article 9, treaty of November 3, 1864, must be construed in the light of the civil law, and certain provisions of the Haytian civil code in regard to the transmission of property.[3]

"But the protocol makes the treaties between the United States and Hayti the sources of reference for the guidance of

[1] Conflict of Laws, section 337.

[2] Id., section 565.

[3] Brief of counsel for defendant government, pp. 31–33.

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the referee. And consequently the obligations and covenants of a reciprocal character, which are contained in these treaties, constitute the supreme law as between the complainant and defendant governments.[1] In the view which the referee has taken of the question submitted to him, the stipulations and guaranties contained in article 6 of the treaty are in themselves sufficient to justify the claim of Van Bokkelen to stand in justice in the courts of Hayti on the same terms with native citizens. However, it does not seem to the referee that the cumulative force of the stipulations in article 9 in respect to the transmission of property can be lessened by the argument of the defendant government insisting upon a restrictive interpretation of the latter article. The construction sought to be put upon article 9 is cramped, narrow, and forced.

"15. It is insisted on behalf of defendant government that 'the whole scope and purpose of the treaty was plainly not to abrogate any law, but to recognize all existing laws in either country and subject the temporary resident to the operation and protection of these laws.'[2]

"The answers to this proposition are obvious. The temporary resident was already subject to the operation and the protection of the laws of the respective countries; but this protection was unequal. In the United States the Haytian citizen could not, in the absence of contumacious fraud, be denied the privilege of making a judicial assignment, or what was equivalent to it, for the benefit of his creditors; nor could he be imprisoned, under the circumstances in which Van Bokkelen was held in bodily confinement. In Hayti, on the contrary, prior to the treaty of November 3, 1864, a citizen of the United States was liable, by the letter of the Haytian statutes, to be summarily arrested and imprisoned for an indefinite period of time, and was excluded from the benefit of judicial assignment. It was to remedy this and other inequalities that articles 6 and 9 were incorporated into the treaty. And their immediate effect and purpose was to relieve the citizens of either of the contracting parties from odious and harsh discrimination of the local laws and to place them on the same footing. If the contention of the defendant government should be admitted, it would render null and void the stipulations of articles 6 and 9. The object of the treaty, as expressed in its opening paragraph, is 'to make lasting and firm the friendship and good understanding which happily prevail between both nations, and to place their commercial relations upon the most liberal basis.' The articles defining the reciprocal rights of citizens of each of the two nations residing and doing business in the territory of the other will be hereafter noticed.

[1] Protocol, article 1.

[2] First brief of counsel for defendant government, p. 39.

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"16. In regard to the suggestion on behalf of defendant government, charging Van Bokkelen with falsehood and fraud, because his representations in regard to his financial condition were different at different times, it may be said that there is no proof in the record that Van Bokkelen was endeavoring, or ever attempted, to keep back or conceal anything or reserve any benefit for himself. And the different estimates which he is charged with having made at different times may be easily reconciled with his changed status and the condition in which he found himself. But whatever presumptions may have availed against Van Bokkelen during the preliminary proceedings in the court of first instance, they may not, in the absence of positive proof, have any force or weight in the consideration of the question now under arbitration. The courts of Hayti and the executive have nowhere rested their action denying to Van Bokkelen the right to make a judicial assignment upon any charge or suggestion of fraud or informality in those proceedings. And the starting point for the decision under this arbitration must be the action of the courts and the executive of Hayti.

"17. Counsel for the defendant government say the 'second section, article 6, opens the courts of the country to the alien upon the same terms as they are open to native citizens; *but it does not change or propose to change any rights pertaining to American citizens.*' And it is insisted that the repeated references to the laws and usages of the country must be taken to mean that American citizens possess no rights in Hayti except those which are specified in the municipal statutes. And the contention then is, that the rule of interpretation which is to be applied in this case is that laid down by M. Pradier Fodéré:[1] 'Lastly, treaties and conventions must be construed in the light which agrees with *public order* established among the contracting nations, and more particularly with their principles of *public law* and with the organization of their jurisdiction; *in case of doubt, and unless there are irrecusable proofs, the construction which is in harmony with the civil and public laws of France must prevail over that which would create a privileged and exceptional right.*'

"It is not perceived how the contention can be sustained which insists that the treaty does not change or propose to change any rights pertaining to American citizens, when, in view of the language of the treaty, its stipulations provide for the guaranty and protection and vindication of the rights of the citizens of the contracting parties on the same terms. The position of defendant government does not receive any support from the citation from M. Pradier Fodéré, for the reason that the author is referring to the '*public order*' and the '*civil and public laws*,' and not to *special* or *private* rights and remedies.

[1] Cours de Droit Diplomatique, II. 457.

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"M. Pradier Fodéré further on says:

"'Il est donc manifeste qu' aucune des nations n'a le droit d' interpreter a son gre les conditions obscures du contrat, ou d'en deleguer l'examen a ses tribunaux, pas plus qu'il a est loisible a la partie qui a consenti une convention synallagmatique d' interpreter elle-meme, ou de faire interpreter par un mandataire a son choix, les clauses obscures ou ambigues que contiendrait cette convention.'[1]

Judicial Character of Treaties.

"18. It is further insisted that it is 'upon the claimant to establish as an affirmative proposition that the treaty of 1864 between the United States and Hayti has repealed the provisions of articles 794 of the code of civil procedure and 569 of the code of commerce.' This contention has been considered elsewhere in this opinion at some length.

Case of Napier v. Richmond.

"Three cases decided by the court of cassation in France, at long intervals of time, are principally relied upon by counsel for defendant government in support of the contention that articles 6 and 9 of the treaty may not be interpreted to abrogate or repeal the municipal statutes in repugnance or conflict therewith. The first and most important is the case of Napier and others *v.* The Duke of Richmond,[2] which is cited in support of the contention that 'diplomatic treaties must be construed in the light where they are in harmony with public and civil law in use among the contracting nations.' This decision, which was rendered on the 24th of June 1839, holds that treaties between nations are not of the character of simple administrative and executive acts, but that they possess the character of laws; that the courts are competent to interpret treaties between nations on the occasion of private (individual) contests which refer to the particular treaties; that when a treaty has stipulated for the giving up to an alien of immovable property located in France and subject to its authority, the courts are competent to decide whether this giving up, after (agreeably to) the treaty, should operate to the benefit of a single alien heir who is mentioned in it, or of all the heirs, in the proportion of their hereditary rights and interests; that in the interpretation of diplomatic treaties the judges should prefer an interpretation which agrees with the common law and the public law of France to that interpretation which conflicts with these principles; that, in particular, the treaty of 30th of May 1814, which, in one of its additional articles, decides, first, that the withdrawal of the sequestration or embargo levied by the decree of Berlin of the 21st of November 1806 upon the d'Aubigny tract of land belonging to the Third Duke of Richmond; second, that the restitution to the nephew of the latter should not be considered as a grant of said land

[1] Cours de Droit Diplomatique, II. 457.

[2] Journal du Palais, year 1839, II. 2 *et seq.*

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in favor of this one alone conformably to the law of primogeniture recognized in England, and to the exclusion of all others having equal right, title, or interest, but this grant must be executed with reference to the succession of the Third Duke of Richmond, so that this tract of land should be divided among all those entitled in succession in accordance with the rule established by the civil code under the title 'Successions.'

"It is to be observed in the first place of this decision, that the subject-matter was real (immovable) property within the territory and jurisdiction of France, and the court rendering the decision was a court of France. The rule is familiar, that the law which governs as to real (immovable) property is *lex rei sitæ;*[1] and under application of this rule the French court, in a controversy between conflicting individual interests, used the language which occurs in this decision, and which has been copied by the civil court of Port au Prince as applicable to the question in controversy in Van Bokkelen's case.

"As the civil court of Port au Prince, and the court of cassation of Hayti, in stating the rule which must govern in the interpretation of treaty language, have quoted and relied upon isolated expressions of the court of cassation of France in pronouncing judgment in Napier *v.* Duke of Richmond, it will be necessary to consider the latter case with some particularity.

"The subject-matter in Napier *v.* Richmond was a tract of land described as the d'Aubigny tract situated in the jurisdiction of France. Like many other estates belonging to the Crown of France, it had been granted to a foreign family. This grant reached back to the year 1422, having been made by Charles VII. in favor of one of the Stuarts of Scotland, who had rendered signal service to France in her wars with England. In the year 1673 this grant was renewed by Louis XIV. in favor of the Duchess of Portsmouth, a French lady, in the language of the grant, to be enjoyed by said duchess, and after her decease by such one of the natural sons of the King of Great Britain whom he might designate, and the male descendants in direct line of this natural son. This grant, which evidently, says the court of cassation of France, had for its object to win over Charles II. to the interests of Louis XIV. does not, however, present in appearance any political character. Charles II. designated as the successor of the Duchess of Portsmouth a natural son whom he had by her, named Charles Lennox, who took the title of First Duke of Richmond.

"He enjoyed until his death possession of the d'Aubigny tract, and transmitted it successively to his eldest son and to the eldest of his grandsons, Second and Third Dukes of Richmond. This property underwent all of the vicissitudes of the French wars and revolutions. Confiscated during one of the said wars of succession, it was restored by the Treaty of Utrecht; confiscated again in 1792, during the wars of the revolutions,

[1] Story, Conflict of Laws, §§ 364–367, 424, 428, 463.

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it was restored at the Peace of Amiens. Finally, having been confiscated for the third time in 1806, it was again restored by the treaties of 1814 and 1815. When, by the Decree of Berlin of 21st of November 1806, the French Government, availing itself of reprisals against England, declared as good prize all the properties belonging to Englishmen in France, the d'Aubigny tract was occupied by Charles Lennox, Third Duke of Richmond, who had taken possession in 1750. This duke died on the 19th of December 1806, without issue, leaving four sisters and the children of a full brother, who died before him, one of whom took the title of the Fourth Duke of Richmond, who was the father of the defendant in this case. This condition of things continued until the treaty of peace of the 30th of May 1814, the fourth article of which stipulated in general terms for the withdrawal of confiscations of the war. However, a secret clause of this treaty added: 'The confiscation of the Duchy of d'Aubigny and the property which belongs to it will be raised, and the Duke of Richmond placed in possession of the property such as it is now.'

"A royal ordinance of the 8th of July 1814, the terms of which reproduced textually those of the secret clause, and an order of the prefect of Cher, of the 3d of August following, were forwarded to the Fourth Duke of Richmond, who was then in France at the head of a division of the English army, putting him in possession of the d'Aubigny tract. His possession was confirmed by a *procès verbal* of the 30th of November 1814. The natural heirs of the Third Duke of Richmond, who did not live in France, being advised later of their rights, addressed themselves, in 1830, to the French courts to demand from the Fifth Duke of Richmond, who had succeeded his father in 1819, a division of the d'Aubigny tract, as belonging to the succession of the third duke. To this demand was opposed notably the provision of the secret clause of the treaty of 1814, insisting that it contained a special derogation from article 4 of this treaty, which prescribed in a general way the raising of the confiscations of the war. The heirs replied that this article 4 and the secret clause should be interpreted one by the other; that it was proper to reconcile their provisions; that the second was only a confirmation of the first, and that it was not reasonable to regard this secret clause as a private and exclusive grant for the benefit of the feudal heir of the third duke. In this condition of the respective claims of the several parties the tribunal of Sancerre, having had the controversy submitted to it, rendered judgment on the 9th of July 1834, which decreed the partition of the d'Aubigny tract.

"Among other reasons assigned for the judgment were the following:

"'As to the second question raised in the argument, that by the literal text the previously dated treaty raised the confiscation affixed to the d'Aubigny tract, and stipulated for the restoration of the property to the Duke of Richmond; that

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although by this denominative expression could not be understood the third duke, against whom the confiscation had been affixed, since the plenipotentiaries must have known that this duke, their colleague in the cabinet and in the House of Lords of England, had been dead nearly eight years, it must be understood that the grant was in fact to his heirs, according to this maxim, *Hæres substinet personam defuncti;* that, moreover, if the treaty did not say that in default of the third duke his representatives should be called to receive the benefit, it was because in a previous article it was stated in a general and absolute manner that the principle of the restoration was in favor of the former proprietors or their heirs, and that this general provision applied to the Duchy of d'Aubigny neither more nor less than to the other cases of restoration; that the confiscation of the d'Aubigny tract, by virtue of the decree of Berlin of 21st of November 1806, must be considered as a spoliation, and that the Treaty of Paris of 1814 stipulated for the restoration of this tract to the proprietor or to those having a right, but that it was not possible to regard the terms of this treaty, as expressed, as a personal statute and as a reward to the Fourth Duke of Richmond; that the restoration of the property would not have been complete if it did not result to the benefit of those having a right or claim to it; that the treaty of 1814, understood in such a restricted sense, would not have been a restoration—a reparation—but the maintenance and continuation of an unjust spoliation, which, however, the high contracting parties declared that they wished to put an end to after the military events which had provoked them; that whereas the succession of the Third Duke of Richmond was opened 19th of December 1806, but at that time the law of the 25th of October 1792 had abolished all kinds of substitution, and that this succession, so far as property situated in France was concerned, was governed by French laws, agreeably to article 3 of the civil code; and that it devolved or descended in five parts to the brothers and sisters of the deceased or to their representatives, in accordance with the terms of article 750, civil code; that in the treaty of the 30th of May 1814 there is no expression that leads to the belief that there was any abrogation of a legislation which had become fixed in our customs or any failure or omission of national dignity which would have resulted in subjecting property situated on the soil of France to the rules of English legislation.'

"The above decree or judgment of the tribunal of Sancerre was brought by the Duke of Richmond on appeal to the royal court of Bourges, which rendered its decision on the 11th of March 1835, reversing the judgment of the tribunal of Sancerre. From this decision an appeal was taken by the heirs of the Fourth Duke of Richmond to the court of cassation of France. When the case came before the court of cassation, the eminent lawyer, M. Dupin, then attorney-general for the government, made an elaborate argument in support of the

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position of the heirs of the Fourth Duke of Richmond and in defense of the decree of the tribunal of Sancerre.

"The court of cassation of France reversed the decision of the court of Bourges, sustaining in substance the decree of the tribunal of Sancerre, as well as the main argument of the attorney-general. In announcing its judgment the court of cassation, among other propositions, held:

"'On the first branch of the argument: Whereas the defendant, having been summoned to make partition of the d'Aubigny tract and to restore the fruits and allowances received by him, as well as by the Fourth Duke of Richmond, has opposed as the principal exception or objection a secret clause in the treaty of the 30th of May 1814, to this effect: "The confiscation affixed to the Duchy of d'Aubigny and on the property which belongs to it shall be raised, and the Duke of Richmond shall be placed in possession of the property such as it is presently;" that the defendant has drawn from this clause the consequence that he had been invested with the exclusive property of this immovable by the diplomatic convention of 1814, and the complainants having disputed this interpretation, the first question to decide in the case is that relative to the true sense and effect of the stipulation above cited; whereas the tribunals having jurisdiction of the action were necessarily competent judges of the exception or objection, since they were not prohibited by any provision of law; that the defendant without avail invokes the principle which forbids the judicial authority to interpret administrative acts; that the treaties between nations are not simple administrative and executive acts; that they possess the character of law and can not be applied and interpreted but in the forms and by the authorities intrusted with applying all the laws within their jurisdiction whenever disputes which give rise to this interpretation have private interests for their object; that the action of complainants, founded upon their character as heirs, raised the questions of private succession and of property, which is allotted by the law to the judicial power; whereas the decrees attacked instead of pronouncing judgment on the questions determining the true sense of this clause, which was never published or inserted in the Bulletin des Lois, declared that the royal court had not the right to seek out the sense of the treaty, and that the complainants should go before the competent authority who executed this act before availing themselves of their character, pretended or real, as heirs in equal proportions of the Third Duke of Richmond; that it resulted from these reasons that the royal court refused to pronounce judgment as well on the principal action and as to the title of the heirs, which was the main question, as also on the exception and the meaning of the clause; that it referred all the points of which it was regularly seized to another authority, which it did not indicate; that the complainants would be deprived by this dismissal of all means of obtaining a legal decision upon their demand; whereas the royal ordinance of

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the 8th of July 1814, and the prefect's decree of the 3d of August following are only acts in execution of the treaty and of the obligations which article 4 of the additional clauses imposed upon each of the contracting powers to raise several confiscations which had been affixed; that moreover these acts, which did not add anything to the treaty, and with which they are identified, can not be considered as acts belonging to the exercise of the administrative power, cognizance of which was forbidden to the tribunals.

"'As to the second branch of the argument: Whereas, the decrees denounced, after having in their reasons declared the incompetency of the tribunals, and referred to another authority, had meanwhile decided that the complainants could not sustain their action, for the reason that the treaty invested the defendant with the property of the immovable claimed by them; that the reasons for these decrees and their provisions imply a contradiction; that they have, in addition, ignored: First, the text of the laws which govern immovables situated in France, and their transmission to the heirs; second, the true meaning of the treaty and of the secret clause; third, the rules established by the civil code for the interpretation of conventions; finally, the d'Aubigny tract, being situated in France was governed, as to the succession of the Third Duke of Richmond, by the law of France; that substitutions were abolished, and the privilege of the oldest male was suppressed, and that the heirs of this duke were entitled to receive this property in equal portions, and that they were invested with it by the mere operation of law; that the defendant can not invoke the law of nations to claim the grant of an exclusive right; that the transmission of property by way of succession is governed by the civil law of each state; whereas, if the text of this stipulation left any doubt of its true meaning, it would be disposed of by the rules of law in reference to the interpretation of conventions; that the first is to seek out the common or ordinary intention of the contracting parties rather than to stop at the literal meaning of the terms; that it is impossible to suppose that the intention of the plenipotentiaries was to regulate the law of succession between co-heirs; to grant to one the whole property in the estate or land to the exclusion of the others, without any indemnity whatever to these latter; that this grant to the Fourth Duke of Richmond alone would have been in derogation of French legislation, and would have created in France a property or estate governed by privileged and exceptional law; that such an intention, which would be in opposition to all the provisions of the treaty, can not be admitted without unexceptionable proofs; that it would have been expressed in positive terms if it had existed; that all the clauses should be interpreted one by the other so as to give to each the meaning which results from the whole text, and the secret clause should be understood in the sense of a restoration to the one who was entitled, or to

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his heirs, in accordance with the spirit of the treaty; that diplomatic treaties should be understood in the sense which places them in accord with the civil and public law recognized by the contracting parties; that the interpretation given to the clause by the decrees which are attacked puts them in opposition to all the laws, the civil as well as the public law of France; that in not designating by name which Duke of Richmond should be placed in possession, the clause could only have had in view the one who was dispossessed, or his representatives; that in admitting the fourth duke to restoration it was for the benefit of his co-heirs as well as for himself. It results from the considerations which precede, that the decrees which are attacked for refusing to take into consideration the rights of the parties in accordance with the interpretation of diplomatic conventions, and in deciding that the apparent text of these conventions had dispossessed the heirs of the Third Duke of Richmond of their rights to the d'Aubigny tract, have violated and misapplied the laws above cited.'

"It seems to the referee that the above exposition of facts and of law which were involved in the case of Napier *v.* The Duke of Richmond, and the decision of the court of cassation of France thereon, make it clear that that case does not justify the use or application which the Haytian courts have attempted to make of it by incorporating in their judgments isolated expressions which are withdrawn from the context in the decision of the former case. The court of cassation of France simply decided that they would not put such a construction upon treaty language as would result in the abrogation of the law of descent of France in respect to real (immovable) property; that as to such property the *lex rei sitæ* governed; and that it was impossible to suppose that the intention of the plenipotentiaries was to abrogate the laws of descent of France in this respect, and that such an intention would be in conflict with all the provisions of the treaty.

"In the view taken of that case there does not seem to be room for complaint or criticism. And there is no evidence that the action of the Government of France, as expressed in the decree of its supreme court, has been ever excepted or objected to by Great Britain. If, however, Great Britain had considered that as a consequence of this decree injustice had been done to one of her citizens, or a treaty stipulation had been violated by France, she would, no doubt, have made it the subject of international settlement.

Case of Challier v. Ovel.

The second case cited by counsel for defendant government in this connection is Challier *v.* Ovel, which was decided by the court of cassation of France on the 17th of March 1830.[1] The extent to which the court went was to hold that, although article 22 of the treaty of the 24th of March 1760 between France and

[1] Journal du Palais, year 1830, p. 272.

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Sardinia[1] had abrogated a principle sanctioned by article 121, ordinance 1629, as also by articles 21–23 and 21–28, civil code, and 646, code of civil procedure, it did not follow that the execution of these judgments rendered by the Sardinian tribunals should be decreed in France when they were contrary to the maxims of the *public law of France* or to the *public order of jurisdiction;* and that in refusing to decree in France the execution of the judgment and decrees rendered in the cause by the Piedmontese tribunal, the decree attacked only conformed to the principles of the public law, *and did not violate either the treaty of 1760, or any law.*

"Challier *v.* Ovel was a case where a citizen of France, having been arraigned before one of the courts of Sardinia, demurred to the jurisdiction of that court, and claimed exemption from suit in the foreign jurisdiction, insisting that he could only be sued in the jurisdiction of his domicil, which was France. The Sardinian court, notwithstanding his plea, proceeded with the cause and rendered judgment against him. It was such a judgment against a citizen of France, so obtained, that the court of cassation of France declined to put into execution. The case has nothing in common with Van Bokkelen *v.* Hayti.

Case of Balestrini v. Aubert.

"The third case cited by counsel for defendant government in this connection is Alberto Balestrini *v.* Aubert and others.[2] The conclusion reached was that international treaties are not simple administrative acts; that they may be applied and even interpreted by judicial authority when it is a question of conventions having for their object individual interests.

"The case of Balestrini *v.* Aubert presented a controversy between contesting associates, one of whom had a concession under the provisions of a treaty which gave him a right to establish and operate a telegraph line under a new system of electric cable between France and the United States. The contest was as to the respective interests of these several associates, and the provisions of the grant or concession in the treaty came thus for consideration incidentally before the court. It was in such a case that the court of cassation of France held that the stipulations of a treaty could be applied and interpreted by judicial authority whenever it was a question of agreements or conventions having private or individual interests for their object. It must be perceived that there is no similarity between that case and the one under consideration.

"The *ratio decidendi* in all these cases is very plain. It is this, that the judicial tribunals of a country, when called upon to decide controversies between individuals which grow out of or are dependent upon treaty stipulations, will not hesitate to construe the language of those treaties according to the rules

[1] Wencke, Codex Juris Gentium, III. 226.

[2] Journal du Palais, year 1873, pp. 37, 38.

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of law which apply to all instruments. They will construe the provisions so as to give effect to rather than to defeat the intention of the contracting parties; and they will reconcile apparent conflicts of particular parts by reference to the context in which they occur and to the whole instrument. They will not impute to the plenipotentiaries in the negotiation of a treaty an intention which is in conflict with the fundamental law of the State. They will not lend their sanction to execute a treaty stipulation when it is in violation of the fundamental law of the jurisdiction; and they do this upon the ground that it is beyond the competency of the treaty-making power to enter into stipulations which are in conflict with the public law or the public policy of the jurisdiction.

"'The treaty-making power is necessarily and obviously subordinate to the fundamental laws and constitution of the state, and it can not change the form of the government or annihilate its constitutional powers.'[1]

"This language has been used by distinguished American jurists in reference to the Government of the United States. It applies equally to the public policy and limitations of all constitutional states.

"In every civilized state two principal divisions of law are recognized: First, the law which regulates the public order and rights of nations, which is called *jus publicum;* second, the law which determines the private rights of men, which is called *jus civile.*[2] The law of procedure (the adjective law) is distinguished from the fundamental law of a state, and includes remedial law, which is a law whereby a method is pointed out to recover a man's private rights or redress his private wrongs.[3] And the instrument by which the individual vindicates his rights and remedies his wrongs is an action or suit at law. In this sense an action is not a right, but it is the means which the law affords for pursuing the right. '*Actio non est jus, sed medium jus persequendi.*'[4]

"'I consider,' says Lord Bacon, 'that it is a true and received division of law into *jus publicum* and *jus privatum*, the one being the sinews of property and the other of government.'[5] Law defines the rights which it will aid and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'substantive law.' So far as it provides a method of aiding and protecting, it is 'adjective law,' or procedure.[6]

"It would seem to be clear from the cases decided by the court of cassation of France, heretofore cited, that the deci-

[1] Story, Commentaries on the Constitution of the United States, III. section 1508; Kent's Commentaries, I. 167, 287, notes.

[2] Tomlin's Law Dictionary, word "Law."

[3] Blackstone's Commentaries, I. 53.

[4] Austin, Jurisprudence, Vol. II. sec. 1034, p. 183, citing Heineccius.

[5] Preparation Toward the Union of Laws, Works, VII. 731.

[6] Holland, Jurisprudence, 75.

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sions do not sustain the position taken by the Haytian courts and by the counsel for defendant government. In the case under consideration Van Bokkelen petitioned the court for the purpose of availing himself of the law of procedure guaranteed to him by the treaty. The pretension that articles 6 and 9 of the treaty of November 3, 1864, contained any stipulation that was violative of the fundamental law of Hayti is without any foundation.

"The article (1054, civil code of Hayti) which Van Bokkelen invoked for his protection belongs to the law of procedure or the adjective law of Hayti. And the article 794 (Haytian code of civil procedure) and article 569 (Haytian code of commerce), which the Haytian authorities opposed in denying Van Bokkelen's petition, are also a part of the law of procedure or adjective law of Hayti. They do not form a part of the constitutional, fundamental, or national law of Hayti. And the attempt by the judicial and executive authorities of Hayti to characterize a simple judicial assignment as an institution of civil law, or an institution of civil right, in the sense intended, is a misuse of language and a misapplication of terms.

Case of Marryat v. Wilson.

"The counsel for defendant government invite attention to 'the leading English case on this subject,' upon which they placed some reliance.[1] This was an action between private litigants upon several policies of insurance on a certain ship and cargo, upon which the defendant in error had effected insurance. While on a trading voyage ship and cargo were captured by a British squadron, and thus became a total loss to the owners and insurers. Demand was then made by the insured upon the insurer to make good his proportion of the loss so incurred. He refused to do so, and when sued set up the defense that the voyage on which ship and cargo were lost was illegal. On the trial before king's bench and exchequer chamber it was admitted that the voyage was illegal unless it was within the protection of certain articles of the treaty between Great Britain and the United States, concluded the 19th of November 1794. Defendant insisted that the voyage was not within the letter of the treaty, and therefore it was illegal. But the exchequer chamber held that the voyage was within the spirit, though not the letter of the treaty, and in deciding the case used the language quoted in the argument for defendant government.[2]

"Chief Justice Eyre, in deciding the case, said:

"'There may be reason to apprehend that this treaty will open a door to many of our own people whom the policy of our laws has shut out from a direct trade to the East Indies. In truth, it can hardly be expected that the spirit of commerce too often found eluding laws made to keep it within bounds,

[1] Marryat v. Wilson, 1 Bosan. and Puller, 430 et seq.

[2] First brief of counsel for defendant government, p. 37.

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that the *lucri bonus odor* should not embark British capital in this trade. This ought to have been foreseen, and therefore I conclude it was foreseen, and that it was found that the balance of advantage and disadvantage preponderated in favor of the treaty. If not, those who advised it will have to answer for it; responsibility is not with us. We are not even expounders of treaties. This treaty is brought under our consideration incidentally as an ingredient in a cause in judgment before us; we only say how it is to be understood between the parties to this record.

"'This we are bound to do; we have but one rule by which we are to govern ourselves. We are to construe this treaty as we would construe any other instrument, public or private. We are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A and B, or happen to be two independent states. The judges who administer the municipal laws of one of those states would commit themselves upon very disadvantageous ground—ground which they could have no opportunity of examining—if they were to suffer collateral considerations to mix in their judgment on a case circumstanced as the present case is. * * * Whether the trade should have been conceded under any qualifications or restrictions is one thing; it having been conceded, now to attempt to cramp it by narrow, rigorous, forced construction of the words of the treaty is another and a very different consideration. We can not suppose that an indirect advantage was intended to be reserved to the East India Company by so framing the treaty that the American trade might by construction be put under disadvantage, because this would be chicanery unworthy of the British Government, and contrary to the character of its negotiations, which have been at all times distinguished by their good faith to a degree of candor which has been supposed sometimes to have exposed it to the hazard of being made the dupe of more refined politicians. The nature of the trade granted, in my opinion, fixes the construction of the grant. If it were necessary to go further strong arguments may be drawn from the context of this article and the contrast, which the comparing it with the preceding article will produce."[1]

"Far from advancing the argument of counsel for defendant government, the conclusions and the reasoning of the Chief Justice in Marryat *v.* Wilson are strongly opposed to the contention of the defendant government, and sustain the position of the complainant government in this case. Marryat *v.* Wilson is strong authority for the proposition that the municipal tribunals of a country may not nullify the purpose and effect of treaty language by imposing upon it a cramped, narrow, and forced construction. And it is to be observed

[1] Marryat *v.* Wilson, 1 Bosan. and Puller, 435, 436.

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that in the case before the exchequer chamber, the judgment of the court sustaining interpretation of treaty stipulations which would give effect to the spirit, if not to the letter, of the treaty, was rendered in a case where the beneficiaries were aliens—that is, citizens of the United States—and in denial of defenses set up by British subjects before one of the superior courts of Great Britain.

"It is to be noted that these several decisions of the highest courts of France and Great Britain, which are cited and relied upon by the defendant government on this branch of the argument, are cases in which the conclusions of the courts were in support and protective of the private property rights of individuals. The result of all these decisions was to work out substantial justice between the parties. In the case under consideration, the result of the judgments of the Haytian courts and the action of the executive of Hayti was to defeat the efforts of Van Bokkelen to protect himself from wrong and injustice, and to secure to himself rights plainly guaranteed to him, in common with all other citizens of the United States, by the treaty.

The Head Money Cases.

"Counsel for defendant government cites a decision of the Supreme Court of the United States,[1] referred to as the Head Money Cases, to the effect that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the United States, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

"On this point there is not room for much controversy. But an act of the Congress of the United States in derogation of treaty rights has always been held to be a ground for diplomatic intervention. In the case under consideration the converse of the proposition announced by the Supreme Court in the Head Money Cases is presented. Here the collision or conflict is between provisions contained in prior municipal statutes of Hayti, and stipulations of a treaty between the United States and Hayti of a subsequent date. The rule is universal that a prior statute is repealed by a subsequent statute which is absolutely repugnant; *leges posteriores priores contrarias abrogant.* The same principle applies when a municipal statute and a treaty stipulation is in competition. A treaty stipulation of a later date repeals a prior statute with whose provisions it is repugnant. And the reverse of the proposition is maintained by the Supreme Court of the United States.[2] In the Head Money Cases the Supreme Court of the United States laid down the following propositions:

"'A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on

[1] Edye *v.* Robertson, 112 U. S. 580.

[2] Foster *v.* Neilson, 2 Peters, U. S., 314; Taylor *v.* Morton, 2 Curt. U. S. 454; Hauenstein *v.* Lynham, 100 U. S. 483.

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the interest and the honor of the governments which are parties to it.

"'If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof and all treaties made or which shall be made under authority of the United States shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute."[1]

"It will be seen from the above review of the several arguments on behalf of defendant government that many of the propositions which are still strenuously urged in defense are addressed to the consideration and support of subsidiary and collateral issues which are by the terms of the protocol excluded from the consideration of the referee.

Treaty of November 3, 1864.

"It becomes, therefore, necessary to examine the provisions of the treaty upon which complainant government relies in its intervention on behalf of Van Bokkelen, and to the application of which defendant government objects.

"Section 2, article 6, stipulates:

"'The citizens of the contracting parties shall have free access to the tribunals of justice in all cases to which they may be a party on the same terms which are granted by the laws and usage of the country to native citizens,' etc.

"'Les citoyens des parties contractantes aurent libre accès près les tribunaux de justice dans toutes les causes où ils seront intéressés, aux mêmes conditions que les lois et les usages du pays font aux nationaux,' etc.

"In view of the explicit language in both texts, it would seem clear that the guaranty to the citizens of contracting states of 'free access to the tribunals of justice in all cases to which they may be a party on the same terms which are granted

[1] Edye v. Robertson, 112 U. S. 433.

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by the laws and usage of the country to native citizens,' means that they shall be entitled to the exercise of all the processes of the courts of the respective countries, whether they concern rights or remedies. And the extent to which these processes of the courts may be invoked is expressed in language equally free from doubt: 'On the same terms which are granted by the laws and usage of the country to native citizens.' It is not denied that a citizen of Hayti, in the situation which Van Bokkelen was, would have been entitled to release from imprisonment upon making a judicial assignment. Indeed, the language and reasoning of the Haytian courts and of the executive of Hayti admit as much.

"'The citizens of each of the high contracting parties within the jurisdiction of the other shall have power to dispose of their personal property by sale, donation, testament, or otherwise; and their personal representatives, being citizens of the other contracting party, shall succeed to their personal property, whether by testament or *ab intestato*. They may take possession thereof, either by themselves or by others acting for them, at their pleasure, and dispose of the same, paying such duty only as the citizens of the country wherein the said personal property is situated shall be subject to pay in like cases,' etc.

"'Les citoyens de chacune des hautes parties contractantes auront, dans la juridiction de l'autre, la faculté de disposer de leurs biens mobiliers par vente, donation, testament, ou autrement; et leurs successeurs, citoyens de l'autre partie contractante, pourront hériter de leurs biens mobiliers soit par testament, soit *ab-intestat*. Ils pourront en prendre possession soit par euxmêmes, soit par des tiers agissant pour eux, comme ils le voudront, et en disposer sans payer d'autres droits que ceux auxquels sont assujettis, dans les mêmes circonstances, les citoyens du pays, où sont situés les dits biens mobiliers,' etc.

Judgments of the Haytian Courts.

"There would seem to be no ambiguity in the language of these articles; and the best way to construe them is to follow the words thereof.

"But the civil court of Port au Prince, and the court of cassation affirming the decision of the civil court, denying Van Bokkelen's petition to execute a judicial assignment, decide that there is nothing in articles 6 or 9 of the treaty of November 3, 1864, which guarantees to Van Bokkelen, or any citizen of the United States, the right to release from imprisonment upon the execution of a judical assignment conformably to the terms of the civil procedure of Hayti. The civil court decided, among other things, that the 'reason which causes the exclusion of foreigners is that the benefit of an assignment has always been regarded as *an institution of civil law* which should benefit native citizens only;' and 'it is impossible to suppose that it was the intention of the contracting plenipotentiaries to abrogate or modify, by article 9 or by article 6 of the treaty, as those articles are worded, article 794 of the code of civil procedure and article 569 of the code of commerce, which exclude a foreigner from the benefit of making an assignment;' and further, that 'whereas, although the text of this stipulation (article 9), and even that of article 6, which grants to the citizens of the two contracting parties free access to the courts

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of justice, in all cases in which they shall be interested, on the same terms that are granted by the laws and usage of the country to native citizens, might leave some doubt with regard to their true meaning, it would be dispelled by the rules of law concerning the interpretation of conventions which are applicable to treaties;' and this court then proceeds as follows:

"'Whereas the first of these rules is to seek out the common intention of the contracting parties rather than to be guided by the literal meaning of the terms.'[1]—Translation.

"From this decision of the civil court of Port au Prince, rendered May 27, 1884, Van Bokkelen appealed to the court of cassation, which rendered its decision affirming the decision of the civil court, on February 26, 1885, almost a year from the time Van Bokkelen was first imprisoned.

"The court of cassation, affirming the judgment of the civil court, held:

"'Whereas the judicial assignment of property is an institution of civil right, the articles 769 (794) of the code of civil procedure and 569 of the code of commerce, excepting foreigners from the benefit of this institution, since they do not exercise in Hayti all rights, they can only enjoy privileges derived from natural rights or of mankind, and not those which are derived from purely civil law.'[2]—Translation.

"If, as I shall hereafter endeavor to show, the judicial assignment (*cession de biens*) is simply a step in the procedure of the courts in bankruptcy proceedings, it is not perceived how the description of it 'as an institution of the civil law' can have the effect of withdrawing it from the guaranty expressed in the treaty grant of 'free access to the tribunals of justice,' unless it was excepted in terms from the treaty stipulations.

"Of the decree of the court of cassation, affirming the decision of the civil court of Port au Prince, it is to be observed

[1] Exhibit No. 4, pp. 32, 33.

[2] "Whereas nowhere in the treaty of friendship, of commerce, of navigation, and of the extradition of fugitive criminals, concluded November 3, 1864, between the United States of America and the Republic of Hayti is to be found that it confers upon the citizens of these two countries the right to exercise the judicial assignment of property, there can be concluded from the terms of articles 6 and 9 of the treaty nothing which would authorize the opinion that this right could be invoked in the United States by a Haytian, or in Hayti by an American. In consequence thereof, Americans can not enjoy in Hayti such civil right, the enjoyment of which is attached exclusively to the quality of a Haytian. That in stipulating that 'the citizens of the contracting parties should have free access to the courts of justice in all cases wherein they may be interested, on the same conditions that the laws and usages of the country give to their citizens, furnishing security required in the case,' this provision of the article (6) was not intended to grant to the citizens of these two nations the enjoyment of civil rights which do not attach (except) to citizens."—Translation.

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that the latter court follows substantially, though not literally, the reasoning of the former.

"A careful reading of the decree of the court of cassation indicates that the court has, in its attempts to justify the authorities of Hayti, indulged in the same peculiar reasoning as the civil court of Port au Prince; and it is consequently open to the same criticism.

"The extreme to which the court has gone in search of reasons to justify its judgment indicates the absence of that good faith which should characterize the interpretation of treaty stipulations. And in view of the language of articles 6 and 9 of the treaty of November 3, 1864, it is difficult to understand by what process of reasoning the court reached the conclusion that a citizen of the United States, within the jurisdiction of Hayti, '*can only enjoy privileges derived from natural rights or of mankind, and not those that are derived from purely civil law.*'

"Equally illogical and untenable is the reasoning of the court of cassation in holding that nowhere in the treaty of November 3, 1864, is there to be found a provision which may be held to confer upon the citizens of the contracting states other and additional rights, i. e., full right to exercise the 'judicial assignment' of property. Under the public law or law of nations aliens enjoy purely natural rights in whatever state they may be. And in the absence of any treaty, a citizen of the United States would have enjoyed natural rights in Hayti; but the terms of the treaty of November 3, 1864, stipulate, in effect, that such citizens shall further enjoy civil rights.

"The court of cassation, although admitting that the treaty stipulates that 'the citizens of the contracting parties should have free access to the courts of justice, in all cases wherein they may be interested, on the same conditions that the law and usages of the country give to their citizens, furnishing security required in the case,' maintains 'that this provision of article 6 is not intended to grant to the citizens of these two nations the enjoyment of civil rights.'

"The court of cassation is in error in assuming that the privilege of release of an imprisoned debtor would be denied to the Haytian citizen by the United States courts, circumstanced as Van Bokkelen was when he invoked the protection of the treaty. In such a case, assuming that other and ordinary applications for release had failed, the writ of habeas corpus would lie to the courts of the United States, and would avail to secure his release from imprisonment.

"In view of the treaty language and terms of the protocol, it is impossible for the referee to sustain the reasoning or the conclusions reached by the civil court of Port au Prince or by the court of cassation. It is not perceived how the nature or character of the remedy or right expressly guaranteed to citizens of the United States within the jurisdiction of Hayti can be withheld from them by describing it, as the judgment of

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the civil court of Port au Prince does, 'as an institution of civil law,' or as the decree of the court of cassation does, 'an institution of civil right.' The 'judicial assignment' (*cession de biens*), as I have elsewhere pointed out, is simply an incident or step in the judicial procedure in the courts of Hayti in bankruptcy proceedings. And if it be not included within the guaranty of 'free access to the tribunals of justice,' the language is without meaning and inoperative. 'Free access to the tribunals of justice' that was limited to admission to the courts, without the privilege to plaintiff or defendant of employing the usual, ordinary processes of the court, would be a delusion and a snare. Such an intention or purpose may not, in the absence of plain language, be imputed to the high contracting parties.

"The attempt of the courts of Hayti and of the executive to exclude a citizen of the United States from the benefit of a judicial assignment, on the ground that the treaty of November 3, 1864, makes no mention of it in express terms, does not seem to call for serious consideration. Such a strained objection would only be satisfied by incorporating the body of the Haytian codes in the treaty articles. With equal force and soundness the courts of Hayti and the executive power might have denied this right, remedy, or privilege to Van Bokkelen on the ground that he was not mentioned or particularly named in the treaty. When the treaty said 'free access to the tribunals of justice * * * on the same terms which are granted by the laws and usages of the country to native citizens,' it included the whole class of citizens, and fixed the terms upon which the laws and usage of the country were to be applied to them.

"Among the international rules proposed by the Institute of International Law at Geneva, 1877, with the view to negotiation of international treaties, the following rules, among others, were adopted:

"'1. *L'etranger sera admis à ester en justice aux mêmes conditions que le regnicole.*

"'2. Les formes ordinatoires de l'instruction et de la procedure seront régies par la loi du lieu où le proces est instruit. Seront considérées comme telles, les prescriptions relatives aux formes de l'assignation (sauf ce qui est propose ci-dessous, 2me al.), aux délais de comparution, à la nature et à la forme de la procuration ad litem, au mode de recueiller les preuves, à la redaction et à prononcé de jugement, à la passation en force de chose jugée, aux délais et aux formalites de l'appel et autres voies de recours, à la peremption de l'instance.'[1]

"Reference is here made to the language of the above rules to show that when an alien is admitted to stand in justice on the same terms as a citizen, he must necessarily be entitled to invoke in his behalf all the customary and civil processes of the courts which are open to citizens.

[1] Lorimer, Institutes of the Law of Nations, II. 530.

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Cession de Biens.

"In view of the fact that the executive and judicial authorities of Hayti have placed their refusal to admit Van Bokkelen to the benefits of the judicial assignment, upon the ground that by the letter of the municipal codes of Hayti all aliens are excluded from its privileges, and that it is confined to native citizens, and that it is a civil institution of the state, it becomes necessary to inquire into the rêal nature and character of the proceeding known as judicial assignment (*cession de biens*). This is of the first importance, because the fallacy in the reasoning of the courts and of the executive of Hayti and of counsel for the defendant government consists in attributing exceptional characteristics and functions to the act of judicial assignment.

"The provisions of the Haytian code which have been cited are here below inserted.[1]

"There is nothing exceptional, unusual, or extraordinary in this proceeding. It is not, as the language of the courts, of the executive of Hayti, and the argument of counsel for defendant government implies, a law unto itself of such supreme authority as to negative the purpose and effect of a treaty stipulation.

"The judicial assignment (*cession de biens*) of the Haytian codes is described under title 5 of the civil code of Hayti, and of 12 of the code of civil procedure, and title 2 of the code of commerce.

"There is nothing hidden or mysterious about it; it possesses no cabalistic power. And the execution of a judicial assignment is simply a step in the ordinary procedure and practice of the courts of Hayti. It is a familiar and well known incident in the jurisprudence of the civil law. The provisions in the Haytian code were transferred bodily from the civil code of France; and France incorporated them in her code from the corresponding title (*cessio bonorum*) of the Justinian code, whence they are traced back to the Lex Julia.[2]

"'The Lex Julia, probably passed in the reign of Augustus,

[1] Le cession judiciare est un bénéfice que la loi accorde au debiteur malheureux et de bonne foi, à quel il est permis, pour avoir la liberté de sa personne, de faire en justice l'abandon de tous ses biens à ses créanciers, nonobstant toute stipulation contraire. (Article 1054, Civil Code of Hayti.)

* * * Ne pourront être admis au bénéfice de cession *les étrangers*, les stellionataires, les banqueroutiers frauduleux, les personnes condamnées pour cause de vol ou d'escroquerie, ni les personnes comptables, tuteurs, administrateurs et depositaires. * * * (Article 794, Haytian Code of Civil Procedure.)

Ne pourront être admis du bénéfice de cession: 1. Les stellionataires, les banqueroutiers frauduleux, les personnes condamnées pour fait de vol ou d'escroquerie, ni les personnes comptables. 2. Les étrangers, les tuteurs, administrateurs au depositaires. (Article 569, Haytian Code of Commerce.)

[2] Merlin, Repertoire de Jurisprudence, IV. 46, etc.

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at length exempted insolvent debtors from the penalty of imprisonment and infamy, and secured to them the *beneficium competentiæ* or right to maintenance, provided they made an immediate and complete *cessio bonorum* to their creditors."[1]

"'The surrender was made by solemn declaration, either judicial or extrajudicial. The property thus given up was sold, and the price distributed among the creditors. The debtor was not released from his debts unless the creditors were fully paid, but he was protected from imprisonment at their instance. If the debtor subsequently acquired property his creditors were entitled to attach it, except in so far as it was necessary for his own subsistence. This latter privilege was called "*exceptio*" or "*beneficium competentiæ.*"'

"'The *Lex Julia de cessione bonorum* introduced a *new procedure* in relation to a bankrupt's estate (*venditio bonorum*), which theretofore was governed by the "*missio in bona.*"'[2]

Interpretation of Treaties.

"The rule for the interpretation of treaty stipulations suggested in the judgment of the civil courts of Port au Prince, as has been pointed out, was taken from its appropriate context in the decision of the court of cassation, in Napier *v.* Duke of Richmond, which case has been considered. As it is sought to be used in relation to the case under consideration, it is without relevance or authority. The language of all the authorities repudiates such a strained and singular construction, whether it be in application to private contracts or to international covenants.

"It may be said of the treaty of November 3, 1864, as was said of the Constitution of the United States by Mr. Justice Story, with the approval of Chancellor Kent, that—

"'The instrument furnishes essentially the means of its own interpretation.[3]

"'The first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms and the intention of the parties. The intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law.[4]

"'And the only case in which a literal meaning is not to be adopted is limited to the exception when such construction would involve a manifest absurdity.[5]

[1] Mackenzie, Studies in Roman Law, 1880, pp. 376, 380; Mackeldy, Roman Law, section 523; Colquhoun, Roman Civil Law, Vol. II. p. 351.

[2] Mackeldy, Roman Law, section 523; White, Recopilacion of the Laws of Spain and the Indies, pp. 170, *et seq.*

[3] Kent's Commentaries, Vol. I. p. 243; note, citing Story, Commentaries on the Constitution of the United States, Vol. I. pp. 382–442.

[4] Story on the Constitution of the United States, Vol. I. Sec. 400; Blackstone's Commentaries, Vol. I. pp. 59 and 60.

[5] Story on the Constitution of United States, Vol. I. Sec. 402, citing authorities.

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"'When the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. In literal interpretation the rule observed is to follow the sense in respect both of the words and construction of them which is agreeable to common use without attending to etymological fancies or grammatical refinements.[1]

"'All international treaties are covenants bona fide, and are, therefore, to be equitably and not technically construed.[2]

"'The principal rule has already been adverted to, namely, to follow the ordinary and usual acceptation, the plain and obvious meaning of the language employed. This rule is, in fact, inculcated as a cardinal maxim of interpretation equally by civilians and by writers on international law.

"'Vattel says that it is not allowable to interpret what has no need of interpretation. If the meaning be evident and the conclusion not absurd, you have no right to look beyond or beneath it, to alter or to add to it by conjecture. Wolf observes that to do so is to remove all certainty from human transactions.[3]

"'Treaties are to be interpreted according to their plain sense.[4]

"'Publicists are generally agreed in laying down certain rules of construction as being applicable when disagreement takes place between the parties to a treaty as to the meaning or intention of stipulations. Some of these rules are either unsafe in their application or of doubtful applicability; and rules tainted by any shade of doubt, from whatever source it may be derived, are unfit for use in international controversy.

"'Those against which no objection can be urged, and which are probably sufficient for all purposes, may be stated as follows:

"'When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, subject to the qualifications, that any words which may have a customary meaning in treaties differing from their common signification must be understood to have that meaning, and that a sense can not be adopted which leads to an absurdity or to incompatibility of the contract with an accepted fundamental principle of law.

"'Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals, and these are to receive a fair and liberal interpretation, according to the intention of the

[1] Story on the Constitution of United States, Vol. I. Sec. 402.

[2] Phillimore, International Law, Vol. II. 3 ed. pp. 94-99, citing authorities.

[3] Phillimore, International Law, Vol. II. 3 ed. p. 99.

[4] Hall, International Law, p. 281.

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contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.'[1]

"Applying these rules to the words, the context, and the subject-matter found in articles 6 and 9 of the treaty of November 3, 1864, there would seem to be no difficulty in ascertaining their precise intention and meaning.

"The infirmity or fallacy disclosed in the reasoning of the decrees of the Haytian courts and in the message of the executive of Hayti, referring to this case and adopting the views of the courts, is, that the judges and President Salomon reason about the competition which exists between the treaty and the municipal law of Hayti as if the question of relative authority and comparative precedence was between a municipal statute of the United States and a municipal statute of Hayti. In doing this they lose sight of the important fact that the competition is between provisions contained in municipal statutes of Hayti and stipulations in a treaty of subsequent date, to which Hayti is one of the contracting parties. It would seem, from the character of the arguments submitted on behalf of Hayti, that counsel did not fail to recognize this infirmity in the reasoning of the judicial and executive authorities. And this seems to have embarrassed counsel for defendant government and accounts for the shifting positions upon which the defense in this case has, at different times, rested. It seems to be forgotten that the operation of treaty stipulations within the jurisdiction of a contracting party is not a foreign interference, nor is it the application of extraterritorial or foreign law. By the constitution and law of Hayti a treaty is a law of the state.

"The treaty of November 3, 1864, is within Lorimer's category of the third class of treaties 'as sources of international law;' treaties which, among other things, recognize the equal rights of foreigners and natives before the municipal law.[2] 'The value of treaties, as a source of the positive law of nations, is supposed to have been greatly enhanced by the annex to Protocol No. 1 of the conferences held in London in 1871 respecting the clauses of the Treaty of Paris of 1856, which have reference to the neutralization of the Black Sea. The protocol is in the following words:'

"'The plenipotentiaries recognize that it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement.'"

[1] Kent's Commentaries, Bk. 1, 13th ed. p. 175; citing Grotius, b. 2, c. 16, Sec. 1; Puff. b. 5, c. 12, Sec. 1; Rutherforth's Institutes, b. 2, c. 7; Vattel, b. 2, c. 17; Eyre, Ch. J., in 1 Bos. & Pull. 438 and 439; opinion of Sir James Marryat, cited in Chitty Comm. Law. 44.

[2] Lorimer's Institutes of the Law of Nations, Vol. I. pp. 44, 45.

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Inconsistent Positions of Hayti.

"Some of the inconsistencies in the positions assumed at different times by the defendant government have been pointed out in the brief on behalf of complainant.[1]

"It was first maintained that the case of Van Bokkelen in the Haytian courts was decided only on an exception; that is to say, that the court of cassation, affirming the judgment of the court below, held that Van Bokkelen, being an alien, the said court had no jurisdiction over the subject-matter.[2]

"At a later date, referring to the decision of the courts, it was argued that 'at the utmost the Haytian judges erred in resting their decision upon grounds erroneous, or open to discussion; and the only error, if any, which may possibly be charged to them, was to set forth as a ground for their judgment that Van Bokkelen's case did not fall within the scope of the treaty, *instead of stating simply that petitioner had not taken the steps required to be entitled to the rights guaranteed him by said treaty stipulations.*'[3]

"As has been said, 'such a decision would, indeed, have created an entirely different situation.'[4]

"In the second argument or note the Haytian minister maintained that under article 148 of the Haytian code of civil procedure judgment in the Van Bokkelen case was null and void. His first proposition in regard to the action of the court is that it dismissed Van Bokkelen's case for want of jurisdiction. His second proposition is that the judgment of the tribunal of Port au Prince must be regarded as a final decision against Van Bokkelen of all the questions raised by the pleadings; and his third proposition is that Van Bokkelen did not exhaust the legal remedies afforded by municipal law, because, on account of an omission on the part of the judges to 'pass upon' all the questions raised, the judgment was null and void, and Van Bokkelen was therefore entitled to the extraordinary remedy known as '*la requête civile.*'[5]

"It is quite clear, from an examination of article 148 of the Haytian code of civil procedure, referred to by Mr. Preston, that the judges are not required to 'pass upon' all the points raised in the pleadings in the sense of judicially determining them, but only of taking notice or mentioning them in the judicial summary of the proceedings, which in Haytian procedure constitutes the judgment. And one of the objects of this requirement seems to be to furnish evidence to the parties in the judgment itself that none of their points have been overlooked. It further appears that the reopening of the judg-

[1] Brief of complainant, pp. 19, 20.

[2] Note of Hon. Stephen Preston, minister from Hayti, to Hon. Thomas F. Bayard, Secretary of State of the United States, August 15, 1887.

[3] "Statement of Facts and Points of Law," by Hon. Stephen Preston, minister of Hayti, p. 21, *et seq.*

[4] Brief of complainant, pp. 20–31.

[5] Brief of complainant, p. 31.

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ment under that article can be had only 'upon the request of those who have been parties, or of those who have been duly brought into court.'[1]

"Reference is again made to the conflicting and contradictory positions assumed, at different stages of the proceedings, by the defendant government, for the purpose of showing how important and necessary it has been for the referee to confine himself to the narrow ground furnished in the single issue suggested by the terms of the arbitration. The language of the protocol necessarily fixed the decision of the Haytian courts and the action of the executive of Hayti as the starting point for the referee's examination and decision.[2] And the treaties between the high contracting parties were made the supreme law for his consideration and guidance.

Award.

"Whether the literal, natural meaning of the language, or the spirit of the treaty of November 3, 1864, or the common intention of the contracting parties be regarded, I am of opinion, first, that the imprisonment of Charles Adrian Van Bokkelen, a citizen of the United States in Hayti, was in derogation of the rights to which he was entitled as a citizen of the United States under stipulations contained in the treaty between the United States and Hayti. Second, that the record of the case and the correspondence between the two governments fails to disclose any extenuating circumstances or sufficient justification for the harsh treatment and protracted imprisonment of Van Bokkelen by the constituted authorities of the Republic of Hayti, notwithstanding the earnest and repeated protests of the representatives of the United States; and I award that the republic of Hayti pay to the United States, on behalf of the representatives of Charles Adrian Van Bokkelen, the sum of sixty thousand dollars ($60,000).

"Witness my hand this 4th day of December, A. D. 1888, at the city of Washington.

"ALEX. PORTER MORSE, *Referee.*"

Payment of the Award.

July 14, 1890, Mr. Douglass, minister of the United States at Port au Prince, signed with Mr. Firmin, minister for foreign affairs, a protocol by which it was provided—

1. That Hayti should pay the award in twelve equal installments of $5,000 each, one such installment to be paid every six months, with 5 per cent interest on the unliquidated part of the principal.

[1] Note of Third Assistant Secretary of State, p. 8.

[2] Decree of the court of Port au Prince, May 24, 1884; decree of the court of cassation, February 26, 1885; annual message of President Salomon, For. Rel. U. S. 1885, pp. 499, 535, 536.

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2. That as the award became due December 4, 1889, and nothing had been paid on it, the first installment should be considered as having become due on that day, and that two installments with interest should be paid at once.

3. That Hayti should then issue as a guaranty for the payment of the rest of the award ten bonds of $5,000 each, bearing interest at the rate of 5 per cent, the interest to cease as soon as the bond was paid.[1]

The last installment under this agreement was paid in 1895.[2]

[1] Mr. Douglass to Mr. Blaine, July 16, 1890.

[2] Mr. Ferres to Mr. Olney, June 21, 1895, MS. Disp. from Hayti. See further as to the payment of the award, Mr. Blaine, Sec. of State, to Mr. Ferres, November 29, 1890; Mr. Douglass to Mr. Blaine, March 9, 1891; Mr. Wharton, Acting Sec., to Mr. Douglass, May 5, 1891; Mr. Uhl, Acting Sec., to Mr. Smythe, December 27, 1893: MSS. Dept. of State.

The Juridical Review, II. (1890) 76–78, has an article entitled "International Arbitration—The Van Bokkelen Case."

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CHAPTER XLIV.

MINOR OR PENDING CASES.

1. The Savage Claim.

In September 1851 a quantity of gunpowder belonging to Mr. Henry Savage, a citizen of the United States, was imported into Salvador and deposited in a temporary storehouse at Acajutla which was designated by the authorities for that purpose. The agent of the owner immediately proceeded to dispose of the powder, and had sold a part of it when in March 1852 a decree, dated the 24th of the preceding month, was published by the Government of Salvador by which it was declared that in six months from the date of the decree the sale of gunpowder should become a monoply of the state, and that all gunpowder remaining after the expiration of that period should be removed from the country under penalty of being declared contraband. The decree further provided that, upon the publication thereof, persons having gunpowder should forthwith store it at a distance from all inhabited places, and that a fine of $50 should be imposed upon any person introducing for sale a greater quantity than 12 pounds.

It was alleged that as a result of this decree the sale of Mr. Savage's gunpowder became impossible; that an effort was made to sell it to the government, but that the government "declined to purchase except at a price ruinous to the owner," and that in the end the powder had to be abandoned, when it was sequestrated by the government.

A claim for indemnity was presented to the Government of Salvador on the ground (1) that as the gunpowder was an article of legal traffic, lawfully imported and stored under the direction of the authorities, it was to be considered as any other article of merchandise, and that the decree of February 24, 1852, was "to be measured by the same rule as would be

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applied to commercial enactments in regard to any other commodities legally imported;" (2) that the decree, being *ex post facto* in respect of the powder in question, violated the constitution of Salvador, which declared "any statute having a retroactive effect to be unjust, oppressive, and null," and that the sequestration of the powder violated another article of the constitution by which it was declared that the property of individuals should not be taken for public purposes without a previous payment of its value; and (3) that citizens of the United States were entitled to the protection of the constitutional guaranties under Article III. of the treaty between the United States and Salvador of January 2, 1850, by which it was provided that the citizens of each of the high contracting parties should have within the country of the other "the power * * * to engage in all kinds of trade, manufactures, and mining upon the same terms with the native citizens," to "enjoy all the privileges and concessions in these matters which are or may be made to the citizens of any country," and to "enjoy all the rights, privileges, and exemptions in navigation, commerce, and manufactures which native citizens do or shall enjoy, submitting themselves to the laws, decrees, or usages there established to which native citizens are subjected."[1]

Mr. Partridge, United States minister, writing to Mr. Seward from San Salvador, February 25, 1864, reported that he had had an interview with the provisional president of the country in relation to the long-pending claim of Henry Savage, who was then a resident of Guatemala. The president was ready to refer it to arbitration, each party to designate an arbitrator and the arbitrators to choose an umpire. Mr. Partridge observed that the claim of Mr. Savage was not, in his opinion, "a clear and indisputable one for the amount he asks. There are," continued Mr. Partridge, "many equities upon the other side, and many delays and failures on his part to comply with the regulations of the government (in regard to the storage, etc., of gunpowder, for the taking of which his claim arises), so that, as it seems to me, an arbitration would offer precisely the appropriate mode of disposing of the matter."

On April 13, 1864, Mr. Partridge reported that he had received a letter from Mr. Savage expressing his satisfaction with the disposition of the government to submit the case to

[1] Mr. Marcy, Sec. of State, to Mr. Borland, January 19, 1854; Mr. Marcy to Mr. Marling, April 21, 1855, MSS. Dept. of State.

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arbitration. Soon afterward Mr. Savage, at Mr. Partridge's request, visited San Salvador, and an agreement was made with the government of Salvador to submit the claim to arbitration in Guatemala on June 1, 1864. An agreement to that effect was signed May 4 in triplicate, one of the copies being retained in the legation at San Salvador. Of the other copies one was retained by the Salvadorian Government, while the other was sent with the papers in the case to the United States legation in Guatemala.[1] Mr. Partridge's proceedings were approved.[2]

March 17, 1865, Mr. Partridge reported that the referees, Messrs. M. J. Dardon, A. Andreu, and Fermin Armas, had, on the 21st of the preceding month, "finally adjudicated" the claim "in favor of Mr. Savage" by awarding him "*four thousand four hundred and ninety-seven dollars and fifty cents* (deducting therefrom the amount of duties due on said gunpowder and still remaining unpaid), with *interest on said amount* at the rate of *six per cent* per annum from the *tenth* day of December 1852 until paid."

2. The Ashmore Fishery.

In a dispatch of October 22, 1884,[3] Mr. John Russell Young, then United States minister at Peking, reported to the Department of State the settlement at Swatow, by arbitration, of a case known as that of the Ashmore Fishery. It appeared that the fishery in question, which was locally known as the Sun Bue fishery, was purchased by Mr. Ashmore in 1872 from its Chinese owner, and that it was enjoyed by Mr. Ashmore without molestation till the end of the year 1881, when the foreign consuls at Swatow asked for the removal of some fishing stakes below that port, which stakes belonged to the people of a neighboring village, and which obstructed navigation. The stakes were ordered to be removed, but their owners "made an outcry and demanded that other places should be assigned to them;" and in order to pacify the people permits were given to them by the authorities to fish elsewhere. These permits being couched in vague terms, the holders of them "organized themselves into a new fishing company and pounced on Ashmore's fishery." Mr. Ashmore complained against the trespassers,

[1] Mr. Partridge to Mr. Seward, May 6, 1864, MSS. Dept. of State.

[2] Mr. Seward to Mr. Partridge, July 29, 1864.

[3] MSS. Dept. of State.

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but failed to obtain redress. This failure he alleged to be due to the "arbitrary and unjust procedure of the Cheng Hai magistrate," in respect of which there were many allegations and counter allegations which it would be profitless to review. Mr. Ashmore offered to settle the claim (1) by selling out his rights to the Chinese authorities or (2) by accepting a restoration of the fishery entire, with indemnity for the losses of himself and his tenants in consequence of their disturbance.

In 1884 Mr. Young visited Swatow, and while there received from Mr. Ashmore certain representations in regard to the latter's grievance. Mr. Young in consequence held two long conversations with the taotai as to the merits of the controversy, and finally suggested that two of the foreign consuls at Swatow should be selected as arbitrators to hear and decide the case. The taotai at length accepted this proposition, and the consuls of Great Britain and the Netherlands were named, the ministers of their respective countries, at Mr. Young's request, permitting them to act in the matter. The arbitrators awarded to the plaintiff the sum of $4,600, which was duly paid. Mr. Young thought that "substantial justice" had been done, and caused an expression of his thanks to be conveyed to the arbitrators.

The award was as follows:

"We, George Phillips, H. B. M. Consul, officiating at Swatow, and Robert Hunter Hill, H. N. M. Consul at Swatow, having been requested by H. E. the Hon. J. Russell Young, E. E. & M. P. of the U. S. at Peking, and Chang, Taot'ai of the Hui Chao Kia Intendancy in the Province of Kuang tung, to arbitrate in a matter as to the sum of money the Rev. Dr. Ashmore, a U. S. citizen, residing at Swatow, is held to be entitled to receive from the Chinese Government, for giving up to them his title deeds to a certain fishery ground, from which he for many years has received an income of four hundred dollars a year.

"We, after deliberately and carefully weighing the facts of this case, hold it as our opinion, that the Rev. Dr. Ashmore should receive from the Chinese Government for giving up his right and title to the said fishery ground, the sum of four thousand six hundred dollars.

"We hold Dr. Ashmore to be entitled to that sum for the following reasons:

"Dr. Ashmore, by giving up his deeds to this fishery ground, loses four hundred dollars per annum, and he should in justice be paid a sum which would without difficulty give him in a like venture the same amount of interest.

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"The Chinese authorities admit that for two years Dr. Ashmore has not received the rental of the fishery ground, which amounts to eight hundred dollars.

"This sum we consider he is entitled to receive.

"The fact that Dr. Ashmore was not willing to part with his deeds, and that he is for the moment deprived of a good investment, should be taken into onsideration, and in estimating the value of the fishery a certain sum has to be added to the purchase money. This we have done, and we have fixed the sum to be due Dr. Ashmore on the three counts, viz: The loss of two years rental; the value of the property; and recompense for compulsory sale, at $4,600.

"In arriving at this decision we think we on the one hand have dealt fairly with the Chinese Government, for we argue that if Dr. Ashmore could get a rental of $400 a year for the fishery ground the Chinese Government will on receipt of the deeds be in a position to relet it for a like amount; we think on the other hand, that taking into consideration the nature of the property, we could not in fairness award Dr. Ashmore a larger amount than we have done, which amount with the interest attainable upon investments of a kindred character in China will always bring him in the amount of which he has been deprived, and at the same time cover all that can be fairly claimed. This amount of $4,600 to be paid two months from today the 24th May, 1884.

"Given under our hands and seals of office this twenty-fourth day of May, 1882.

[SEAL.] "GEO. PHILLIPS,
"*H. B. M.'s Consul, officiating at Swatow.*

[SEAL.] "ROBT. H. HILL,
"*Acting Netherlands Consul.*"[1]

3. RIOTS AT PORT AU PRINCE.

Civil Commotions.

On September 22, 1883, at a time of civil commotion in Hayti, a riot took place in Port au Prince. It was caused by twenty or thirty people, who started a fight in the streets, accompanied with revolutionary outcries against the government of President Salomon. Failing to obtain the popular response which they expected, they stole away and concealed themselves in various private houses and in some of the consulates. Not long afterward, however, government troops appeared on the scene and

[1] It was at one time in contemplation to submit to arbitration what was known as the *Peiho* claim against Japan, for the seizure of that vessel, the property of a citizen of the United States, by the Japanese authorities in 1869. (Mr. F. W. Seward, Acting Sec., to Mr. Rollins, February 10, 1879, MS. Dom. Let. CXXVI. 413.) The claim was directly settled in 1880. (Mr. Payson, Third Assistant Sec., to Mr. Hackett, Nov. 8, 1880, MS. Dom. Let. CXXXV. 207.)

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indulged in various acts of violence. The number of lives lost was not large, but there was much destruction and pillage in the heart of the city, where hundreds of valuable buildings were burned.

On the 23d of September the scenes of the preceding day were reenacted and aggravated. The special cause of the excitement appears to have been the landing at Port au Prince of General Piquant, who had been wounded by insurgents at Miragoane. The lives of all those who were suspected of disaffection to the government were put in jeopardy, and their property was destroyed. Indeed, so general was the fury and excitement of the soldiers and of the loyal element of the population that they used their firearms and torches with little discrimination. No respect was paid to foreign flags. Diplomatic and consular officers were forced to appeal to foreign men-of-war in the harbor for protection, and, in order to stay the destruction of life and the pillage and burning of property, were finally compelled to threaten the bombardment of the city, including the national palace. The minister of the United States was at the time absent on leave, and there was no American man-of-war in the harbor; and the vice-consul-general of the United States did not sign the ultimatum. It was subscribed, however, by the diplomatic or consular representatives of Belgium, France, Germany, Great Britain, the Netherlands, Spain, and Sweden and Norway, and troops were landed with the permission of the government from British, French, and Spanish men-of-war.

During the two days of pillage and destruction the records and furniture of the department of foreign affairs, finance, and commerce were almost wholly destroyed, and among the private individuals who were injured in person or property, or in both, were various foreigners. Of these, six were American citizens, all of whom lost property, and two of them were physically maltreated by the government troops.[1]

Mixed Commission.

After much negotiation it was agreed that a mixed commission of four persons, two Americans and two Haytians, should be appointed. Pursuant to this agreement Charles Weyman and Edward Cutts were named on the part of the United States, and B. Lallemand, president of the tribunal of cassation, and C. A.

[1] Mr. Langston to Mr. Frelinghuysen, November 20, 1883, For. Rel. 1883, 594.

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Preston on the part of Hayti.[1] Dr. J. B. Terres was afterward substituted for Mr. Cutts and Ségu Gentil for Mr. Preston.[2] No formal convention was concluded, but it was arranged by correspondence that the indemnities should be paid in American money or its equivalent, less a commission of 10 per cent to a commercial house for redeeming the awards. The question as to the commission's jurisdiction of the subject of nationality was disposed of by the admission by the Haytian secretary of state of the American nationality of all the claimants whose cases were prosecuted by the United States minister.[3]

On the 22d and 24th of April 1885 the commissioners agreed on the amount to be allowed on all the claims but two. The total amount awarded was $5,700.

The Williams and Fournier Claims.

The claims on which the commissioners could not agree were those of two widows, named Williams and Fournier, who demanded, respectively, $16,000 and $1,500, in each case for the destruction of a house. The Haytian commissioners denied the claimants' right to indemnity on the ground that foreigners were unable under Haytian law to hold real property. The American commissioners maintained that they were entitled to indemnity on the sole fact of possession. This difference was referred to the two governments.[4] The Government of the United States took the ground that as the claimants held title deeds to their houses, and no legal proceedings had ever been taken to dispossess them, they were entitled to redress for having been violently deprived of their property under circumstances for which the government acknowledged its liability. Titles, said the United States, could not be determined by violence. Even if the sole title was that of possession, the owner could be dispossessed only by process of law; and in the present instance the case of the claimants was, it was maintained, strengthened by the fact that the government, which was the only party entitled to make complaint, had permitted them to remain in possession.[5] The Haytian Government at first refused to admit these positions, saying that the rule which it sought to apply to the claims in question had been accepted by the representatives of other powers.[6] In the end, however, it settled the claims by paying to the min-

[1] For. Rel. 1885, p. 500.
[2] Id. 505–519.
[3] Id. 504.
[4] Id. 520.
[5] Id. 525.
[6] Id. 540.

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ister of the United States on November 30, 1887, the sum of $9,000, of which $8,000 were for Mrs. Williams and $1,000 for Mrs. Fournier.[1]

4. The Kellett Case.

In 1896 Mr. E. V. Kellett, United States vice-consul-general in Siam, visited Chiengmai on business relating to the estate of an American citizen. On the evening of November 19 his clerk, Nai Sye, an educated native, while on his way to the post-office, accompanied by a servant with a lantern, was arrested by some military police and conducted to the police station on a charge of violating the ordinances by carrying a dangerous stick at night. The stick seems to have been a light cane with an engraved silver head. When Mr. Kellett heard of the arrest he proceeded to the police station and made a protest, and, failing to receive a satisfactory explanation of the affair, demanded his clerk's release. The clerk does not appear to have been at the moment detained. At any rate he was not prevented from going with Mr. Kellett away from the station, though the authorities required him to leave his stick behind. Up to this point "both sides had possibly been excited and used strong language," but nothing had occurred that could not have been "smoothed over the next day." But when Mr. Kellett had proceeded about 50 yards from the station he was suddenly surrounded by fifteen or twenty soldiers, some of whom attacked him with the butts of their rifles, while others stood about with arms in their hands. Mr. Kellett at first endeavored to resist, but soon desisted. The object of the attack seems to have been the rearrest of Sye, who was seized and carried away. When this was effected Mr. Kellett, who was bruised about the shoulders but not disabled, was allowed to proceed to his home. Two hours later Sye was released by order of the chief commissioner and sent to Mr. Kellett's residence.[2]

Both sides made a report of the affair to Bangkok; and the legation of the United States, on being informed of the facts, presented to the Siamese Government a formal complaint. Siam was disposed to throw the blame of the affair upon Mr. Kellett, and promised an investigation by a Siamese tribunal. The legation, however, in view of the provisions of the trea-

[1] Mr. Thompson, Minister to Hayti, to Mr. Bayard, Sec. of State, December 1, 1888, MSS. Dept. of State.

[2] Siam Free Press, November 15, 1897.

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ties in regard to extraterritorial jurisdiction and of the official character of Mr. Kellett, asked for an investigation by a mixed commission, and, while the discussion was pending, a visit was paid to Bangkok by the U. S. S. *Machias*. At length Mr. Barrett, the minister of the United States, proposed that the mixed commission should be constituted as a board of arbitration; and to this proposal the Siamese Government acceded.

September 20, 1897, the arbitrators rendered the following award:

"Whereas we, the undersigned, have been duly appointed and authorized respectively by the United States and Siamese Governments to investigate a certain alleged assault upon the United States vice-consul-general, Mr. E. V. Kellett, at Chiengmai, in November 1896, and to arbitrate all questions of law, fact, and reparation of said alleged assault;

"Whereas we have held an investigation in both Bangkok and Chiengmai and have heard all evidence obtainable in this matter;

"Whereas from said investigation it appears that on the 19th of November, 1896, at about 7 p. m., after and following certain difficulties between the said vice-consul-general of the United States and soldiers of His Siamese Majesty's army acting as police, in regard to the arrest of a clerk of said vice-consul-general of the United States, the said vice-consul-general was assaulted in one of the main streets of Chiengmai by a number of said soldiers;

"Whereas this unfortunate incident could have been avoided, or at least its gravity lessened, if the Nai Roi Ake—i. e. Captain—Luang Phuvanat, the officer in command of the soldiers who committed the said assault, had taken the steps which his duty and the circumstances required;

"Whereas the Nai Roi Tri—i. e. Sublieutenant—Choi, under whose immediate command the soldiers who committed the said assault were placed and who was present when the said soldiers committed the assault, did nothing to prevent them from inflicting injuries upon the person of the vice-consul-general;

"Whereas Nais Kram, Niem, and Phun, ordinary soldiers, while obeying certain orders, are convicted of having transcended such orders, and of having struck several times the said vice-consul-general, using to that effect the butts of their rifles, and inflicting bruises upon his body;

"Whereas the conduct of the said officers and soldiers is, to a certain extent, excusable from the excitement resulting from the unusual and imprudent steps taken by the vice-consul-general in this matter;

"*Therefore we have agreed on the following:*

"I. The Nai Roi Ake—i. e. Captain—Luang Phuvanat, shall be recalled to Bangkok without delay after the publication of this decision; he shall be reprimanded in the presence of an

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official of the United States legation, in Bangkok, and a Siamese official of equal rank; he shall lose the grade he holds in His Siamese Majesty's army, and shall be reduced to the grade of nai roi toh—i. e. Lieutenant—from which he shall not be promoted for a period of two years from date of reprimand; he shall be suspended from the army without pay for a period of one year from date of reprimand; he shall not return to Chiengmai within five years from date of this decision.

"The Nai Roi Tri—i. e. Sublieutent—Choi, shall be recalled to Bangkok without delay after the publication of this decision; he shall be reprimanded in the presence of an official of the United States legation, in Bangkok, and a Siamese official of equal rank; he shall not be open to promotion for a period of eighteen months from date of reprimand; he shall be suspended from the army without pay for a period of six months from date of reprimand; he shall not return to Chiengmai within five years from the date of this decision.

"III. Nais Kram, Niem, and Phun shall be recalled to Bangkok without dely after the publication of this decision; they shall be reprimanded in the presence of an official of the United States legation in Bangkok and a Siamese official of equal rank; they shall be deprived of their pay during three months from date of reprimand; they shall not return to Chiengmai within five years from date of this decision.

"*We have also agreed:*

"A. His Siamese Majesty's Government shall express its official regrets to the United States Government, through the latter's representative in Bangkok, that soldiers of His Siamese Majesty's army committed an assault upon the person of a consular official of the United States, and shall duly instruct the chief commissioner of the Monthon Laochieng, Phya Song Suradij, to take such steps as will prevent a repetition of such an incident.

"B. That copies of this decision shall be published in the official gazettes of both Governments within a reasonable time after their acquaintance with the same, and one shall be posted on the gateway of the police station in Chiengmai for not less than three weeks and within seventy-five days of the date of said decision.

"Done in duplicate at Chiengmai this twentieth day of September, eighteen hundred and ninety-seven (20th September, 1897).

"JOHN BARRETT,
"*Minister Resident and Consul-General of the United States,*
"*Arbitrator on behalf of the United States Government.*

"PIERRE ORTS,
"*Assistant Legal Adviser to H. S. M.'s Government,*
"*Arbitrator on behalf of H. S. M.'s Government.*"

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5. The Delagoa Bay Railway.

Annual Message of December 1, 1890.

In his annual message to Congress of December 1, 1890, the President of the United States referred as follows to a difference which had arisen with Portugal touching the Delagoa Bay Railway:

"In the summer of 1889 an incident occurred which for some time threatened to interrupt the cordiality of our relations with the Government of Portugal. That government seized the Delagoa Bay Railway, which was constructed under a concession granted to an American citizen, and at the same time annulled the charter. The concessionary, who had embarked his fortune in the enterprise, having exhausted other means of redress, was compelled to invoke the protection of his government. Our representations, made coincidently with those of the British Government, whose subjects were also largely interested, happily resulted in the recognition by Portugal of the propriety of submitting the claim for indemnity, growing out of its action, to arbitration. This plan of settlement having been agreed upon, the interested parties readily concurred in the proposal to submit the case to the judgment of three eminent jurists, to be designated by the President of the Swiss Republic, who, upon the joint invitation of the Governments of the United States, Great Britain, and Portugal, has selected persons well qualified for the task before them."

Prior Negotiations.

The first step of the Government of the United States toward intervention in respect of the Delagoa Bay Railway was taken in May 1889, on the 9th of which month Mr. Blaine, as Secretary of State, instructed Mr. Lewis, then minister of the United States at Lisbon, to send to the Department of State all the documents relating to the grant by the Portuguese Government to Edward MacMurdo, a citizen of the United States, of the concession for the construction and operation of the railway.[1] On the 19th of the next month Mr. Blaine further instructed Mr. Lewis that it was reported that the Portuguese Government intended to take possession of the railway on the 24th of June; and he expressed the hope that no decisive action might be taken till the Government of the United States could investigate the case and make known any objections it might desire to express. At the same time he reserved all the rights of the United States in the matter.[2] In due time Mr. Blaine was informed that the concession had been

[1] Telegram, May 9, 1889, MSS. Dept. of State.

[2] Telegram, June 19, 1889, Id.

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canceled. He then directed Mr. Lewis to enter a formal protest, reserving all rights which the heirs of Mr. MacMurdo, who had then died, or other American citizens, might have in the concession;[1] and he subsequently instructed Mr. Loring, who had succeeded Mr. Lewis as minister at Lisbon, to inform the Portuguese Government that the United States, after careful investigation, viewed the forfeiture of the concession and the confiscation of the railway as unwarranted and unjust.[2]

Coincidently with the making of these representations to the Portuguese Government, Mr. Blaine caused Mr. Lincoln, then minister of the United States in London, to inform the foreign office that the Government of the United States would actively cooperate with that of Her Majesty to secure the respective rights of the American and British investors and stockholders who had been injured by the action of the Portuguese Government in relation to the railway.[3] Lord Salisbury expressed gratification with this offer, and gave Mr. Lincoln a copy of his instructions to the British minister at Lisbon of September 10, 1889, containing the demand of Her Majesty's government upon Portugal. On the 8th of November Mr. Blaine dispatched to Mr. Loring the following instructions, setting forth the conclusions of the United States on the subject in controversy:[4]

"DEPARTMENT OF STATE,
"*Washington, November 8, 1889.*

"SIR: Referring to previous correspondence on the subject of the seizure by the Portuguese Government of the Delagoa Bay Railway, I have now to acquaint you with the views which this government, after careful consideration of the facts, has reached on that subject.

"On December 14, 1883, Edward MacMurdo, a citizen of the United States, received from the Portuguese Government a concession for the construction of a railway from the port of Lourenço Marques to the frontier, between the territory of Portugal and the Transvaal. The line of the railway so to be constructed and its extent were subsequently defined by plans approved by the Portuguese Government on October 30, 1884.

"In accordance with the provisions of his concession, Colonel MacMurdo at once proceeded to form a company for the construction of the railway, which bore the title of the Lourenço Marques and Transvaal Railway Company, and was organized in Portugal. This company after several extensions of time was

[1] Telegram, July 1, 1889, MS.
[2] Telegram, October 12, 1889, MS.
[3] Telegram, October 7, 1889, MS.
[4] MSS. Dept. of State.

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unable to procure funds with which to complete the contract, and Colonel MacMurdo then sought to obtain the necessary capital in England. His efforts in that direction resulted in the formation in London of the Delagoa Bay and East African Railway Company, and under the auspices of this organization the funds required for the completion of the railway were secured. In these various transactions Colonel MacMurdo, who remained all through, as the original concessionaire, a responsible party for the completion of the road, took and paid for a large amount of stock and bonds, and his proceedings for the formation of the British company had the approval of the Portuguese Government, the only reservation which it made in regard thereto being that the concession should not be transferred to the British company. With this reservation it was understood on both sides, as appears by the correspondence, that the British company might hold a part or even all the shares of the Portuguese company.

"The capital was raised and the construction of the road proceeded with, in accordance with the plans approved by the Portuguese Government on October 30, 1884. No intimation of any change in those plans was made until July 1887, on the 24th of which month a plan was presented to the resident engineer of the British company at Lourenço Marques by the Portuguese official engineer, Major Machado, with a letter in which it was intimated that the Portuguese Government required the extension of the railway to a point nine kilometers beyond the limit fixed in the original and approved plans. Inquiries made at the colonial department of the government in Lisbon, on behalf of the British company, elicited the information that nothing was known by that department of any plans other than those which had been approved; and that, if such plans were presented by Major Machado, he had not communicated with the government on the subject. Subsequently the Portuguese company also protested against the alleged additional requirement, and in consequence of its protest an extension of time for examination of the subject was granted by the Portuguese Government until January, 1888.

"In the mean time the railway was completed in accordance with the original plans and accepted by the Portuguese Government, with a reservation of the question as to the further extension of the line.

"In January 1888 no conclusion had been reached by the government on that subject, and on the 30th of that month the Portuguese minister of marine and colonies wrote to the president of the Portuguese company a letter stating that the frontier between the Portuguese territory and the Transvaal had not been determined; that the failure to do so was due to the refusal of the Transvaal government to agree upon a boundary; that the reason of such refusal was the right which the company possessed under the concession to Colonel MacMurdo to fix its own tariffs; and that whenever the boundary

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should be determined the government would have no hesitation in granting a reasonable term for the completion of the line. Subsequently, correspondence took place between the government and the Portuguese company, with a view to induce the latter to accept a fixed tariff of rates as desired by the Transvaal Government. This effort having been unsuccessful, the Portuguese Government in October 1888 issued a decree fixing the terminal point of the railway at a distance of eight kilometers beyond the terminus set in the original plans, and also fixed a period of eight months, ending on June 24, 1889, for the completion of this extension. Against this decree the Portuguese company, at the instance of the British company, protested, on the ground that it was impossible, owing to physical causes the existence of which was well known, to complete the extension within the time prescribed, and consequently that the decree was inconsistent with the assurance given in the letter of the 30th of the preceding January that a reasonable time should be given for the completion of the line whenever the frontier should be determined. The period prescribed included the whole of the rainy season, which continues from November until May, and the justice of the protest is shown by the fact that notwithstanding every effort of the contractors to complete the extension (their protests having been disregarded) within the time prescribed, difficulties which they could not overcome prevented them from so doing, and among these was the washing away by the heavy rains, in January last, of parts of the extension which had been constructed.

"When the period fixed for the completion of the extension drew near, this government, having been informed of the facts and of the intention of the Portuguese Government to seize the road, on the 19th of June last instructed the minister of the United States at Lisbon, by telegraph, to state to the Portuguese Government that it was most earnestly hoped that no decisive action would be taken until the Government of the United States had investigated the case and stated its objections; that instructions would be sent as speedily as possible; and that this government desired to reserve its rights in the matter. A copy of this instruction was communicated to Senhor Barros Gomes on the 19th of June. On the 22d he replied, expressing regret that the decree of seizure must be carried into effect. For this decision reasons were stated which this government is unable to regard as sufficient. At the expiration of the period in question the Portuguese Government annulled the concession, and seized the road and all its appurtenances. This action was taken ostensibly under the forty-second article of the concession, but it was also taken in disregard of the fifty-third article of the same document, which provided that all questions which might arise between the government and the company touching the execution of the contract should be submitted to arbitration.

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"On the 1st of July last, your predecessor was instructed to enter a formal protest reserving all rights which Colonel MacMurdo's heirs (Colonel MacMurdo having died in London on the 8th of May last) or other American citizens might have in the concession. This protest was communicated to Senhor Barros Gomes on the 18th of July last.

"Upon full consideration of the circumstances of the case, this government is forced to the conclusion that the violent seizure of the railway by the Portuguese Government was an act of confiscation which renders it the duty of the Government of the United States to ask that compensation should be made to such citizens of this country as may be involved. With respect to the case of Colonel MacMurdo, who is now represented by his widow, Katherine A. MacMurdo, his sole executrix and legatee, it is to be observed that by the terms of the concession the company which he was required to form was to include himself and that his personal liability was not merged in that of the company. But in any case, the Portuguese company being without remedy and having now practically ceased to exist, the only recourse of those whose property has been confiscated is the intervention of their respective governments.

"In this relation it is proper to advert to the note of Senhor Barros Gomes of the 22d of June last above referred to, in which he stated that there were two ways in which an arrangement could then be made with the Portuguese company which would protect the interests of the share and bondholders. One of these ways was the acceptance by the company of the tariff of rates proposed by the government of the Transvaal; the other, a radical alteration of the concession, which would produce the same result. These statements have the effect of admitting the rights of the company, and of admitting at the same time that the reason for sacrificing them was the desire of the Portuguese Government to effect certain arrangements with the government of the Transvaal. No offer was made to arbitrate with the company, as the concession required. No proposition of arrangement was held out, except such as involved a virtual annulment of the concession. And it was in fact annulled and the property acquired under it confiscated, because the company which Colonel MacMurdo organized under the concession was unable to perform an impossible condition subsequently imposed without the consent and against the protests of that company.

"I inclose herewith a copy of the petition of Mrs. MacMurdo to this government, in which you will find a statement of her claims. In regard to the amount of these claims this department has formed no definite conclusion, the question of amount being regarded as one for further investigation and proof. This question can readily be determined, the Portuguese Government first agreeing to admit its liability to make compensation for the losses occasioned by its forcible seizure of the

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railway in disregard of the rights of the concessionaire and the owners. This government is desirous of reaching an early and amicable settlement of the case, and hopes that the Portuguese Government will be disposed to repair the injuries which its action has produced.

"You are at liberty to read this instruction to Senhor Barros Gomes and to leave with him a copy of it, if he should so desire.

"I am, etc.,

"JAMES G. BLAINE."

The views expressed in this instruction were reaffirmed in another instruction to Mr. Loring, of November 30, written in response to a dispatch inclosing the reply of the Portuguese Government to the protest of the United States. The instruction of November 30 was as follows:

"DEPARTMENT OF STATE,
"*Washington, November 30, 1889.*

"SIR: I have to acknowledge the receipt of your dispatch No. 16 of the 9th instant, inclosing a copy of the reply of Senhor Barros Gomes, the Portuguese minister for foreign affairs, dated the 5th of November, to the representations made by you in your note to him of the 15th of October last, in the matter of the Delagoa Bay Railroad concessions.

"The views of the department, as expressed in its instruction No. 22 of the 8th instant, are not modified by the note of Senhor Barros Gomes, of the 5th instant, which virtually admits the facts upon which this government's opinion in respect to the confiscation of the railway is based. The offer of arbitration now held out to the Portuguese company, which has practically ceased to exist, is not the offer of arbitration contemplated by the concession to Colonel MacMurdo. That concession provided for the arbitration of any difficulties which might arise between Colonel MacMurdo and the company which he was to form, on the one hand, and the Portuguese Government on the other. Such a difficulty having arisen in consequence of the action of the Portuguese Government, that government, instead of offering to submit it to arbitration, makes it a ground for the annulment of the concession and the seizure of the property acquired thereunder. But, having thus annulled the concession, the Portuguese Government now appeals to its provisions as governing the rights of the contractors and investors. If the terms of the concession still bind those persons to the arbitration therein provided, they must also be held likewise to bind the Portuguese Government, and hence to require the rescinding of the order of annulment and the restoration of the property to its owners in order that such arbitration may take place. It is scarcely necessary to say that it is not within the power of one of the parties to an agreement first to annul it, and then to hold the

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other party to the observance of its conditions as if it were a subsisting engagement.

"The instructions of the department above cited are thought to have answered by anticipation the note of Senhor Barros Gomes, and may be treated as a reply thereto.

"I am, etc.,

"JAMES G. BLAINE."[1]

During the early part of 1890 various propositions were considered. The Government of the United States, while desiring a direct settlement of the matter, insisted that if arbitration should be adopted the submission should be in such form as to secure a decision "on the merits and not upon such terms and conditions as will by any inference, however remote, admit the rightfulness of the seizure of the railway." In the event of an agreement to arbitrate, the United States expressed a willingness "to have an arbitrator selected either from Sweden, from Switzerland, or from another neutral State."[2] The negotiations were finally directed to the end of securing an arbitration, and the Portuguese minister for foreign affairs having desired the Government of the United States to make an ultimate statement of its views, Mr. Blaine early in April 1890 directed Mr. Lincoln to confer with Lord Salisbury as to what steps the British Government proposed to take, and as to whether they would follow the action of the United States.[3] Lord Salisbury happened at the time to be in France, but it was ascertained that Her Majesty's government had not decided what action they would take, and that they would like a suggestion from the United States of a joint plan of action. The Government of the United States stated that it would accept nothing less than an international arbitration of the real merits of the case,[4] and the British minister at Lisbon was instructed "to support the view of the United States."[5] It was subsequently agreed, on the proposition of Mr. Blaine, that the individual arbitrators should be named by some neutral nation or nations, and not

[1] The two foregoing instructions Lord Salisbury wished to include in the papers presented to Parliament, but, although copies of them had been given to his lordship, permission for their publication in England was withheld because they had not been published in the United States. (Telegram, Mr. Blaine to Mr. Lincoln, January 28, 1890, MS.)

[2] Mr. Blaine to Sir Julian Pauncefote, March 19, 1890, MS.

[3] Telegram, April 8, 1890, MS.

[4] Telegram, Mr. Blaine to Mr. Loring, April 24, 1890, MS.

[5] Sir Julian Pauncefote to Mr. Blaine, June 1, 1890, MS.

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by any of the interested powers,[1] to ask the Government of Switzerland to select three eminent Swiss jurists to determine, as international arbitrators, the indemnity due from Portugal for the annulment of the charter and the taking possession of the railway. Mr. John D. Washburn, minister of the United States at Berne, was instructed to confer with his British and Portuguese colleagues and to unite with them in identic notes to the Swiss Government for that purpose.[2] On August 13, 1890, identic notes were, in accordance with this plan, addressed to the President of Switzerland.

In these notes the matter to be arbitrated was clearly defined as "the question of the amount of compensation, which is due by the Portuguese Government, in consequence of the latter having rescinded the concession of the Delagoa Bay Railroad Company and of their having taken possession of the railroad."[3]

Nomination of Arbitrators.

September 15, 1890, President Ruchounet informed the ministers of the powers that he had named as arbitrators Joseph Blaesi, vice-president of the federal court at Lausanne; Andreas Heussler, professor of law in the University of Bâle; and Charles Soldan, president of the council of state of the canton of Vaud. President Ruchounet further stated that they had accepted; that they had chosen M. Blaesi as their presiding officer; and that they had selected Berne as the place where the arbitration should be held.[4]

Conclusion of a Protocol.

The arbitrators having been chosen, it remained for the three powers interested in the dispute to conclude a protocol to govern and regulate the submission. The completion of this part of the transaction was retarded by a claim of the Delagoa Bay and East African Railway Company, Limited, the English company formed for the purpose of furnishing money for the conconstruction of the railway, to represent "the whole of the bond and share holders irrespective of nationality," and to receive for due and proper distribution, as the party in behalf of whom not only Great Britain but also the United States had intervened, the whole of the sum which might be awarded

[1] Telegram, Mr. Blaine to Mr. Wilbor, chargé, Lisbon, June 6, 1890, MS.
[2] Mr. Wharton, Acting Sec., to Mr. Washburn, July 26, 1890, MS.
[3] Mr. Washburn to Mr. Blaine, August 30, 1890, MS.
[4] Mr. Washburn to Mr. Blaine, September 19, 1890, MS.

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as compensation. The United States repelled this claim, saying that it "was never requested either by the government of Her Majesty or by the English company to support the claim of the latter, and never did support it, save in that incidental way in which the effort to obtain indemnity for the seizure and confiscation of the railway inured to the advantage of the English company;" that the claims were "under the control of the governments which have respectively presented them," so that it was "not conceived that if the government of Her Majesty had done nothing in the matter, the Government of the United States would have been precluded from protecting the interests of its citizens, because they had suffered an injury in common with those of citizens of another government;" and that if the pretension of the company should receive the sanction of Her Majesty's government, the United States would, "in consideration of its own dignity, without delay inform the Government of Switzerland of its withdrawal from the arbitration and of the annulment of its request for the appointment of arbitrators;" and would "at the same time inform the Government of Portugal of the facts and notify it that it will not regard the arbitration as in any respect an adjustment of the claim advanced by the Government of the United States in behalf of the estate of the late Colonel MacMurdo."[1] Action on the protocol was deferred till this question was settled[2] by an agreement between the parties, that the bonds and shares of the English company belonging to the estate of MacMurdo, and held as collateral in London, should be delivered, as they afterwards were, to the minister of the United States in London till the conclusion of the arbitration, when the United States should pay to the holders so much as it should deem proportionable of all the moneys awarded to Mrs. MacMurdo as executrix.[3]

This difficulty removed, Mr. Washburn was instructed to proceed with the negotiation of the protocol.[4] As to the question to be submitted, the contracting parties adhered to the

[1] Mr. Blaine to Mr. Lincoln, October 13, 1890, MS.

[2] Mr. Blaine to Mr. Washburn, February 27, 1891, MS.

[3] Mr. Blaine to Mr. Lincoln, February 9, 1891, MS. The claim of the English company was stated in a letter of its secretary, which was afterward disapproved by the chairman of the company, and was not sustained by the British Government.

[4] Telegram, March 24, 1891, MS.

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terms of the invitation to the President of Switzerland to name the arbitrators.[1] A protocol was signed June 13, 1891. Its provisions were as follows:

"The President of the Swiss Confederation having notified the Governments of Great Britain, the United States of North America, and Portugal, that the Swiss federal council had taken into consideration the request made by those governments that it be pleased to appoint three lawyers, selected among those of the greatest distinction, to constitute an arbitration tribunal charged with fixing the amount of the indemnity due by Portugal to the claimants of the other two countries on account of the rescission of the concession of the Lourenço Marques Railroad, and of the taking possession of that railroad by the Portuguese Government, the undersigned, envoys extraordinary and ministers plenipotentiary of Great Britain, the United States of North America, and Portugal, accredited near the Swiss Confederation, duly authorized by their respective governments, have agreed to the following:

ARTICLE I.

The mandate which the three governments have agreed to refer to the arbitration tribunal is, to fix, as it shall deem most just, the amount of the compensation due by the Portuguese Government to the claimants of the other two countries, in consequence of the rescission of the concession of the Lourenço Marques Railroad, and the taking possession of that railroad by the Portuguese Government, and thereby to settle the controversy existing between the three governments on the subject.

ARTICLE II.

"The arbitration tribunal will set the Governments of Great Britain and the United States of North America the term within which they must deliver to it the memoranda, conclusions and documents in support of the claims of their citizens.

"These documents shall be transmitted in duplicate to the Portuguese Government, with the invitation to present its reply, its conclusions and the documents in support of them, likewise in duplicate, within the term which shall be set for it.

"The arbitration tribunal shall itself, after hearing the parties or their representatives, and with their consent, fix the mode of procedure, especially the terms above mentioned, and those to be set for the putting in of the replication and the rejoinder, the rules to be followed in hearing the parties or their representatives, the production of documents, the deliberation in its own bosom, the rendering of the judgment and the drawing up of the protocol.

[1] Mr. Blaine to Mr. Washburn, February 27, 1891, and May 1, 1891, MS. These terms were entirely acceptable to counsel for the claimant. (Mr. Ingersoll to Mr. Blaine, January 27, 1891, MS.)

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"Each of the three governments undertakes to do all in its power to have the documents and information demanded by the arbitration tribunal furnished to it in due form and within the terms fixed by it.

"ARTICLE III.

"The arbitration tribunal shall have full authority to take cognizance of the conclusions presented to it by each of the parties, in their whole extent and in all their appurtenances or incidents; it shall render its judgment upon the substance of the cause, and shall pronounce, as it shall deem most just, upon the amount of the indemnity due by Portugal to the claimants of the other two countries, in consequence of the rescission of the concession of the Lourenço Marques Railroad, and of the taking possession of that railroad by that government.

"ARTICLE IV.

"The judgment shall be final and without appeal.

"The president of the arbitration tribunal shall deliver a certified copy of the decision to the representatives of each of the three governments.

"The three governments bind themselves beforehand, for themselves and for their respective citizens, to accept and carry out the decision, as a final settlement of all their differences upon this question. It is understood that, although it appertains to the arbitration tribunal to designate the private persons or the moral persons who are entitled to the indemnity, the amount of that indemnity shall be paid by the Portuguese Government to the other two governments, in order that they may make distribution of it to the claimants. The receipt given by those two governments shall constitute a complete and valid discharge of the Portuguese Government.

"The amount of the indemnity shall be paid by the Portuguese Government to the other two governments within the term of six months, counting from the rendering of the award.

"ARTICLE V.

"The president of the arbitration tribunal shall be requested to present an account of all the expenses occasioned by the arbitration, and the three governments bind themselves to have them paid at such time as the president shall fix.

"In testimony whereof, the undersigned have drawn up this protocol, and have affixed their signatures and their seals.

"Done in triplicate at Berne, June 13, 1891.

"CHARLES S. SCOTT. [SEAL]
"JOHN D. WASHBURN. [SEAL]
"D. G. NOGUEIRA SOARES." [SEAL]

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Order as to Procedure.

On August 3, 1891, the arbitrators made the following order as to procedure:

"Order of the Delagoa arbitral tribunal concerning the procedure to be observed in the case pending between the Governments of the United States of America, of the United Kingdom of Great Britain and Ireland, and of the Kingdom of Portugal, on the subject of the amount of indemnity due from Portugal to the interested parties by reason of the rescission of the concession of the railway of Lourenço Marques and the taking possession of the railway by the Portuguese Government.

"The Delagoa arbitral tribunal, in view of the arbitral agreement concluded and signed at Berne June 13, 1891, between the envoys extraordinary and ministers plenipotentiary of the United States of America, of the United Kingdom of Great Britain and Ireland, and of the Kingdom of Portugal accredited to the Swiss Confederation, *Orders*—

"ART. I. The arbitral tribunal's duty is to fix the amount of compensation due from the Portuguese Government to the interested parties in the two other countries in consequence of the rescission of the concession of the railway of Lourenço Marques and of the taking possession of the railway by the Portuguese Government, and to settle the difference existing between the three governments on that subject.

"The tribunal is fully competent to take cognizance of all the contentions presented by each of the parties in all their extent and in all their incidents; and it will render its judgment on the case and make such a pronouncement as it shall think most just on the amount of the indemnity in question. (Arts. I. and III. arbitral agreement.)

"ART. II. The president of the tribunal will have the direction of the proceedings. He will preside at the meetings of the tribunal, and will in the interval make all necessary orders to assure the progress of the business.

"The tribunal will consult with closed doors in the absence of the parties. Its decisions will be made by a majority of votes.

"It will be assisted by a secretary, who will have charge of the record and of the editing of it, as well as of the official notification of any papers issuing from the tribunal or from its president.

"The meetings of the tribunal will be held as a rule at Berne. (Art. II. par. 2, arbitral agreement.)

"ART. III. A period of three months will be allowed the Governments of the United States of America and of the United Kingdom of Great Britain and Ireland for the presentation of introductory memorials, contentions, and documents in support of the claims of their citizens.

"Upon the receipt of these papers a communication of them will be made to the Portuguese Government with an assign-

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ment of the same period for the production of its answer, contentions, and documents in support thereof.

"Periods of equal duration shall in succession be assigned to the parties for the production of the reply (*réplique*) and rejoinder (*duplique*).

"The aforesaid periods may if necessary be prolonged by the decision of the tribunal or of its president.

"The memorials of the parties (introductory memorial, answer, reply, and rejoinder) as well as their contentions must be drawn up in French, and six copies must be presented through the federal department of foreign affairs.

"The documents and proofs must be presented in their original text; the tribunal will cause such papers to be translated into French as it may deem necessary.

"All the papers will be circulated among the members of the tribunal in the order of their production. (Art. II. pars. 1 and 2, arbitral agreement.)

"ART. IV. After the papers shall have been exchanged, the tribunal will meet again for the purpose of deciding upon the order of proofs, and, if there should be occasion for it, upon the subject of expert valuations. It may order all probatory processes (proofs, expert valuations, etc.) which it shall think necessary.

"ART. V. The production of proof being closed, the parties will have the right, if they shall deem it necessary, orally to present their respective views before the tribunal. Each party may be represented at that hearing by only one advocate. The arguments shall be made in French. (Art. II. par. 2, arbitral agreement.)

"ART. VI. The tribunal will then pronounce its judgment, which will be definitive and without appeal.

"The president of the tribunal will deliver to the representatives of each of the three governments, through the federal department of foreign affairs, an authentic copy of the decision. (Art. IV. pars. 1 and 2, arbitral agreement.)

"ART. VII. The copy of the decision will be accompanied by a statement of all the expenses incurred in the arbitration, certified as correct by the president of the arbitral tribunal. The parties are obliged to furnish in the course of the proceedings, to be taken account of for final deduction, advances the total amount of which will be fixed by the president of the tribunal. (Art. V. arbitral agreement.)

"ART. VII. The present order will be communicated to the parties with an invitation to present, if there should be occasion for it, their views upon it within a period of thirty days, in default of which, that period having expired, the order will become definitive.

"Done in Switzerland, August 3, 1891.

"In the name of the arbitral tribunal:

"BLAESI, *President*,
"BRÜSTLEIN, *Secretary*."

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Pleadings.

In accordance with the plan set forth in the foregoing order, the arbitrators on September 9, 1891, made a rule requiring the United States and Great Britain within three months from the date of its communication to them to present memorials setting forth (1) the parties; (2) the facts and law relating to their claims; (3) the object of their application to the tribunal, and (4) a detailed statement of the evidence relied on.[1] The time, however, was subsequently extended, and the memorials were presented under date of March 5, 1892.[2] The Portuguese memorial was presented in November 1892.[3] It was accompanied with many documents, filling twenty-five volumes.[4] Owing to the voluminous character of the Portuguese answer, the time for replying to it was two or three times suspended.[5] Portugal was allowed three months from December 28, 1893, within which to file a rejoinder (*duplique*), but the time was twice extended.

Memorial of the United States.

The memorial of the United States set forth that Edward MacMurdo, deceased, and Katherine Albert MacMurdo, his widow, executrix and universal legatee, were native-born citizens of the United States, and that the amount claimed from Portugal by Mr.

[1] Mr. Washburn to Mr. Blaine, September 14, 1891, MS.

[2] Memoir presented by the Government of the United States of North America (*sic*). This memorial was signed by Robert G. Ingersoll, 45 Wall street, New York, and Charles W. Clark, 4 Rue de Solferino, Paris, and was printed in French, as well as in English. (Mr. Cheney to Mr. Gresham, Sec. of State, April 13, 1893, MS. Dispatches from Legation in Switzerland.) Subsequently Mr. Clark withdrew as associate counsel, and was succeeded by John Trehane, of London, who had been connected with the case from the beginning. (Mr. Blaine to Mr. Washburn, February 29, 1892, MS.) The memorial of Great Britain was in French, and was accompanied with an appendix, the titles of the documents being as follows: Mémoire présenté par le Gouvernement de la Grande Bretange; Appendice au Mémoire présenté par le Gouvernement de la Grande Bretange. The British memorial was signed by Emanuel M. Underdown, Q. C., Temple, London, and Malcolm McIlwraith, Lincoln's Inn, London.

[3] Mémoire présenté par le Gouvernement du Portugal en réponse aux Mémoires introductifs d'instance présentés par les Gouvernements des Etats-Unis de l'Amérique du Nord et de la Grande Bretange, 1892.

[4] The Portuguese memorial was signed by C. Sahli, an advocate of Berne, and L. Rambert and A. Prélaz, advocates of Lausanne.

[5] Réplique présentée par le Gouvernement des Etats-Unis de l'Amérique du Nord; Appendice à la Réplique présentée par le Gouvernement des Etats-Unis de l'Amérique du Nord. This reply bears date November 15, 1893.

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MacMurdo was £760,000, with interest at 5 per cent from June 25, 1889, together with costs and expenses. The claim was treated under two periods.

The first period extended from December 11, 1875, to March 1887. On the former date the Government of Portugal and the South African republic entered into a commercial treaty in which, as well as in the accompanying protocol, provisions were inserted touching a railway which was to be constructed from the port of Lourenço Marques to the Transvaal frontier. On December 14, 1883, the Portuguese Government granted a concession to Mr. MacMurdo for the construction of the railway in question within Portuguese territory. Under this concession, or contract, MacMurdo engaged to construct the railway from "the port of Lourenço Marques to the frontier which separates the Portuguese territory from the territory of the Transvaal." The frontier was not then determined. But a survey of the route of the railway was made by the government, and plans for its construction were made and approved, without prejudice to the settlement of the question which MacMurdo had raised as to the last part of the line near the frontier. In the plans thus formulated the line was erroneously represented as being nine kilometers shorter than it really was. Of this mistake the Portuguese Government was advised by its engineer as early as August 1885. The government, however, did not inform Mr. MacMurdo of the mistake until July 23, 1887, during which time he was raising funds and making contracts for the construction of a railway of eighty-two kilometers instead of ninety-one.

In March 1886 a prospectus was issued in London soliciting subscriptions for the construction of the road. In this prospectus it was stated that the length of the railway was "about fifty-two miles," and that the line "had been carefully surveyed and the plans approved by the Portuguese Government." Fifty-two miles were about the equivalent of eighty-two kilometers. It appeared, however, that in the prospectus the working expenses of the road were estimated on an assumed length of ninety kilmometers, thus: "Working expenses at £500 per kil. (90 kil. × £500) = £45,000." How "this figure of 90 slipped into the prospectus" could not, said the memorial of the United States, be explained, unless some person not accustomed to calculate in kilometers had made an error.

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The memorial contended that the concession, which granted "the exclusive right to construct and work the railway * * * for the term of ninety-nine years," gave Mr. MacMurdo a monopoly of railway communication between Lourenço Marques and the Transvaal frontier for that period, including by inference the right to fix the rates of freight. On May 14, 1884, a company, which by the terms of the concession MacMurdo was bound to form, was duly organized at Lisbon with special statutes approved by the government on that day. By a contract made May 26, 1884, between this company and MacMurdo, the latter undertook to construct the railway according to the terms of the concession for £425,000, in bonds authorized by the statutes of the company. These bonds were secured as a first charge upon the concession by a deed of trust in favor of the Express and Trust Company, Limited, an English corporation. By the same contract Mr. MacMurdo transferred to the company the rights and privileges vested in him by the concession, in consideration of which the company agreed to issue to him 498,940 full-paid shares, on which he had actually paid 5 per cent in cash. Under these conditions it was claimed that Mr. MacMurdo could have constructed the road and paid interest at 6 per cent on the bonds until the railway was in a self-supporting condition, if no obstacles had been placed in his way.

The memorial then stated that in May 1884 a deputation from the Transvaal, consisting of the president of the republic and other leading officers, visited Lisbon and informed the Portuguese Government that a syndicate had been formed in Holland for the purpose of constructing and working a railway from Pretoria to the frontier, and that this syndicate would like to obtain a concession for the building and working of the section of the railway in Portuguese territory. The Portuguese Government replied that the Portuguese section had already been granted to Mr. MacMurdo. The deputation expressed its regret, adding that attempts to reach an understanding with Mr. MacMurdo had remained without result. The Portuguese minister of the marine and the colonies promised to make an effort to induce MacMurdo to enter into an arrangement with the representatives of the Transvaal on the question of rates. MacMurdo made an offer which the deputation on May 9, 1884, rejected, and the Portuguese Government promised that if MacMurdo should forfeit his concession by failing to fulfill his engagements it should be granted to the

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Dutch company. The deputation, however, was not satisfied with these terms. It desired to obtain the MacMurdo concession, and on May 14 it submitted to the minister for foreign affairs a proposition for connecting the port of Lourenço Marques with the Transvaal by a tramway. May 16 the minister of the colonies offered to grant the privilege, provided that the tramway was used for the exclusive purpose of transporting material for the Pretoria line, so as not to conflict with the concession owned by the Portuguese company. Twenty-four hours later, however, the Portuguese Government, through the minister for foreign affairs, informed the deputation that it would grant the concession for the tramway for the transportation of material for the railway to Pretoria if the Lourenço Marques company did not finish its line soon enough for that purpose, and that it would likewise permit this tramway to be used for the carriage of goods and passengers in the event of the two companies not arriving at an understanding as to rates on international traffic. The memorial claimed that this document directly attacked the two valuable rights acquired by MacMurdo: (1) The monopoly of railway transportation between Delagoa Bay and the Transvaal frontier, and (2) the right to fix freight rates without the control of the government. The memorial contended that the term "tramway" was understood in the Transvaal as a "light railway" operated by steam.

The memorial further claimed that the Portuguese memorandum of May 17, 1884, was concealed by the Portuguese Government, but was used by the Boer government to the injury of MacMurdo. On June 13, 1884, MacMurdo read in the London *Times* in Paris a telegram from Amsterdam stating that a prospectus had been issued by a company for the construction of a railway between Delagoa Bay and Pretoria. The telegram also stated that, as to the section of the railway in Portuguese territory, negotiations were proceeding with Mr. MacMurdo, but that, as a provision against their failure, President Kruger had obtained a promise from the Portugese Government of a concession for a tramway from Delagoa Bay to the Transvaal frontier. This publication upset MacMurdo's financial arrangements and compelled him to return to London. Inquiries of the Portuguese Government elicited the reply that nothing had been done inconsistent with the concession to MacMurdo, and that the tramway was conceded to the Transvaal Government only on the hypothesis that the

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construction of the Portuguese section should be so delayed as to prejudice the building of the line from the frontier to Pretoria, thereby rendering the transportation of materials for the latter line difficult.

On February 4, 1886, said the memorial of the United States, ratifications were exchanged of a convention between Portugal and the Transvaal of May 17, 1884, supplementary to the treaty of December 11, 1875. In the documents of the ratification there was a statement that the tramway memorandum of May 17, 1884, appeared in the Transvaal copy of the supplementary convention and not in the Portuguese, no legislative sanction of it being necessary in Portugal. Up to that time the existence of the tramway concession had been concealed from the Portuguese legislature. But the repeated assertions of the Boers in regard to it had so shaken public confidence that an attempt to sell bonds for the construction of the Portuguese railway in March 1886 failed. Under these circumstances a firm of English solicitors made inquiries of the Portuguese Government and received from the minister of the colonies under date of June 26, 1886, a reply containing assurances similar to those previously given.

On December 28, 1885, the Portuguese Government extended the time for the construction of the railway from three years to four. Assuming that the plans of the whole line were approved October 30, 1884, the time thus fixed for the construction would have expired October 30, 1888. On March 3, 1887, the Delagoa Bay and East African Railway, Limited, was formed in London under the companies act with a capital of £500,000, in shares, for the purpose of completing the railway. On March 5 Mr. MacMurdo assigned to this company his shares in the Portuguese company, and his right to receive the bonds which were to be issued to him for the purpose of raising funds, together with his contract with the Portuguese company of May 26, 1884. By a contract of May 17, 1887, between the Portuguese company and the English company, this arrangement was confirmed by the former. Mr. MacMurdo then transferred to the English company his shares and his right to receive the bonds of the Portuguese company, whereupon the English company issued to him full-paid shares representing the whole of its £500,000 share capital. The English company then issued a prospectus inviting subscriptions. In reality the English company was a shareholder in the Portuguese com-

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pany, in which it held a majority of the stock; but it was not officially recognized by the Portuguese Government. The Portuguese company remained the owner of the concession, and the only corporation responsible to the Portuguese Government. The Portuguese company, as the owner by transfer of the original concession, possessed the widest possible powers, including the right to fix freight rates, so that at no time after the incorporation of the Portuguese company could the Transvaal government have made any arrangement as to the rates to be charged on freight by the Portuguese company with any other persons than the board of directors of that company. The English company, as the holder of a majority of shares of the Portuguese company, could control the election of the directors.

On March 19, 1887, while the Portuguese and English companies were pushing the work of construction, the Portuguese Government instructed its minister at The Hague to notify the minister of the Transvaal that the Portuguese Government could not continue the negotiations with regard to the concession for a tramway. The Transvaal minister several days later replied that this decision had greatly displeased his government, which thus witnessed the loss of its natural union with Lourenço Marques, and which, rather than subject itself to English influences, would prefer to unite with Natal. Negotiations then ensued on the subject of freight rates on international traffic. On December 14, the eighty-two kilometers of the railway were opened to traffic and were accepted by the Portuguese Government.

The memorial of the United States then set forth in detail the circumstances of the abrogation of the concession, substantially as they were stated in the instruction of Mr. Blaine to Mr. Loring, of November 8, 1889, and concluded with a discussion of the question of damages.

Portuguese Answer.

The first chapter of the Portuguese memorial, or answer, related to the so-called secret convention. By a protocol annexed to the treaty of commerce between Portugal and the Transvaal of December 11, 1875, each of the contracting parties engaged, said the answer, to permit the construction on its territory of an international railway, and to employ in common accord the most useful and efficacious means of assuring, under all circumstances, the execution of an enterprise which would result so

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much to the advantage of both countries. In October 1883 Mr. Barbosa du Bocage, minister of the colonies, contemplated the acceptance of a proposition of Portuguese and French capitalists to construct the Portuguese part of the line, the Portuguese Government guaranteeing interest on the money invested in it. A change of ministry having taken place, Mr. Pinheiro Chagas, who became minister of the colonies, entered into a contract with Colonel MacMurdo, who was vouched for by the minister of the United States. In this relation two facts were to be borne in mind: (1) The end which the Portuguese Government had in view in granting the concession to Colonel MacMurdo was to fulfill the solemn engagements which it had assumed to the Government of the Transvaal, to increase the prosperity of the colony of Lourenço Marques, and to promote the civilization of Africa. (2) The concessionaire was not ignorant of the fact that all the rights and privileges accorded to him could be exercised only in conformity with that threefold public utility.

The Portuguese answer next took up the negotiations with the Transvaal deputation. It denied that the object of the deputation was to obtain the concession which had been granted to Colonel MacMurdo. It declared that the Transvaal was disposed to cooperate with Portugal in regard to the line, and that nothing was more natural than the communications made in regard to it. The Transvaal line was incomparably the longer and more difficult part of the international railway. The minister of the colonies in the first instance referred the deputation to Colonel MacMurdo. May 5, 1884, they reported that he had offered to let his line for thirty-five years at an annual rental of £55,000, equivalent to 6 per cent on a capital of £925,000. MacMurdo had not them formed the Portuguese company. The capital to construct his line had not been raised, and yet he valued at £925,000 a road, the cost of which the Portuguese engineers estimated at £281,000. These circumstances led the Transvaal deputation to think that he desired to use his concession for speculative purposes, and on May 14, 1884, it expressed to the Portuguese minister for foreign affairs its disappointment that he had not thought proper to include in the supplementary convention the right to connect the port of Lourenço Marques with the Transvaal by a tramway, adding that "this indisputable right" was of the last importance to the deputation. On May 15 the minister for

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foreign affairs submitted the matter to the minister of the colonies, who understood it to relate to a way for cars and wagons drawn by animals, and not to a steam railway. The application of mechanical force to traction on tramways had not then been tried in Portugal, and transportation at Lourenço Marques was wholly carried on with animals. The minister of the colonies believed that the Portuguese Government could authorize the construction of the tramway without violating the concession. Why, then, did the Portuguese Government refuse? For the same reason that it subsequently refused to allow the Transvaal to construct a canal. It thought that the tramway would compete more or less seriously with the operation of the Portuguese railway line. In his memorandum of May 16 the minister for foreign affairs said that he could not comprehend the insistence of the deputation in putting aside the Lourenço Marques railway, and seeking by every means another outlet for the railway of the republic. The insistence of the deputation touched the patriotic sentiment of the minister, since it seemed to imply doubts in regard to the direction of the Portuguese company, and led the minister to indulge in extravagant language.

The Portuguese answer next discussed the alleged contradiction between the memorandum of May 16, 1884, and that of the 17th of the same month, and maintained that there was no such inconsistency. The first refused an "immediate" concession of a tramway as an "indisputable" right. The second granted nothing immediately. It conceded the privilege of constructing a tramway for the "transportation of material" for the construction of a railway from Pretoria, if the Lourenço Marques company should not finish its line in time to assure the commencement of the work on the Transvaal railway. The Portuguese Government also engaged to permit the tramway to be used for the transportation of merchandise and passengers in case the two companies should not reach an understanding on the subject of rates on international traffic. The Portuguese answer contended that these conditions rendered the memorandum of May 17 entirely consistent with the concession. According to Portuguese law, MacMurdo had the right of initiative in respect of rates, but it was not permissible for him to use that right unreasonably. He could not be allowed to defeat the end of the concession by abusing his rights under it. The memorandum was not a concession, but

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merely a promise made and accepted in good faith and in a spirit of conciliation, and the execution of which depended absolutely on the same good faith and spirit of conciliation.

Should this memorandum be called a secret convention? It was not published in Portugal, but it was published in the Transvaal journals, and MacMurdo became acquainted with it through those journals some months after it was signed. Nevertheless he made no protest or complaint to the Portuguese Government till he had need to explain the failure of his financial arrangements. The fact that the memorandum was not published in Portugal was favorable rather than unfavorable to the Portuguese company. If the Portuguese Government had published it, it would have been compelled to explain to the chambers the insistence of the Transvaal deputation on being assured of communication with the sea independent of the line conceded to MacMurdo, as well as the suspicions which had been expressed in regard to him, and the discussion of these subjects in Parliament and in the press would have injured the enterprise, which was in a high degree dependent on an arrangement with the Transvaal line. The Portuguese Government never denied the existence of the memorandum of May 17, or of the promise which it had made to the Transvaal. It merely denied that it had made any concession violative of that to MacMurdo. The deputation, on taking its leave, declared that if it could not obtain a reasonable agreement as to international rates it would seek another solution of the question by renouncing the port of Lourenço Marques.

The Portuguese answer next discussed the alleged exclusive and absolute right of the concessionaire to fix rates, first, in view of Portugal's obligations to the Transvaal under the treaty of December 11, 1875, and then in view of Portuguese and French legislation and of the common law. The right of the concessionaire was conceded, subject to the limitation that he use it reasonably. The answer also discussed the law in the United States, and referred to the many instances in which legislative power had been used there in respect of railway rates. It also discussed the legislation of England, of Germany, and of Switzerland in regard to railways. In closing the discussion on the subject of rates it summed up the case as follows:

1. The object of the Lourenço Marques railway was to develop commercial relations between the Portuguese territory

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and that of neighboring countries, including the Transvaal; to secure for the Transvaal railway communication with the sea, and to increase the commerce of the port of Lourenço Marques.

2. This end could be secured only by an accommodation of the interests of the Portuguese line and the Transvaal line, especially in respect of rates.

3. The concessionaire of the Portuguese line had other ends in view, his object being, by refusing to agree on rates, to use his alleged exclusive right in the matter for the purpose of compelling the Transvaal to purchase the control of his line at an exaggerated price.

4. The concessionaire never possessed the power absolutely and finally to fix rates. The concession did not accord it. On the contrary, the concession was expressly declared to be subject to Portuguese legislation, which reserved to the government the supervision of railways, and especially the right to approve rates.

5. The provision in the statutes of the company which gave the directors the right to fix rates concerned only the organization of the road, and did not prejudice the right of approval of the state.

6. No declaration of a minister or provision in the statutes of the company could in any case take from the state its right of sovereignty in the matter.

7. The right of the state to control railway rates was admitted in all known legislation, notably in that of England and the United States.

8. Absolute freedom in respect of rates was specially inadmissible when the concessionaire enjoyed a monoply of railway transportation in a certain extent of territory.

9. The concessionaire acted contrary to the end of the concession in refusing to agree on the subject of rates with the Transvaal company, in order to utilize the concession solely for his own personal interest.

10. The Lourenço Marques railway possessed a value for both states only in case it should reach the heart of the territory of the Transvaal. The two parts of the lines considered separately had no value.

The Portuguese answer next discussed the question of plans. The concession, said the answer, required MacMurdo to send a

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competent engineer to Lourenço Marques within forty days and to submit final plans to the government within a hundred days after the forty. MacMurdo asked that the plans previously made by the Portuguese Government be transmitted to him to facilitate the work of his engineer, and the government consented; but it was his duty to make plans himself; and if the time allowed him for that purpose was not sufficient it was his own fault. When his plans were due he demanded a delay of sixty days, alleging that heavy rains had prevented his engineer from concluding his work. The government engineer, however, reported that MacMurdo's engineer had not attempted to make any surveys, but had evidently been sent out merely as a formality. If the minister of the colonies had conspired with the Transvaal deputation to annul the concession, now was his opportunity. But he extended the time to July 2, 1884, and on June 27 MacMurdo presented to him the very same plans which had been furnished him, declaring that he accepted them, with some slight modifications. He presented no plan of the latter part of the line. In fact, his engineer had not been on the ground. Certain information had been collected in London, and it was on this that the requests for modifications were based, so that when the extension of time expired MacMurdo had not fulfilled his obligations. Nevertheless, on October 30 the government approved the incomplete plans without prejudice to the presentation of a project as to the end of the line. It was false to accuse the Portuguese Government of concealing the investigations made by its engineer, Major Machado, concerning the end of the line. Machado gave information on the subject to MacMurdo's engineer, to the engineer of the company, and to one of the company's directors. In a report of December 22, 1888, he stated that the company had long since known almost to a kilometer the length of the line. The Portuguese company and the English company both knew that the line was to be about ninety kilometers, and it was so stated in the prospectus.

The Portuguese memorial next considered the organization of the Portuguese company, contending that the system on which it was organized was condemned in the legislation of all civilized countries, including that of the United States, and that it was unable to accomplish the ends for which the concession was granted; and then proceeded to inquire, What had the company done to fulfill its obligations? Nothing. The

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whole thing was fictitious. For three years MacMurdo sought, directly and indirectly, new concessions and new facilities, and invented new explanations of the disorder of his financial arrangements. By the end of 1885 general incredulity existed as to the enterprise. The government forebore to exercise its right to terminate the concession, and had now to reproach itself for its good will, tolerance, and excessive indulgence. The Portuguese company being unable to complete the road, the English company was formed in a manner which was contrary to the Portuguese law, and which placed in an unsafe position the founders of the Portuguese company. The directors of the London company on December 18, 1886, declared that it could not obtain the capital necessary to construct the road unless the Portuguese Government would guarantee the interest on its obligations; and they requested the president of the board of directors at Lisbon to ask the government to make such a guaranty or else to permit the transfer of the concession to the English company.

The Portuguese answer next discussed the rescission of the concession. By an express provision the government had the right to cancel the concession if its conditions were not fulfilled. In fact, the line was not built, and the company had no money with which to complete it. The government on October 24, 1888, granted a new postponement of eight months. American counsel had said that it was only in February 1889 that the company let the contract for the completion of the road. The contract was, in fact, a bankrupt contract, and was dated March 23, 1889. Neither the contractor nor the material could reach Lourenço Marques before May; and the company thus attempted the impossibility of doing in a month and a half what they declared it would be impossible to do in eight months. The contractor arrived at Lourenço Marques only on the 10th of June. On June 18 an application was made to the government for another extension of time, and then for the first time the argument was invoked that the heavy rains in January 1889 constituted a case of *force majeure*. The reports of the Portuguese engineer showed that the injuries done by the rains of 1888 and 1889 should be ascribed to faulty construction, some of the works being only provisional. In reality, the English company had not a sou of capital of its own, but proposed, just as the Portuguese company had done, to construct the railway by issuing its obligations. By means of certain

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names in its directory and of ambiguous assertions in its prospectus it obtained funds to construct a part of the line, but when this money was spent it found itself involved in unsurmountable difficulties, and could not find the additional capital. During five years and a half, from December 1883 to January 1889, the Portuguese Government had shown the greatest good will, indulgence, and tolerance. It had a right to cancel the concession: (1) When the concessionaire let the period of one hundred and forty days go by without presenting plans of the road. (2) When he failed in the sixty subsequent days to present complete plans. (3) When the Portuguese company avowed May 18, 1886, that it had not found the necessary capital to begin work before June in that year, and that it could not say when it would commence it. (4) When the same company avowed February 16, 1887, that it was absolutely unable to fulfill its object, and that its abnormal situation was incompatible with the interests of the country. (5) When the same company allowed the period of three years, ending October 30, 1887, to expire without having presented plans for and constructed the last part of the line, and without having completed even the eighty-two kilometers comprised in the plans approved October 30, 1884.

From motives of pure benevolence the Portuguese Government did not use its right of rescission until it had become impossible to do otherwise without compromising the most serious interests of the state. But even then it offered to continue to the interested parties the benefits of the concession, if they would reconcile their private interests with the public interest by making an equitable arrangement as to rates with the Dutch company. But, counting on the intervention of their governments, they rejected this proposition, demanded the payment of an exorbitant sum, and threatened to compel the payment of sums still more exorbitant unless the government would yield to their demands. Moreover, in order to obtain the intervention of their governments, they had not feared to launch against the Portuguese Government defamatory charges, the falseness of which was shown by authentic documents. They had even accused the Portuguese Government of having omitted to offer the road for sale at public auction, in accordance with article 42 of the concession, because it had obliged itself to transfer it to the Transvaal Government. The documents proved: (1) That they

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had rendered it impossible to put the road up at auction by demanding an indemnity through diplomatic channels. (2) That they had rejected the proposition of the Portuguese Government to give to the arbitral tribunal a competency sufficient to enable it to order the road to be put up at public auction.

On the strength of such accusations the interested parties, said the answer, asked the high arbitral tribunal to allow them an indemnity of about £2,000,000. In respect of this exorbitant claim it was proper to recall the fact that the work and material of the railway were valued in an inventory made after the rescission of the concession, conformably to article 42, at £160,000.

In conclusion, the answer stated that the Portuguese Government acknowledged its obligation to pay the claimants a sum equivalent to the expenses incurred in the construction of the road up to the moment of the withdrawal of the concession, as set forth in the inventory made by the agents of the government, subject to such deductions as the tribunal should find to be equitable.

Opinion of MM. Lyon-Caen and Renault.

In 1893 an opinion was given by MM. Ch. Lyon-Caen and L. Renault in behalf of the claimants. As to the nature of an act of concession for a railway—whether it was to be regarded as an act of sovereignty or a private contract—they deemed all inquiry superfluous. The Portuguese Government had agreed to submit to arbitrators the determination of the "amount of compensation due" for the withdrawal of the concession, and had thus admitted that compensation was due for its withdrawal. Nevertheless, they maintained that the concession for the construction of the railway was not in the nature of an act of sovereignty, but of a contract, just as it was denominated in all the documents produced by the Portuguese Government. The only act of sovereignty in the matter was the royal decree by which the contract was approved, and as to this decree no question had been raised. The arbitration related solely to the provisions of the contract to which the decree gave validity. Though the Portuguese Government had in granting the concession exercised acts of sovereignty, it had at the same time entered into an actual contract by the provisions of which it was bound.

The argument put forward in behalf of the Portuguese Government that the demands of the claimants involved its

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competency to perform acts of sovereignty, as, for example, in its negotiations with the Transvaal, betrayed, said MM. Lyon-Caen and Renault, a confusion of ideas. No one denied the competency of the Portuguese Government to perform any act of sovereignty or of administration. But, while retaining all its sovereign powers, it could not by qualifying its acts by one name or another relieve itself from its obligations. It was therefore entirely proper to examine the acts of the Portuguese Government in order to determine whether it had committed not an excess of power but an abuse of power. In any other view the agreement of arbitration was meaningless.

In one respect, indeed, the concession could not be treated as an ordinary contract between individuals. A tribunal having jurisdiction of such a contract might annul acts done in violation of it and require its execution. In the present case this could not be done. The tribunal of arbitration was not invested with power to annul any act of the Portuguese Government. It could only determine the indemnity due as a reparation for the injustice done to the claimants.

MM. Lyon-Caen and Renault next discussed the question whether the concessionaire possessed the exclusive right to fix rates on the railway. By article 20 of the concession the Portuguese Government granted to the concessionaire "the exclusive right to construct and run" the railway for a certain term of years. He was required to transport certain persons at a fixed price or free of charge (articles 29 and 30), as well as troops, munitions of war, and the mails (articles 31 and 32). He was required to run at least one train a day, at a speed to be subject to the regulation of the government (article 33), and to provide enough cars to accommodate the travelers (article 34). These were the only restrictions placed on the management of the road, and they had no relation to its commercial use, and did not allude to the fixing of rates. What was the inference to be drawn from this silence?

The position of the Portuguese Government was that the exclusive right to fix rates was one of such an extraordinary character that it could not be implied; that the conduct of the enterprise was subject to Portuguese laws (article 50); that the control of rates by the state was in accordance with common law, and particularly with French law, and that it was necessary in the present case in order to facilitate commercial relations with the Transvaal and perform the obligations of

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international commerce. MM. Lyon-Caen and Renault considered that these arguments were not decisive, and that the concessionaire preserved his freedom of action where it was not limited, and that he could fix rates according to his interests. They found difficulty in admitting that there was any common law governing the subject. The right to control rates did not, as they understood, belong to the state in England or in the United States. In France the maximum rates were fixed in the first instance by a schedule of charges, but below that the companies could modify the rates at will. If it should be admitted that, in consequence of the silence of the concession, the Portuguese Government had control of rates, its control would be unlimited and would be unrestrained by any pecuniary responsibility. As between the government and the concessionaire, a reasonable construction of the contract would require the control of rates to be vested in the latter. This construction was admitted, as they maintained, by the government itself in divers ways—by the letter of the minister of the colonies of May 4, 1885, corroborated by the telegram to the representative of Portugal in London, saying that the company had "the absolute and uncontrolled right to fix tariffs;" and by another ministerial declaration in 1888 in the same sense. As to the argument drawn from the relations between Portugal and the Transvaal, it seemed strange to speak of the right of the Transvaal to demand of the company any particular rates. The company dealt with Portugal just as the Transvaal did. If there was need for Portugal to retain the control of rates and to subject the enterprise to the exigencies of its intercourse with the Transvaal, it should have reserved the power to do so. It could not urge its obligations to the Transvaal for the purpose of diminishing the rights which it had granted to the concessionaire.

MM. Lyon-Caen and Renault next considered the question whether the concessionaire was obliged to construct the line to the frontier, wherever it might be. By the terms of the contract he was bound to construct a railway from Lourenço Marques to the frontier, but it was impossible to maintain the position that this obligation was to be construed in an unrestricted sense to mean the frontier, however and wherever it might be run by agreement between the two governments. The parties, in fact, had in view a particular line, both in fixing the period within which the road must be completed and

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in the appreciation of the obligations which the concessionaire assumed. The plans furnished by the government to the company in 1884 were based on the report of the engineer, Major Machado, of April 30, 1883, and contemplated a railway eighty-two kilometers in length. This was the understanding of the parties when the concession was made in December 1883, and it was confirmed by the royal decree of October 30, 1884, by which the plans were approved. By this decree the plans were, it was true, approved "without prejudice to the presentation of a plan relative to the end of the railway, near the frontier." But it was unreasonable to give to this reservation an indefinite extension, so as to permit the addition of nine or ten kilometers to the line at the will of the Portuguese Government and require it to be constructed within the period originally fixed for the completion of the eighty-two kilometers. The reasonable construction of the decree was that the reservation had reference only to a distance of small importance.

That an error of nine kilometers was committed by the agents of the Portuguese Government was reported by Major Machado to that government in August 1885. He mentioned the fact in a letter to the engineer of the company July 23, 1887. The situation thus created was a proper subject for a new understanding between the government and the company. Nevertheless, by a decree of October 24, 1888, the company was notified as to the point of the termination of the line and was allowed eight months in which to reach it. The government sought to treat this as a fixing of the terminus under the first article of the original concession; but if this view was well founded it was surprising that the government took so long to do it. Moreover, though the period of eight months was fixed by the decree of October 24, 1888, the plans for the additional kilometers were not approved till February 23, 1889. If this was done in execution of the original contract, why were not the nine additional kilometers required to be constructed within the period prescribed in 1884 for the completion of the line? According to the contention of the government, that period expired in 1887, and it was in October 1888 that the government made known the terminal point. If the contract of December 14, 1883, was to be applied to the new part of the line, its fortieth article should have been observed and three years allowed from the approval of the plans for the completion of that part.

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On these grounds MM. Lyon-Caen and Renault maintained that the period of eight months prescribed by the decree of October 24, 1888, for the construction of the nine additional kilometers never was binding on the company. But, even admitting that the company ought to conform to the decree, it could invoke the impossibility of performing it within the period prescribed. In respect of certain obligations the contract itself made an exception on the ground of *force majeure*, and this was in accordance with the general principles of law.

The next subject considered by MM. Lyon-Caen and Renault was that of the concession for a tramway made May 17, 1884, to the government of the Transvaal. By article 20 of the concession the Portuguese Government granted to the concessionaire "the exclusive right to construct and operate" the railway, and agreed that it would "neither construct nor concede in the territory of the district of Lourenço Marques, within a space of one hundred kilometers on each side of the line of the company," a competing line of railway. This stipulation gave the company a virtual legal monopoly of the railway business within the district in question. The very terms in which the concession for the tramway was promised showed that it was an infringement of the exclusive privilege which belonged to the company. It violated the rights of the company both in respect of its monopoly of transportation and in respect of its exclusive right to fix rates. But even assuming that the Portuguese Government had the right to cancel the concession, it was bound to take certain steps which it had not taken. By article 42 of the concession it was provided that if the contract should be canceled the line, so far as constructed, and all the materials on hand, should be put up at public auction and sold to the highest bidder, and the proceeds paid to the company. In case no bid should be made within six months, the government was to have the right to take the road without indemnity. The government had, however, taken possession of the road without previously offering it for sale.

As to the damages due, MM. Lyon-Caen and Renault maintained that they were defined by articles 1149–1151 of the French civil code, namely, the loss which the company had suffered and the gain of which it had been deprived, subject to the qualification (1) that a debtor is liable only for such damages as have been proved and as could have been foreseen when the contract was made, unless it was by his wrong that

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it was not executed; and (2) that, if the failure to execute it was due to his wrong, the damages should comprehend, in respect of the losses suffered by the creditor and the gains of which he was deprived, only such as follow immediately and directly from the nonexecution of the agreement. The damages allowed should comprise both the loss of the creditor (*damnum emergens*) and the benefit of which he was deprived (*lucrum cessans*). The loss suffered related to a past transaction and was generally capable of precise ascertainment. The benefit referred to the future and was necessarily more uncertain. The loss comprised the expenditures of the company in buying land and constructing its works. The benefits comprised not only those which the company had realized on that part of the line open to traffic, but also those which it would in all probability have realized if the concession had not been annulled. These included the probable development of the traffic as shown by the increase since the Portuguese Government took possession of the line, and by the increase in the price of shares, of which Mrs. MacMurdo held a large number. It was also to be remembered that the number of shares held by Mrs. MacMurdo gave her a position in the company which was of pecuniary value. The tribunal should take into account the conscious wrong of the government as a ground for a liberal estimation of damages suffered. On the principal sum found to be due, interest should be allowed.

Opinions of M. Meili.

Two opinions in behalf of the Portuguese Government were given by M. Meili, professor of private international law at the University of Zurich, one before the opinion of MM. Lyon-Caen and Renault, and the other in reply to it. M. Meili contended in his reply, as he had done in his first opinion, that the case before the tribunal could not be considered as an action either *ex contractu* or *ex delicto*. The object of the claimants in so treating it was to gain an opportunity to criticise a long series of acts accomplished by Portugal in the exercise of her rights of sovereignty. It was not denied that the decree of June 25, 1889, and the taking possession of the railway had the effect of annulling the right conceded to MacMurdo to operate the railway. But if that act of the government had injured the rights of the concessionaire, it was nevertheless perfectly legitimate, and could not be controlled by the tribunal. On the other hand it pertained to the tribunal to accord to the concessionaire an indemnity and to fix its amount.

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In order to establish an action *ex delicto* it was necessary to show (1) an unlawful act, willful or negligent; (2) damage; (3) a connection between the act and the damage. Applying these conditions to the present case, the question would be, Had the Portuguese state negligently or fraudulently taken administrative measures to rescind the concession and sequestrate the railway? The answer must be in the negative. The government had exercised its sovereign rights legitimately and moderately. Moreover, it was inadmissible to subject such acts to the test of judicial precedents. No principle could impose on the state any responsibility whatever by reason of the inopportuneness or negligence with which it exercised its sovereign powers. The tribunal could only take the place of the arbitral tribunal originally provided for in the concession. It could not subject to a retrospective examination the acts of the Portuguese Government. The tribunal ought to confine itself to the examination of the question whether certain definite promises had been made, having the nature of private rights, and whether those promises had not been kept. Portugal had not recognized by the agreement any obligation to repair damage. Portugal had never ceased to declare her readiness to pay the actual value of the works constructed in the building of the line—in other words, the amount of her enrichment—and already 700,000 francs had been devoted to that account.

M. Meili argued that the case must be governed by Portuguese law.

He then discussed the relations of Portugal with the Transvaal, contending that the subject of international communication was a proper one for arrangement between them, and one which they had long been considering. In discussing this subject, he maintained that the Portuguese memorandum of May 17, 1884, to the Transvaal deputation, was prospective and entirely proper. It was not injurious to the right of the concessionarie to fix rates by his own act, even if he possessed it. And whether he possessed the right or no, it was clear that he was not authorized to use it arbitrarily and unreasonably. But he thought that they did not possess the right. The state was not to be presumed to have despoiled itself completely of its rights. Neither the concession nor any subsequent act had conferred on the concessionaire the right to fix, without limitation, the rates on any particular kind or class of merchandise. There was a middle ground between the absolute right of the

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concessionaire and the absolute right of the state in the matter. The concessionaire had a right to determine rates, not arbitrarily, but reasonably. In support of this view, M. Meili cited MM. Lyon-Caen and Renault's Manuel de Droit Commercial, 2me éd. 1891, Nos. 720–721. MacMurdo understood that the right of which he obtained the concession was necessarily limited by the international exigencies which the execution of the treaty of 1875 was intended to satisfy. But independently of the treaty M. Meili invoked the law of nations. Nations have duties as well as rights. Portugal could not abandon to MacMurdo her sovereign right to contract with the Transvaal in virtue of the maxims of the law of nations. The Boers had the right to demand an arrangement as to rates, and Portugal was obliged to accord it.

M. Meili maintained the right of the state to cancel a concession for the failure of the concessionaire to fulfill its conditions, and he then turned his attention to the great emphasis placed by the claimants on the question of the eight additional kilometers. He said that by the ministerial decree of October 30, 1884, the plans relative to eighty-two kilometers were approved by the government with a reservation as to the end of the line. The prospectus of the Delagoa Bay company and of the Portuguese company of March 30, 1886, and February 14 and March 7, 1887, gave the length of the line as ninety kilometers. The Portugese Government was under no obligation to furnish plans. There was no foundation for saying that the Portuguese Government had made a mistake in the plans and ought to bear the consequences. There was no mistake. The Portuguese Government was authorized to proceed as it did by an express clause. It was not correct to say that it had guaranteed to the concessionaire that the length of the line would be only eighty-two kilometers. The Portuguese Government granted three extensions of time. The road was not finished because of negligence, and not because sufficient time was not allowed.

M. Meili maintained that the tribunal could allow only the actual value of the works constructed. Nothing could be separately claimed for the loss of the right to operate the road, since that right fell with the cancellation of the concession. Nor was the speculative value of the stocks and bonds on the bourse to be taken as the value of the property. The claimants had insisted on what they called a right of control. Such

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a thing was not capable of separate estimation. The three and a half millions at which they estimated the right of control was a sum in the air. Portugal owed for the real and effective value of the works of which she took possession. She owed nothing for damage, direct or indirect, nor for the gain of which the enterprise had been deprived. The fantastic claim of 47,500,000 francs, with interest at various rates, was beyond the range of discussion.

Present Status of the Arbitration.

Prior to March 31, 1896, all the pleadings had been filed by the parties in interest, and all the proofs laid before the tribunal. On that day the tribunal, on application of the parties, appointed an expert to go to South Africa, and, after due investigation, report upon a number of interrogatories presented to him by the tribunal. May 13, 1896, upon the request of the Portuguese Government, the number of experts was increased to three; and the 9th of the following month M. Dietler, director of the St. Gotthard Railway, and on the 9th of the next September M. Nicole, engineer, were respectively appointed as second and third experts. November 6, 1896, M. Nicole proceeded to South Africa to obtain the information necessary to enable the experts to make their report to the tribunal. He returned to Switzerland early in April, 1897. After the report of the experts is made, probably toward the end of the present year (1897), it is expected that the tribunal will hear oral argument, and then proceed to render judgment.[1]

6. The Cheek Claim.

It has been agreed between the United States and Siam to submit to the governor of the Straits Settlements, as arbitrator, the claim of Dr. M. A. Cheek, a citizen of the United States, against the Government of Siam. The nature and history of the claim are disclosed in the following report of Mr. Olney, Secretary of State, to the President, of March 1, 1897:[2]

"In answer to the resolution of the Senate, dated February 24, 1897, requesting that that body be furnished with 'all the information in possession of the Department of State relating to the claim of M. A. Cheek against the Siamese Government,' I have the honor to say that the correspondence on file in this

[1] Mr. Peak, U. S. minister at Berne, to Mr. Moore, April 13, 1897.

[2] S. Doc. 180, 54 Cong. 2 sess.

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department relating to the claim of M. A. Cheek against Siam is so voluminous that it is physically impossible to place copies of it before the Senate during the continuance of the present session. There are not less than 2,000 pages of typewritten matter. The resolution, moreover, does not call specifically for correspondence, but for information. I submit, therefore, as a substitute for the full correspondence, a brief synopsis of the case, together with copies of the most recent communications that have passed between the two Governments.

"*Synopsis.*—April 23, 1889, Dr. M. A. Cheek, a citizen of the United States, residing in Siam, entered into the following agreement with Prince Warawan Nakorn, who represented the Government of Siam:

"'First. That His Royal Highness Prince Warawan Nakorn, agrees to advance to Dr. M. A. Cheek the sum of 600,000 ticals to be used in the working of teak forests and the purchasing of teak wood.

"'Second. That Dr. M. A. Cheek shall, by way of security, execute a bill of sale mortgage in favor of His Royal Highness Prince Warawan Nakorn, on all teak wood now belonging to Dr. M. A. Cheek, according to a schedule accompanying this agreement, and on all teak wood which may be worked or purchased by him during the currency of this agreement; also on 76 elephants now belonging to Dr. Cheek and on all elephants which may be purchased by, or which may become the property of, Dr. M. A. Cheek during the currency of this agreement. Dr. Cheek shall pay to his Royal Highness Prince Warawan Nakorn, interest at the rate of 7½ per cent per annum, on all moneys advanced to him by His Royal Highness Prince Warawan Nakorn.

"'Third. That Dr. Cheek will deliver at Bangkok, at an estimated price of 3 pikot, all wood, which may be worked or purchased by him; upon the arrival of the wood at Bangkok the estimated price of 3 pikot shall be released and Dr. Cheek may at any time after such delivery draw from His Royal Highness Prince Warawan Nakorn the amount of money so released for carrying on the work up country.

"'Fourth. That at the end of each season (about the 31st of March) Dr. Cheek shall make up his books and render a statement of the amount of wood in stock, the value of such wood, and the actual cost of wood delivered at Bangkok during the season; the difference between the actual cost of the wood delivered at Bangkok and the estimated cost of 3 pikot shall be debited or credited as the amount may be found to be greater or less than the estimated cost of 3 pikot. In reckoning the cost of the wood delivered at Bangkok, Dr. Cheek shall include all expenses incurred in the handling of the wood. Dr. Cheek shall receive no salary.

"'Fifth. That Dr. Cheek shall have the management of the working of the teak forests, and of the buying and selling or disposing of the wood. Dr. Cheek will sell the wood at

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Bangkok, or will cut up and ship the wood as may be most profitable to the parties to this agreement, provided that the wood is not sold at a price of less than 3 pikot. Dr. Cheek shall not sell the wood at a less rate than 3 pikot, except with the knowledge of His Royal Highness Prince Warawan Nakorn. If the wood can not be sold at a price amounting to 3 pikot, His Royal Highness Prince Warawan Nakorn shall have the option of taking the wood over [at] the rate of 3 pikot, or disposing of it.

"'Sixth. That Dr. Cheek shall make up the books of the teak business on the 31st of March of each year, and the profits realized shall be divided as follows: His Royal Highness Prince Warawan Nakorn shall receive one-third and Dr. M. A. Cheek shall receive two-thirds of the net profits.

"'Seventh. That during the currency of this agreement all forest leases now held by Dr. Cheek, or which may be acquired by him shall become the property of His Royal Highness Prince Warawan Nakorn.

"'Eighth. That all teak wood now held by Dr. Cheek (except 4,400 logs to be delivered to the Borneo Company, Limited) and all wood worked by him during the currency of this agreement shall be dealt with according to the terms of this agreement.

"'Ninth. That this agreement shall remain in force for a period of ten years from the date of signing unless Dr. Cheek shall at any time settle up the account and pay to His Royal Highness Prince Warawan Nakorn such sums of money as may be due to His Royal Highness Prince Warawan Nakorn from him.

"'Tenth. That Dr. Cheek shall, from time to time, advise His Royal Highness Prince Warawan Nakorn of all transactions connected with the working and purchasing and selling of the wood.

"'Eleventh. It is hereby agreed that no liabilites for losses incurred in the management of the business shall be shared by His Royal Highness Prince Warawan Nakorn.

"'WARAWAN NAKORN.
"'MARION A. CHEEK.

"'Witness:
"'DEVAWONGSE.'

"On the same day Cheek executed to the same representative of Siam the following instrument, which is designated by the parties as a 'bill of sale mortgage.'

"'I, Marion A. Cheek, resident of Chiengmai, for and in consideration of the sum of six hundred thousand (tls. 600,000) ticals to be paid to me and on my account by H. R. H. Prince Warawan Nakorn, according to the terms of articles of agreement drawn up and signed this 23rd day of April 1889 by and between H. R. H. Prince Warawan Nakorn of the first

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part and Marion A Cheek of the second part. do hereby grant and sell unto H. R. H. Prince Warawan Nakorn and his assigns forever the teak wood and elephants according to a schedule hereto annexed, the said teak wood and elephants being my lawful property.

"'*Provided, nevertheless*, and this mortgage is upon the condition that if the said M. A. Cheek shall pay or cause to be paid to H. R. H. Prince Warawan Nakorn, or his assigns, the said sum of six hundred thousand (tls. 600,000) ticals with interest thereon at the rate of seven and one-half (7½ per cent) per cent per annum from the date of the payment of the same to M. A. Cheek or on his account by H. R. H. Prince Warawan Nakorn, then this mortgage shall be void, otherwise to remain in full force and effect.

"'*And provided further*, That until default be made by M. A. Cheek in the performance of the conditions of this mortgage or in the performance of the conditions of the said articles of agreement for the working of teak wood, drawn up and signed this 23rd day of April 1889 by and between H. R. H. Prince Warawan Nakorn and M. A. Cheek, it shall be lawful for M. A. Cheek to retain possession of and to have the management of the said teak wood and elephants, to use the same for the joint benefit of H. R. H. Prince Warawan Nakorn and M. A. Cheek according to the conditions of the said articles of agreement hereinbefore mentioned.

"'M. A. CHEEK.

"'Witness:

"'DEVAWONGSE.'

"(Here follows a list of Cheek's property to which the lien was to attach.)"

"The amount named in the above-quoted instruments, to wit, ticals 600,000, was paid to Cheek. January 23, 1890, the Siamese Government advanced Cheek ticals 200,000 additional upon terms set forth in the following instrument:

"'This agreement, made the 23rd day of January 1890, supplementary to the agreement of the 23rd of April 1889, between His Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse of the one part, and Dr. M. A. Cheek of the other part.

"'Whereas under the agreement of the 23rd of April 1889, entered into between His said Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse and the said Dr. Cheek, a sum of six hundred thousand ticals (tls. 600,000) was advanced to the said Dr. M. A. Cheek by His said Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse for the purposes specified therein; and whereas the said Dr. Cheek is now desirous to have a further advance of two hundred thousand ticals (tls. 200,000) in addition to the sum of six hundred thousand ticals (tls. 600,000) already advanced by His said Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse under the

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agreement aforesaid; and whereas his said Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse agrees to advance the same:

"'Now it is mutually agreed between the said parties as follows:

"'*First.* That for the considerations already expressed and specified in the aforementioned agreement of the 23rd of April 1889, His said Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse advances the sum of two hundred thousand ticals (tls. 200,000) to the said Dr. M. A. Cheek (of which receipt is hereby acknowledged), and the said Dr. M. A. Cheek hereby agrees and promises to pay to His said Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse interest at the rate of seven and a half (7½%) per cent per annum on the said sum of two hundred thousand ticals (tls. 200,000).

"'*Second.* That as a security for the payment of the said sum of two hundred thousand ticals (tls. 200,000) so advanced by His said Royal Highness Krom Mun Naradhip Prabhandhbhongse the said Dr. M. A. Cheek hereby agrees to mortgage, under the bill of sale hereto annexed, all his properties as specified in the schedule attached to the bill of sale to the said His Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse.

"'*Third.* That the provisions of Clauses II., III., IV., V., VI., VII., VIII., IX., and X. of the aforesaid agreement of the 23d of April 1889, entered into between the said Dr. M. A. Cheek and His said Royal Highness Prince Krom Mun Naradhip Prabhandhbhongse shall in all respects be applicable to this present agreement as if they were inserted therein, in so far as they are not contrary to the terms of this present agreement.

"'In witness whereof, the parties hereto have signed and sealed this present agreement on the date first above written.

"'NARADHIP.
"'M. A. CHEEK.

"'Witness:
"'DEVAWONGSE.'

"Estimating a tical to be worth 50 cents in currency of the United States, the whole amount advanced to Cheek by Siam upon the terms set forth in the contracts quoted was $400,000.

"It appears from Cheek's memorial that he had, previous to any of these agreements with Siam, leased large tracts of teak forest in upper Siam, which he needed capital to work. The capital needed was furnished to him by the Government of Siam, as above shown. In explanation of the legal effect of his contracts with Siam, Cheek sets forth the usages of the industry upon which he entered in Siam. It requires, according to his statement, about three and a half years to get a log of teak timber from the stump to the market in Bangkok. The logs are first girdled, then cut, and then dragged to the

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nearest stream by elephants. Thence they are floated, first singly and afterward in rafts, down these streams into the main river, which carry them to Bangkok. In the dry season the small streams are too shallow to float the logs, and they lie where they are cut until the arrival of a season of sufficient water to float them.

"At the time of his agreement with Siam, Cheek had logs in all stages of progress toward the market. At the end of the first year of his contract with Siam he paid the interest for that year upon the money advanced. The second year, ending March 31, 1891, was a dry year and very little timber was got into market. Cheek was compelled to employ the proceeds of his second year's sales in keeping up the work in the forests, it being necessary to make advances to his employees and subcontractors. In view of these facts the Siamese Government indulged Cheek in consideration of his promise to pay compound interest on the advancement for the second year—that is, the interest due was added to the principal.

"The next season, ending March 31, 1892, was worse than the preceding, and Cheek failed a second time to pay the interest on the Siamese advancement. The proceeds of his sales for that year were in fact insufficient to keep the forest work going on, and he was compelled to raise additional funds by some means. He had at this time, according to his statement, a sufficient quantity of logs in the forests and in the streams to pay, when sold, the full amount of the advancement made to him by Siam, both principal and interest, and to leave a handsome surplus for himself.

"Cheek endeavored to get money from the Bombay-Burmah Trading Corporation by a sale for cash of logs to be delivered the following season (1892–93). Since Cheek's agreement with Siam compelled him to dispose of his logs in a manner therein specified, his proposal to the Bombay-Burmah Trading Corporation required the sanction of the Siamese Government, which was refused. Cheek then sought relief from another lumber company called the Borneo Company, and made with that company a provisional arrangement by which for a reasonable commission, in addition to the actual cost of transportation, that company undertook to transport during the coming season all the teak logs in the water at the time of the negotiation, and all others which Cheek might be able to put into the water. He had at that time 12,000 logs in the streams and hoped to put in 8,000 more, making in all 20,000 logs to be transported by the Borneo Company. Cheek valued these logs at rupees 48 to 50 each, and he expected to raise on them at least rupees 576,000—estimating the rupee at 33⅓ cents, amounting to about $192,000. This provisional arrangement was also subject to the ratification of the Siamese representative, and was rejected by him.

"Cheek was then left without funds to pay the interest on

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the Siamese advance or to continue his work. August 20, 1892, the Siamese Government notified our consul-general at Bangkok that all of Cheek's timber arriving after that date would be taken over as the property of the government. At the same time a government official seized the logs already in Bangkok and others belonging to Cheek which had reached a place higher up the river called Chainat. This official continued to seize logs as they came down. September 11, 1892, the Siamese representative telegraphed Cheek, who was up in the forest country:

"'Wood received. Will be sold at public auction. Proceeds in bank until your settlement.'

"Cheek protested, but in vain.

"Cheek claims that under his contracts with the Siamese Government, as construed in accordance with the usages of the enterprise in which he was engaged, annual interest was to be paid upon the money advanced to him only when the season had been good and he was able to raft his logs. In bad years the partner or lender who had advanced the capital was required by local custom to let the interest go over until a good season, when all past dues would be liquidated. Failure to pay interest at the end of a year in which it was impracticable to market the timber was not, Mr. Cheek claims, a breach of contract justifying any proceeding in the nature of foreclosure.

"Cheek makes the further point that the summary method adopted by the Siamese Government was unlawful and injurious to him, even if he had been legally in default.

"The logs seized by the Siamese Government were sold at auction at much less than their value, and the proceeds appropriated by the government. The next season, the winter of 1892–93, proved to be favorable for rafting timber, and had Cheek been permitted to go on with his work without molestation from the government he would have been able to bring down all the logs he had cut, in value as estimated by him of rupees 640,000, about $214,000. Even if the logs had been held in Bangkok without sale, they could have been used as a basis of credit under Clause III. of the agreement to the extent of rupees 380,000—about $126,666—an amount in excess of all that the Siamese Government could, at that time, by any construction of the agreement have claimed from Cheek; but for this premature, arbitrary, and illegal action of Siam, Mr. Cheek contends that he would have been able to provide for current expenses, to pay off all interest due, and 100,000 rupees of the principal debt, besides keeping up the credit with his foresters and contractors which he had been so many years building up and carefully maintaining.

"Not content with the summary seizure of all Cheek's logs that came down the river, the Siamese Government, July 15, 1893, published the following royal proclamation:

"'July 15, 1893, Chow Mun Rajabut, chief of the mahathai

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(department of the north) and commanding officer of the province of Chiengmai, has received orders from Phya Song Suradet, chief commissioner of the Lav Chieng States, that the following notice be published:

"'Whereas the minister of the royal treasury has sent an official letter No. 596/5892 dated the 9th September 1892, conents as follows:

"'Formerly Dr. M. A. Cheek made a written agreement and borrowed a large amount of money from the royal finance department for the purpose of working forests, and mortgaged forests, wood in forests and in streams, elephants, implements for forest work and debtors all and singular as security for the royal treasury with sundry conditions as set forth in said agreement.

"'Afterward Dr. M. A. Cheek violated the agreement in many particulars. Therefore Chow Mun Mahatlek was appointed commissioner of the royal treasury, with full power of attorney to act for the minister of finance in the province of Chiengmai. Therefore, anyone a debtor or creditor of Dr. M. A. Cheek, or who has charge of elephants or teak wood or implements for forest work, let him report to Chow Mun Mahatlek, commissioner at Chiengmai of the royal treasury, within the period of fifteen days from the date of this notice. If anyone is a debtor or has charge of elephants or teak wood or implements for forest work, let him give a correct report to the commissioner within the time appointed. The commissioner will deduct, relinquish, forego a suitable portion (of the debt). If afterward it be ascertained that elephants, wood, implements for forest work, or debtors be concealed, secreted, removed, or falsely reported, and proper account be not rendered to the official, the said officer will prosecute in court (such offender), and they will be fined according to the law.'

(SEAL OF CHOW RAJABUT.)

"This embargo completed the demolition of Cheek's business, and left him a ruined man in the midst of the fourth year of his ten-year contract with Siam.

"The questions which, according to the claimant, are involved are (1) the legal relations of the two parties to the contract—whether Cheek was a partner with Siam or a mere borrower of money; (2) whether Cheek was legally in default at the time the Siamese Government seized and sold the logs and published the manifesto of July 15, 1893; (3) whether the Siamese Government adopted a lawful remedy in case it should be found that Cheek was in default and was liable to a legal proceeding for the recovery of money due that Government.

"In relation to the third point, it is contended for Cheek that the local law of Siam provided an adequate judicial remedy against him; and that the consular court of the United States was also a forum clothed with powers ample for the purpose of enforcing his obligations to Siam. The summary method of

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proceeding resorted to by Siam was, Cheek claims, in violation of Siamese law and also of the treaty between Siam and the United States. Cheek's losses are estimated by him at rupees 1,607,331 ($535,777). From this amount he deducts the principal and unpaid interest of the Siamese advancement to him, amounting to rupees 1,266,218, leaving a total claimed by Cheek as damages of rupees 341,113 ($113,704).

The Siamese Reply.

"The Siamese Government has filed an elaborate reply to Cheek's claim, and alleges large indebtedness on the part of Cheek's estate as still existing and unpaid. According to the statement of Siam, Cheek was deeply in debt when the Siamese Government came to his relief in 1889. A considerable portion of the 800,000 ticals advanced to him was paid to his creditors and the residue thereof was applied to the timber business. On his first failure to pay interest (March 31, 1891) he was given as a favor another year in which to pay it. At the end of the second year (March 31, 1892) Cheek not only was unable to pay the accrued interest for the two preceding years, but he had not sufficient funds to continue the business, and was unable to raise money except by methods which involved the Siamese Government as his surety. Seeing that his financial condition was hopeless and that the only means of obtaining repayment of even a part of the money advanced to him was by immediate action, the Siamese Government decided to seize such timber as should come down the river and apply the proceeds to the indebtedness. The argument for Siam apologizes for, rather than defends, the order of July 15, 1893, which placed an embargo upon Cheek's business and destroyed it.

"Siam's view of the case is apparently that when Cheek violated the conditions on which money was advanced to him by failing to pay the interest accrued thereon, the transfer of property made in the 'bill of sale mortgage' became absolute, so that Siam in seizing the logs seized the property of the Government, and not the property of Cheek. It is declared in the Siamese argument that there is no law of mortgages in Siam, and therefore no procedure in the nature of foreclosure; that seizure and appropriation by an officer of the royal treasury was the legitimate and the only method of enforcing the rights of Siam as against Cheek in this case.

"Cheek had, besides the logs seized by Siam, other property in upper Siam, which was also included in the 'bill of sale mortgage.' This property was not seized by the Siamese Government, and when Cheek died it went into the hands of his administrator. Siam contends not only that the seizure of Cheek's logs and the other acts of the government were lawful, but that the proceeds derived therefrom were insufficient to pay Cheek's indebtedness to Siam. The property now in the hands of Cheek's administrator is claimed by Siam as being subject to the 'bill of sale mortgage' above referred to, and

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responsible for the amount of indebtedness still unliquidated. In other words, Siam has presented a counterclaim against Cheek.

"I have undertaken in this brief outline of the Cheek case to show the nature only of the controversy, and not to indicate the merits of either claimant. The merits of the case can be determined only from a study of the entire mass of evidence and consideration of the elaborate arguments filed on both sides. These will be presented later should the Senate desire, after reading this brief review of the case, to take it upon its merits."[1]

[1] By a telegraphic dispatch from Mr. Barrett, minister resident and consul-general of the United States at Bangkok, of April 2, 1698, it appears that the arbitrator, Sir Nicholas Hannen, governor of the Straits Settlements, has awarded the claimant's estate 706,721 ticals, equivalent to $200,000 in gold. The arbitrator holds (1) that Siam's seizure of Cheek's property was a violation of the treaty; (2) that the allegation that Cheek was at the time of the seizure in default under his contract, especially as to interest, was not established; (3) that the Chiengmai order was illegal, and (4) that the bill of sale or mortgage of the property in question is now void, so that the estate retains the assets. The amount of indemnity due to the claimant's estate was determined on the basis of what his position would have been if the property had not been seized nor the Chiengmai order issued. (MSS. Dept. of State.)

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CHAPTER XLVII.

THE COSTA RICAN-NICARAGUAN BOUNDARY: TREATY OF DECEMBER 24, 1886.

Proceedings.

By a treaty concluded December 24, 1886, the republics of Costa Rica and Nicaragua agreed to submit to the President of the United States, as sole arbitrator, the question which had long been pending between them as to the validity of the "Treaty of Limits" of April 15, 1858. The acceptance by the President of the office of arbitrator was duly solicited by the ministers of the two republics at Washington, by means of notes addressed to the Secretary of State, who on the same day informed them of the President's compliance.[1]

By one of the provisions of the treaty of arbitration, the President was authorized to delegate his powers, subject to the limitation that he should directly participate in the pronouncement of the final decision. Under this authority the President on January 16, 1888, empowered Mr. George L. Rives, Assistant Secretary of State, to examine the arguments and evidence submitted on both sides, and to make thereon, as soon as might be, a report on which his decision of the question in dispute might rest.[2]

[1] For. Rel. 1887, 267-298.

[2] The instrument by which the President delegated the authority in question to Mr. Rives was as follows:

"[GROVER CLEVELAND, President of the United States.]

"Whereas by a convention of arbitration between the government of the republics of Costa Rica and Nicaragua, signed at Guatamala City on the 24th day of December, 1886, the high contracting parties agreed to submit to arbitration the question pending between them in regard to the validity of the treaty of limits of 15th April 1858, between the said governments, together with such other points of doubtful interpretation as may require decision in the event of the said treaty of limits being found valid;

"And whereas under the terms of the said convention of arbitration the contracting parties have solicited my acceptance of the office of arbitrator

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A copy of this order was communicated by Mr. Rives to the representatives of Costa Rica and Nicaragua on the day on which it was made.[1]

On March 22, 1888, Mr. Bayard, as Secretary of State, inclosed to the same representatives a copy of the President's award and of Mr. Rives's report; and in due course he received from them the customary acknowledgments.

Mr. Rives's Report. The report of Mr. Rives was as follows:

"REPORT TO THE ARBITRATOR, THE PRESIDENT OF THE UNITED STATES.

"By GEORGE L. RIVES, *Assistant Secretary of State.*

"To the PRESIDENT.

"SIR: On the 24th day of December 1886 the Republics of Costa Rica and Nicaragua, by a treaty signed on that day, agreed that the question pending between the Contracting

to decide such question or questions, and the charge has been accepted by me;

"And whereas within the periods named in the said convention of arbitration the parties to the arbitration have submitted to me their respective arguments, which have been duly communicated to the opposing parties as required by said convention; and, further, the respective replies of each of the parties to the argument of the other have been laid before me in due time, so that all the evidence and arguments necessary to a decision of the point or points in dispute are before me as arbitrator thereof;

"And whereas by the final paragraph of the fifth article of the said convention of arbitration of December 24, 1886, it is provided that 'the arbitrator may delegate his powers, provided that he does not fail to intervene directly in the pronunciation of the final decision';

"Now, therefore, I, Grover Cleveland, President of the United States of America, in the capacity of arbitrator as aforesaid between the governments of the republics of Costa Rica and Nicaragua, and to the end that the fullest examination of the point or points in dispute between the governments shall be made to enable me to reach a just and equitable conclusion in the premises and pronounce a final decision thereon, do by this present instrument delegate my powers to George L. Rives, Assistant Secretary of State, to the extent contemplated and permitted by the aforesaid convention of arbitration, hereby enjoining the said George L. Rives to use all due circumspection and diligence in examining the arguments and evidence submitted on both sides, and to make to me, as soon as may be, a report thereon for my consideration and upon which my decision of the matter in contention may rest.

"Given under my hand and the seal of the United States this 16th day of January, in the year of our Lord one thousand eight hundred and eighty-eight, and the Independence of the United States the one hundred and twelfth.

[SEAL.] "GROVER CLEVELAND.

"By the President:

"T. F. BAYARD,

"*Secretary of State.*"

[1] For. Rel. 1888, part 1, pp. 455–456.

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Governments in regard to the validity of the 'Treaty of Limits' of the 15th April 1858 should be submitted to arbitration. It was further agreed that the Arbitrator of that question should be the President of the United States of America; that within sixty days from the ratification of the Treaty of Arbitration the Contracting Governments should solicit of the Arbitrator his acceptance of the charge; that within ninety days from the notification to the parties of the acceptance of the Arbitrator, they should present to him their allegations and documents; that the arbitrator should communicate to the representative of each Government, within eight days after their presentation, the allegations of the opposing party, in order that the opposing party might be able to answer them within thirty days following that upon which the same should have been communicated; that the decision of the Arbitrator must be pronounced within six months from the date upon which the term allowed for the answers to the allegations should have expired; and that the Arbitrator might delegate his powers, provided he did not fail to intervene directly in pronouncing the final decision. It was further provided that if the Arbitrator's award should determine that the Treaty of the 15th April 1858 was valid, the same award should also declare whether Costa Rica has the right of navigation of the river San Juan with vessels of war or of the revenue service; and that he should in the same manner decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and communicate to the other within thirty days after the exchange of ratifications of the Treaty of Arbitration.

"In accordance with the procedure thus agreed on, the Republic of Nicaragua communicated to the Republic of Costa Rica a statement of eleven points of doubtful interpretation in the Treaty of the 15th April 1858 which it proposed to submit to the decision of the Arbitrator. The Government of Costa Rica did not communicate any corresponding statement, and now declares that it finds nothing in that Treaty which is not perfectly clear and intelligible.

"The two Governments having thereafter solicited your acceptance of the charge, you were pleased, on the 30th day of July 1887, to signify your acceptance of it, and the representatives of both Governments were duly notified of that fact.

"On the 27th day of October 1887 both Governments presented to you their allegations and documents. These were duly communicated to the opposing parties, and on the 3d day of December 1887 they both presented answers to the allegations of their opponents. The Spanish documents were subsequently translated and printed.

"On the 16th day of January 1888, by an instrument in writing, you were pleased to delegate your powers as Arbitrator to me, in pursuance of the provisions contained in the last sentence of Article V. of the Treaty of Arbitration, and to

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direct me to examine into the questions at issue and report my conclusions to you.

"In accordance with these directions, and after a careful consideration of the allegations of the respective parties, of their answers, and of the documents submitted by each, I have now the honor to submit the following:

"REPORT.

"The questions to be passed upon by the Arbitrator, as will be observed from the foregoing statement of the Treaty of Arbitration, are capable of being classified under two heads:

"*First.* Whether the Treaty of Limits of the 15th of April 1858 is valid.

"*Second.* If valid, what is its true meaning in respect of the right of Costa Rica to navigate the River San Juan with vessels of war or of the revenue service, and also in respect of the eleven points submitted for decision by the Government of Nicaragua?

"If the first of these questions is decided in the negative—that is, if the Treaty of Limits is decided to be invalid—it will not be necessary to consider at all the questions under the second head.

"Before discussing the grounds urged by the Government of Nicaragua, on the one hand, as proving the invalidity of the Treaty of Limits, and those urged by the Government of Costa Rica on the other as establishing its validity, it will be essential to consider briefly the evidence submitted to show what were the recognized boundaries prior to the date of the Treaty, and what were the powers of the respective Governments in regard to it. This historical enquiry, it must be remembered, is not a matter of immediate concern, nor is it directly involved in the decision of the questions now submitted to arbitration; but it is important as elucidating the nature of the principal controversy, and as showing the facts upon which the parties base their respective arguments.[1]

[1] The argument of Costa Rica cited, on the question of boundaries: Torres de Mendoza, Colección de Documentos Ineditos de Indias publicada bajo los auspicios del Gobierno Español, IV.; Peralta, Costa Rica, Nicaragua y Panamá, en el siglo XVI. Madrid, 1883; Leon Fernandez, Colección de Documentos para la Historia de Costa Rica, San José, 1882, II. 226–227; Herrera, Descripción de las Indias Occidentales, V. 55; Chaps. XIII. XXXI.; Archivo de Indias de Sevilla, Registro de Reales Cédulas, Cartas y Expedientes del Presidente y Oidores de la Audiencia de Guatemala, files for 1694–1696, 1726–1736, 1758–1771; Descripción del Reino de Guatemala, printed at Guatemala, 1850; Molina, Bosquejo de Costa Rica, New York, 1850; Spanish Manuscripts, British Museum, add. 17,566; Depósito hidrográfico, Madrid; Peralta, El Canal Interoceánico, Brussels, 1887, 64; Peralta, The River San Juan de Nicaragua, in S. Ex. Doc. 50, 49 Cong. 2 sess. 36–42; Juarros, History of Guatemala, I. part 1, ch. 3; Torquemada, Monarquia Indiana; Peralta, Costa Rica y Colombia; Streber, Census of Costa Rica, 1864; Walker, War in Nicaragua; Gaceta de Nicaragua, No. 15, May 28, 1851; Anuario de Ambos Mundos, Nicaragua.—J. B. M.

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"Two questions, essentially distinct in their character, were in discussion in 1858 touching the boundary of the two Republics. The first of these was the question whether the District of Nicoya lawfully belonged to Costa Rica or to Nicaragua; the second, as to the true boundary line between the Republics from the Caribbean Sea to the borders of Nicoya. The evidence in regard to each of these disputed questions must be reviewed in its order.

"The District of Nicoya lies on the Pacific side of the Continent, and—roughly speaking—is triangular in shape, its apex lying toward the South. It is bounded on the Westward by the Pacific Ocean, and on the Eastward by the Gulf of Nicoya and the Rio del Salto, or Tempisque, a small stream emptying into the head of the Gulf and having its sources not far from the Southerly shore of Lake Nicaragua. The Northerly boundary, or base of the triangle, seems to have never been accurately fixed, and its position is a matter of dispute between the Governments of Costa Rica and Nicaragua. The argument of Nicaragua, submitted to the Arbitrator, cites the authority of Don Antonio Alcedo and the historian Juarros to the effect that it is bounded by the Lake of Nicaragua on the North, which seems to imply a further boundary line running from the Southern end of the Lake to the Pacific Ocean. The arguments of the Costa Rican Government, on the other hand, place the Northern boundary as far up as the La Flor River; and the records of land titles, and the statements of Stephens and Baily, are cited in support of this view. It is wholly unimportant, however, for the present purpose, to decide which of these opposing views is correct. It is only needful to point out that a diversity of opinion exists, and that there is no grant or agreement precisely fixing the boundaries of the District.

"As to the title to the District, the facts are plainer. Nicoya, or, as it is sometimes called, Guanacaste, was undoubtedly recognized as a part of Nicaragua prior to 1826. It is asserted by Costa Rica that at times Nicoya was temporarily united with it, or placed under the control of its authorities; and some evidence is produced tending to show that such a change was made in 1573, 1593, 1692, the middle of the XVIIIth century, and even as late as 1812. But any such connection with Costa Rica can have been but temporary, and it may be regarded as settled that at the time of the Declaration of Independence from Spain in September 1821, Nicoya formed a part of Nicaragua. This condition of things seems to be distinctly recognized in the Constitution of Costa Rica, adopted 21st January 1825, in which it is stated that—'the territory of the State extends at present from West to East, from the Rio del Salto, *which divides it from Nicaragua, etc.*'

"It would seem, however, that about 1824 the inhabitants of Nicoya, or some of them, asked to be annexed to Costa Rica. This question was referred to the Federal Congress of Central America, the Federal Republic of Central America having

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been theretofore formed and its Constitution adopted 22nd November 1824, and that body on the 9th December 1825, passed the following decree:

"'The Federal Congress of the Republic of Central America, taking into consideration, firstly, the reiterated petitions of the authorities and municipal bodies of the towns of the District of Nicoya, asking for their separation from Nicaragua and their annexation to Costa Rica; and, secondly, that the said towns and people actually annexed themselves to Costa Rica at the time in which the political troubles of Nicaragua took place; and, thirdly, the topographical situation of the same district, has been pleased to decree, and does hereby decree:

"'Article 1. For the time being, and until the demarcation of the territory of each State provided by Article VII of the Constitution is made, the District of Nicoya shall continue to be separated from Nicaragua and annexed to Costa Rica.

"'Article 2. In consequence thereof, the District of Nicoya shall recognize its dependence upon the authorities of Costa Rica, and shall have, in the Legislature of the latter, such representation as corresponds to it.'

"It further appears that the Government of Costa Rica thereupon took possession of Nicoya, and has been continuously in possession of it ever since; and was so at the date of the Treaty of 1858.

"The Government of Nicaragua, however, has not always acquiesced in the validity of this act of annexation. It has, on the contrary, on several occasions protested against it; and in its arguments, now before the Arbitrator, it contends that the decree above referred to was not recognized at the time; that Nicaragua was not then represented in the Federal Congress; that the decree was, by its terms, only temporary; and that the municipalities of Nicoya as well as the Legislature of Nicaragua protested against the action of Congress as soon as they were aware of it.

"Here again, it is not necessary for the Arbitrator to decide the question of title. But it is clear that in 1858 Costa Rica had been continuously in possession of the District of Nicoya, under a claim of title, for more than thirty-two years.

"As to the boundary line between the Rio del Salto and the Caribbean Sea, the question was purely one of fact; and it can hardly be said that any very clear or satisfactory answer was possible.

"The Government of Costa Rica, in the arguments submitted to the Arbitrator, has presented an elaborate historical review of the two Provinces of Costa Rica and Nicaragua under Spanish rule, which, it may be assumed, contains a reference to all the important documents bearing upon the question of boundaries. Passing over the history of the discovery and first settlement of this region in the early part of the XVIth century, it appears that in 1541 the Emperor Charles V. decreed that the upper fifteen leagues of the San Juan River, should belong to the Province of Nicaragua; that the lower, or remain-

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ing portion of the river, should belong to the Government of Costa Rica; and that the use of the river and lake, for purposes of navigation and fishing, should be common to both Provinces. In 1561 King Philip II. appointed Licentiate Don Juan Cavallon to be 'Alcalde Mayor' of the Province of New Cartago and Costa Rica, describing it in the preamble of the letter of appointment as extending along the Northern Sea 'up to the Outlet, this being included' (*hasta el Desaguadero inclusive*). In 1573, by articles of agreement between the Spanish Crown and Diego de Artieda, who was appointed Governor and Captain-General of Costa Rica, the boundaries of that Province were defined substantially as they continued to be down to 1821. The limits of Artieda's jurisdiction are thus defined:

"'From the Northern to the Southern Sea in width; and in length from the boundary of Nicaragua, on the side of Nicoya, right to the Valleys of Chiriqui, as far as the Province of Veragua on the Southern side; and on the Northern side, from the mouths of the Outlet, which is towards Nicaragua (*desde las bocas del Desaguadero, que es á las partes de Nicaragua*), the whole tract of land as far as the Province of Veragua.'

"No subsequent grant or decree by the Spanish Crown is cited, and—apart from some evidence of acts of possession by the respective Government—there is nothing further to define the boundaries of the two Provinces.

"Soon after the Declaration of Independence, Costa Rica and Nicaragua, then States of the Republic of Central America, adopted Constitutions defining generally their respective boundaries.

"The Constitution of Costa Rica, adopted the 21st January 1825, provides as follows:

"'Article 15. The territory of the State extends at present from West to East, from the River del Salto, which divides it from that of Nicaragua, up to the River Chiriqui, the boundary of the Republic of Colombia; and North and South from one to the other sea, the limits being on the North [Sea] the mouth of the San Juan River and the Escudo de Veraguas, and on the South [Sea] the mouth of the River Alvarado and that of the Chiriqui.'

"Nicaragua, by the Constitution adopted the 8th April 1826, defines her boundaries thus:

"'On the East, the sea of the Antilles; on the North, the State of Honduras; on the West, the Gulf of Conchagua; on the South, the Pacific Ocean; and on the Southeast, the free State of Costa Rica.'

"These are the last declarations *ante litem motam*. It will be observed that all these documents leave the precise boundary vague and undetermined. Indeed, the line to be followed between the Rio del Salto and the 'mouths of the Outlet,' is nowhere laid down. Nicaragua contends that a straight line from the mouth of the Rio del Salto to the mouth of the Colorado, the most Southerly of the three mouths of the San Juan,

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is intended. This is met by the argument that as the Rio del Salto was the boundary, that river in its whole length, and not the mouth or any other part of it, was the dividing line; and that the San Juan River proper—the Northernmost of the three channels at the mouth of that stream—formed the end of the line on the Caribbean Sea. Costa Rica further contends that the boundary line was not straight, but that it followed the course of the San Juan in its whole length and the Southern shore of Lake Nicaragua; and she alleges that she was in possession of the territory up to that line—an allegation not admitted by Nicaragua.

"In my judgment the evidence establishes that the boundary of Costa Rica, under the terms of the Spanish grants (leaving Nicoya out of the question), began at the head of the Gulf of Nicoya, ran northerly along the River del Salto to its source, and thence ran to the mouth of the San Juan River at the port of San Juan del Norte—this being, at the time, the mouth of the principal channel or outlet of the stream. But the evidence is not sufficient to form the basis for any satisfactory judgment as to how this line was to be drawn between the source of the del Salto and the mouth of the San Juan. I perceive no reason for thinking that it should have been a straight line.

"No decision of this question is, however, necessary; for it is only important, for present purposes, to point out that no precise line of demarcation can be found in any of the earlier documents. Nor is this surprising in view of the fact, to be inferred from the evidence, that the region through which the line ran was a rough, densely wooded and thinly settled country, where no need was felt of any exact delimitation in the days of the Spanish dominion.

"But with the establishment of the Federal Republic, and, still more, with its dissolution, the questions of boundary began to assume importance.

"The Federal Constitution seems to have provided by its Article VII. for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.

"In 1838 Costa Rica seems to have urged upon Nicaragua—then assuming the rank of an independent State upon her withdrawal from the Federation—a desire for a recognition of the annexation of Nicoya. In 1846, 1848, and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years.

"That the documentary evidence was slight and unsatisfactory, has been already shown; and that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guarantees' of the

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8th March 1841—which asserts as the boundaries of Costa Rica the line of the River La Flor, the Shore of Lake Nicaragua and the River San Juan.

"I now proceed to state the history of the negotiations which resulted in the Treaty in question, and of the executive and legislative acts which are relied on by Costa Rica as constituting a sufficient ratification.[1]

"The long and bitter struggle in which Nicaragua and other Central American States had been involved, and of which the part played by Walker and the filibusters was the most notorious incident, came to an end in 1857. The Republic of Costa Rica had taken part in that struggle, and her case states as a fact that at the close of the contest the Costa Rican troops held military positions on both sides of the San Juan. The argument of Nicaragua seems to imply that such possession was not taken until after the close of the war; but the fact itself is not in dispute. It was regarded by Nicaragua, at the time, as constituting a *casus belli;* and Costa Rica having failed to withdraw her troops, war was declared by Nicaragua on the 25th November 1857—although negotiations for a settlement of the difficulty still continued, but without success.

"In this posture of affairs the Republic of San Salvador offered mediation through its Minister, Colonel Don Pedro Rómulo Negrete. Owing principally, as it would seem, to Colonel Negrete's earnest efforts, the opposing Governments appointed Ministers Plenipotentiary, who met with the Salvadorian Minister at San José de Costa Rica, and there concluded the Treaty of Limits,—the validity of which is now under examination.

"By that instrument, the boundary line is made to begin at Punta de Castilla, at the mouth of the San Juan River; thence it follows the right or Southern bank of that stream to a point three miles below the Castillo Viejo; thence it runs along the circumference of a circle drawn round the outworks of the Castle as a center, with a radius of three miles, to a point on the

[1] In support of the validity of the Treaty of Limits, the Costa Rican argument cited: Calvo, Droit Int. I. sec. 711; Convención Internacional entre los Gobiernos de Nicaragua y Costa Rica y Don Felix Belly para la canalización del Istmo, Managua, Imprenta del Progreso, frente al Palacio Nacional, 1859; Code of Nicaragua, Tit. I. Book IV.; Documentos relativos á las últimas negociaciones entre Nicaragua y Costa Rica sobre limites territoriales, Canal interocéanico, Managua, 1872; For. Rel. of the U. S. 1873, II. 738; Gaceta de Nicaragua, No. 15, of May 8, 1858; Ayon, The Question of Territorial Limits between the Republics of Nicaragua and Costa Rica, Managua, 1872; Parsons on Contracts, Book I. ch. II. sec. 1; Dalloz, Répertoire, "Cautionnement," "Obligation," Traité International;" Ayon, Consideraciones sobre la cuestión de límites territoriales, entre las Repúblicas de Nicaragua y Costa Rica, Managua, 1872, Imprenta de "El Centro Americano;" Savigny, Droit Romain, III. 126; Calvo, Droit Int. I. sec. 729.—J. B. M.

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Western side of the Castle, distant two miles from the River; thence parallel to the San Juan and the lake, at a distance of two miles therefrom, to the Sapoá River; and thence in a straight line to the center of Salinas Bay on the Pacific Ocean. The Treaty further provides that surveys shall be made to locate the boundary; that the Bay of San Juan del Norte and Salinas Bay shall be common to both Republics; and that Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan,—Costa Rica having the right of free navigation for the purposes of commerce in that part of the River on which she is bounded. It was further agreed that in the event of war between Costa Rica and Nicaragua, no act of hostility was to be practiced in the Port or River of San Juan, or on the Lake of Nicaragua; and the observance of this article of the Treaty was guaranteed by the Republic of San Salvador.

"It is admitted by the parties to the present arbitration that the Treaty was duly ratified by Costa Rica on the 16th April 1858; and that it was not ratified at all by San Salvador. It is further established that there was some ratification by representatives of Nicaragua,—but whether or not such ratification was sufficient is one of the points now in controversy, and it is therefore necessary to examine fully the powers and the proceedings of the Nicaraguan authorities.

"The Republic of Nicaragua, as appears from the evidence, was a Constitutional Government of limited powers, which were defined by a written Constitution. Nicaragua, as one of the States of the Central American Republic, adopted her first Constitution on the 8th April 1826. Upon the dissolution of the Federal Republic she assumed the rank of an independent nation; and in 1838 adopted a new Constitution, which her representatives now contend was in full force and vigor at the time of the execution of the Treaty of Limits. The full text of the Nicaraguan Constitution of 1838 is not contained in the arguments which have been laid before the Arbitrator; but it sufficiently appears that power was vested in an elective President and a Congress. It also appears that by Article 2 (cited in full below), the boundaries of the State were defined; and that by Article 194, quoted in the argument of Nicaragua, a complicated method of amendment was provided, of which the only feature now necessary to notice is that no proposed amendment shall take effect until it has been approved by two successive Legislatures.

"In 1857 the necessity for a complete revision of the Constitution of 1838 seems to have been generally recognized. The long and exhausting conflicts which had been waged from 1854 to 1857, and the existence, during the greater part of that time, of two hostile governments, each claiming to exercise constitutional and supreme power throughout the country, had demonstrated, to the satisfaction of the inhabitants, the importance of changes in the organic law. Accordingly a Constituent

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Assembly, with ample powers, was duly elected. The due election, and the full constituent powers of this body, are facts not disputed in the arguments now submitted on behalf of Nicaragua.

"In November 1857, the Constituent Assembly met, and addressed itself at once to the task of framing a new Constitution for Nicaragua, as well as of legislating upon the ordinary affairs of the nation.

"On the 18th of January 1858, the previous negotiations with Costa Rica having failed, the Assembly ordered new Commissioners to be appointed to negotiate treaties of peace, limits, friendship and alliance between Nicaragua and Costa Rica.

"On the 5th February 1858, a further and supplemental decree on the same subject was adopted, which is as follows:

"'The Constituent Assembly of the Republic of Nicaragua, in use of the legislative faculties with which it is invested, decrees:

"'Article 1. For the purpose that the Executive may comply with the decree of January 18th instant, the said Executive is hereby amply authorized to act in the settlement of the difficulties with Costa Rica in such manner as it may deem best for the interest of both countries, and for the independence of Central America, without the necessity of ratification by the legislative power.

"'Article 2. Such treaties of limits as it may adjust shall be final, if adjusted in accordance with the bases which separately will be given to it; but, if not, they shall be subject to the ratification of the Assembly.'

"What were the separate bases of negotiation given to the Nicaraguan Executive does not appear from any of the documents submitted to the Arbitrator. But it is not distinctly asserted by the representatives of Nicaragua that such instructions were disregarded in the negotiation of the Treaty—the arguments relied on to prove its invalidity resting upon entirely different grounds, which will be stated hereafter.

"On the 15th April 1858, the Treaty of Limits was signed by the Plenipotentiaries of Costa Rica, Nicaragua and San Salvador; and on the 26th April 1858, ratifications were personally exchanged by the Presidents of Costa Rica and Nicaragua, who met for the purpose on Nicaraguan territory at the City of Rivas. The Treaty had not then been passed upon by the Assembly, the decree of ratification being by the President alone. It is as follows:

"'TOMAS MARTINEZ, the President of the Republic of Nicaragua:

"'Whereas General Máximo Jerez, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the Republic of Costa Rica, has adjusted, agreed upon and signed, on the 15th instant, a Treaty of Limits, fully in accordance with the bases

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which, for that purpose, were transmitted to him by way of instructions; finding that said Treaty is conducive to the peace and prosperity of the two countries, and reciprocally useful to both of them, and that it facilitates, by removing all obstacles that might prevent it, the mutual alliance of both countries, and their unity of action against all attempts of foreign conquest; considering that the Executive has been duly and competently authorized, by legislative decree of February 26th ultimo, to do everything conducive to secure the safety and independence of the Republic; and by virture, furthermore, of the reservation of faculties spoken of in the executive decree of the 17th instant:

"'Does hereby ratify each and all of the articles of the Treaty of Limits made and concluded by Don José Maria Cañas, Minister Plenipotentiary of the Government of Costa Rica, and Don Máximo Jerez, Minister Plenipotentiary of the Supreme Government of Nicaragua, signed by them on the 15th instant, and ratified by the Costa Rican Government on the 16th. And the additional act of the same date is likewise ratified.'

"On the 28th May 1858, thirty-two days after the ratification, and forty-three days after the signature of the Treaty of Limits, the following decree was passed by the Constituent Assembly:

"'The Constituent Assembly of the Republic of Nicaragua, in the use of legislative powers vested in it, decrees:

"'Sole Article. The Treaty of Limits concluded at San José on the 15th of April, instant, between General Don Máximo Jerez, Minister Plenipotentiary from this Republic, and General Don José Maria Cañas, Minister Plenipotentiary from the Republic of Costa Rica, with the intervention of Colonel Don Pedro Rómulo Negrete, Minister Plenipotentiary from Salvador, is hereby approved.'

"On the 19th August 1858, the Constituent Assembly adopted the new Constitution, of which it is only needful to cite the first article, viz:

"'The Republic of Nicaragua is the same which was, in ancient times, called the Province of Nicaragua, and, after the independence, State of Nicaragua. Its territory is bounded on the East and Northeast by the Sea of the Antilles; on the North and Northwest by the State of Honduras; on the West and South by the Pacific Ocean; and on the Southeast by the Republic of Costa Rica. The laws on special limits form part of the Constitution.'

"No further formal ratification of the Treaty of Limits was ever had; but the arguments submitted by Costa Rica cite a number of instances in which the Government of Nicaragua, during the period between 1858 and 1870, recognized the Treaty as a valid and binding instrument.

"Since 1870 the Government of Nicaragua has contended that the Treaty is invalid; and that view is now urged upon

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three distinct grounds, which are stated as follows in the argument submitted on its behalf:

"'The Government of Nicaragua affirms the invalidity of the Treaty of 1858, and insists that it ought not to be bound thereby, for the reason—

"'*First.* That it has not received that sanction which the Constitution of the State of Nicaragua requires to give effect to, and validate, a treaty of its character.

"'*Second.* It has not been ratified by the Government of San Salvador, so as to give effect to the guarantees on behalf of that Government of the tenth article of the Treaty.

"'*Third.* That the pretended ratifications of the Treaty were exchanged before the Treaty had been submitted to the Congress of Nicaragua, and it was not approved by the first Congress of Nicaragua until after the expiration of the forty days provided for the exchange of ratifications in Article XII.

"I shall consider each of these three reasons in order.

"I.

"The argument very forcibly presented on behalf of Nicaragua to establish the first ground of objection,—the lack of such a sanction as was required by the Constitution to give effect to, and validate, a Treaty of the character of the one in question,—is as follows: The Constitution of 1838 was in full force on the 15th April 1858; that Constitution fixed the boundaries of Nicaragua; the Treaty of Limits curtailed the boundaries so fixed by the Constitution; it was therefore, 'in direct and flagrant violation of the fundamental law of the State, and to have validity must receive the same formal ratification that an amendment to the Constitution itself demands;' the Constitution provides that an amendment adopted by one Legislature in the manner prescribed, by a two-thirds vote of both houses, 'shall not be considered as valid nor form part of the Constitution until it has received the sanction of the next Legislature;' the Treaty of Limits was never sanctioned by a second Legislature; therefore it is not valid.

"This argument, it will be perceived, rests wholly upon the fundamental assumptions that the Constitution of 1838 was in force, and that it fixed the boundaries of Nicaragua. If, as a matter of fact, that Constitution was not in force, or if the boundaries were not definitely fixed by its provisions, then the whole argument falls; for the Treaty is then a mere treaty of limits, settling disputed boundaries, and is not one involving a concession of territory and an amendment to the Constitution. It is not pretended that a treaty fixing boundaries requires, on general principles, any extraordinary sanction.

"The general doctrine that in determining the validity of a treaty made in the name of a state, the fundamental laws of such state must furnish the guide for determination, has been

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fully and ably discussed on the part of Nicaragua, and its correctness may certainly be admitted. But it is also certain that where a treaty has been approved by a government, and an effort is subsequently made to avoid it for the lack of some formality, the burden is upon the party who alleges invalidity to show clearly that the requirements of the fundamental law have not been complied with. In my judgment, Nicaragua has failed in establishing a case under this rule.

"In the first place, it may well be doubted whether the Constitution of 1838 can be said to have been in full force and effect at the time of the execution of the Treaty on the 15th April 1858. The legislative power was then vested in a Constituent Assembly,—a body, it would seem, expressly chosen for the purpose of amending the Constitution in any way it saw fit. To say that such a body could not adopt a decree which in effect modified the Constitution, is to deny to it the power to carry out the very objects for which it existed.

"Moreover, the Constitution framed by the Assembly, and promulgated on the 19th August 1858, defining the boundaries of Nicaragua, adds that 'the laws on special limits form part of the Constitution.' If therefore the decree of the 28th May 1858, and the other acts of the Assembly, were in any respect insufficient as involving some unconstitutionality, the defect was supplied by practically embodying the Treaty of Limits, and the decree approving it, in the new Constitution,—thus giving the highest sanction possible to this legislation.

"But whether or not the Constitution of 1838 was in full force in April and May 1858, I am clearly of opinion that it did not definitely fix the boundaries of the State. The power of defining absolute boundaries by a Constitution is not denied. The question is merely whether the Constitution of 1838 did in fact contain such a definition of the boundaries of Nicaragua as to preclude their adjustment by an ordinary treaty.

"The provisions of that Constitution, respecting boundaries, are as follows:

"'Article 2. The territory of the State is the same as was formerly given to the Province of Nicaragua; its limits being on the East and Northeast the Sea of the Antilles; on the North and Northwest the State of Honduras; on the West and South the Pacific Ocean; and on the Southeast the State of Costa Rica. *The dividing lines with the bordering States shall be marked by a law which will make a part of the Constitution.*'

"Thus it appears that 'the dividing lines with the bordering States' were expressly not defined. It was plainly the intention to leave the Constitution incomplete in this respect; though a means of completing it was provided, by allowing the passage of an ordinary law by a single Legislature. It is not pretended that any law, marking the boundary on the side of Costa Rica, was passed before the execution of the Treaty of Limits. The decree approving the Treaty is the only attempt,

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so far as appears, to comply with this provision of the Constitution. The statement that the boundary is, 'on the Southeast, the State of Costa Rica,' defines nothing. What were the limits of Costa Rica in 1838, was a matter of dispute. No precise decision was possible, and I have already expressed my opinion that the evidence laid before the Arbitrator is altogether too vague to afford grounds for any satisfactory judgment. The Constitution of 1838 therefore did not fix the boundaries of Nicaragua definitely.

"These views are strengthened by a consideration of the evidence adduced on the part of Costa Rica to prove acquiescence by Nicaragua for ten or twelve years in the validity of the Treaty. I do not regard such acquiescence as a substitute for ratification by a second Legislature, if such had been needed. But it is strong evidence of that contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation.

"I conclude therefore that the first ground of objection stated by Nicaragua is untenable.

"II.

"The second ground of objection urged by Nicaragua to the validity of the Treaty, is that it has not been ratified by the Government at San Salvador, so as to give effect to the guarantees on behalf of that Government of the *tenth* article of the Treaty.

"It is argued, in support of this objection, that the guarantee of the mediating Government against hostilities on the River and Lake was of great importance to Nicaragua; that it might well have been the controlling consideration in the mind of the negotiator of the Treaty that led him to agree to the relinquishment of claims to great tracts of territory; that the failure of San Salvador to ratify this Treaty took from it one of the chief considerations moving to Nicaragua; and that the consideration never having taken effect, the Treaty never became of valid or binding force. It is added that this was, in effect, a tripartite Treaty, and unless all the parties became bound, neither of them was.

"In my opinion this argument is unsound. The Treaty was not tripartite, but was between Costa Rica and Nicaragua only, with an independent and separable clause of guarantee, as to a single feature of the arrangement, on the part of San Salvador. Without the guarantee, the Treaty was complete as between the two principals, if they saw fit to accept it in that shape. The non-ratification by the Republic of San Salvador was known to the Government of Nicaragua when ratifications were exchanged with Costa Rica. It follows therefore that Nicaragua never lost any of the considerations which

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induced her to consummate, by an exchange of ratifications, the negotiations for the Treaty.

"The facts may be briefly recalled.

"On the 15th April 1858 the Treaty of Limits was signed. In form it is a Convention agreed upon by the representatives of Costa Rica and Nicaragua, and declares that they having exchanged their respective powers, 'which were examined by Hon. Señor Don Pedro R. Negrete, exercising the function of fraternal mediator in these negotiations,' had agreed to and adjusted the terms of the Treaty. The Treaty itself, after reciting the desire of Costa Rica and Nicaragua for peace, fixes the boundary line between them; provides for a survey of the line, and for the common use and defense of the Bay of San Juan del Norte and Salinas Bay, and of that portion of the San Juan River on which Costa Rica borders; grants the use in common of the Punta de Castilla until Nicaragua recovers full possession of all her rights in the Port of San Juan del Norte; forbids the levying of custom duties at Punta de Castilla while San Juan del Norte remains a free port; defines the jurisdiction over, and right of navigation on, the waters of the San Juan River; secures existing contracts of canalization or public transit made by the Government of Nicaragua, and regulates the execution of future contracts; and neutralizes the Port and River of San Juan and the Lake of Nicaragua in the event of war between Costa Rica and Nicaragua. Then follows this:

"'Article X. The stipulation of the foregoing article (that relating to neutrality) being essentially important for the proper custody of both the Port and the River against foreign aggression, which would affect the general interests of the country, the strict performance thereof is left under the special guarantee, which in the name of the mediator Government, its Minister Plenipotentiary herein present is ready to give, and does hereby give, in use of the faculties vested in him for that purpose by his Government.'

"Finally, Costa Rica and Nicaragua mutually give up all claims against each other, and 'the two contracting parties' waive all claims for damages which either might have against the other.

"This instrument is plainly, neither in form nor in substance, tripartite. The 'two Governments,' the 'two contracting parties' spoken of in the Treaty, are always Costa Rica and Nicaragua, never San Salvador. San Salvador is not in form a contracting party at all. And in substance that Government is not a party to the agreement—the clause containing the guarantee being entirely separable from all the rest.

"As a proposition of international law, it may be regarded as settled that a guarantee is always merely subsidiary to the principal contract. 'Le traité par lequel un état se porte garant d'un traité conclu entre deux autres puissances, est un traité

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accessoire destiné à assurer l'execution du traité principal.' (Bluntschli, 430 *note*, Lardy's trans.) 'La garantie peut être comprise dans les stipulations annexées au traité principal qu'on vent garantir, et devient alors une obligation accessoire.' (Vattel, Droit des Gens, Ed. 1863, Liv. II, ch. 16, §240; note by Pradier Fodéré, the editor.) 'Lorsque la garantie est destinée à assurer l'inviolabilité d'un traité elle forme toujours une obligation et un traité accessoire (*pactum accessorium*), même quand elle ferait partie de l'acte principal.' (Klüber, Droit des Gens, §158.) It follows that the clause of guarantee in the Treaty of Limits is no part of the principal agreement, and that on general principles the rest of the Treaty would not stand or fall with this subsidiary or accessory contract.

"The necessity for ratification by contracting powers may be freely admitted. But even conceding to it as high an importance as the execution of deeds by individuals, the failure of a guaranteeing state to ratify will not necessarily invalidate a treaty which the principal contracting parties have concluded by an exchange of ratifications as between themselves.

"The analogy of individual deeds may serve to illustrate the point now under discussion. The case may readily be imagined of a deed between two parties as principals with a third party as guarantor. Leases of this character are not infrequent. If such a deed were prepared by the agents of the three parties, and if the two principal parties were to sign, seal, acknowledge, and formally deliver to each other duly executed duplicates of the deed, without waiting for the signature of the guarantor, it is too plain for argument that neither could subsequently object, and claim the right to rescind, because the deed had not been executed and delivered by the guarantor.

"So in this case. The Presidents of Costa Rica and Nicaragua in person, on the 26th April 1858 formally exchanged ratifications of the Treaty, without waiting for San Salvador. The arguments now advanced by Nicaragua, as establishing the invalidity of the Treaty, might perhaps have been urged as reasons for refusing to exchange the ratifications until San Salvador was ready to unite in the act. But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. The Treaty was complete without Article X. To all the other articles and stipulations it contained Costa Rica and Nicaragua alone might fully bind themselves. They did so, irrevocably, by a formal exchange of ratifications; and neither may now be heard to allege, as reasons for rescinding this completed Treaty, any facts which existed and were known at the time of its consummation.

"I conclude therefore that the *second* ground of objection stated by Nicaragua is untenable.

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"III.

"The the third ground of objection urged by Nicaragua to the validity of the Treaty is 'that the pretended ratifications of the Treaty were exchanged before the Treaty had been submitted to the Congress of Nicaragua, and it was not approved by the first Congress of Nicaragua until after the expiration of the forty days provided for the exchange of ratifications in Article XII.'

"It will be remembered that on the 5th February 1858 the Constituent Assembly of Nicaragua passed a decree by which the Executive was 'amply authorized' to treat with Costa Rica 'without the necessity of ratification by the legislative power'; and that it was further decreed that such treaties of limits as the Executive might adjust should be final,—if in accordance with certain separate instructions. Acting under this grant of power, the President of Nicaragua concluded and ratified the present Treaty on the 26th April 1858, eleven days after its signature by the Plenipotentiaries, without 'ratification by the legislative power.' On the 28th of May 1858 the Constituent Assembly adopted a decree approving the Treaty; and this decree was signed by the President on the 4th June 1858.

"The argument now presented by Nicaragua is twofold, and raises two points, *first*, that the Treaty is invalid because ratifications were exchanged before approval by the Assembly; and, *second*, that it is invalid because such approval was given more than forty days after signature.

"As to the first of these points, it would perhaps be enough to say that Nicaragua can not now seek to invalidate the Treaty on any mere ground of irregularity in the order of its own proceedings. If its Legislature did in fact approve the Treaty, that is enough for the present purpose. Whether such approval was expressed before or after the exchange of ratifications is an immaterial matter now,—certainly so far as Nicaragua is concerned.

"But it does not appear that there was any real irregularity in these proceedings. The full text of the Nicaraguan Constitution of 1838 not being contained in the arguments submitted to the Arbitrator, it is not made clear just what restrictions upon the treaty making power that instrument imposed. Ratification by legislative authority is not always required, even in constitutional governments. The necessity for legislative ratification is not to be presumed, but must be established as a fact. Still less can there be any presumption as to the form and manner in which the legislative sanction is to be expressed. In the present instance, the Constituent Assembly, a body of extensive powers, expressed in advance its approval of any treaty of limits that might be concluded by the Executive upon certain bases. It is not shown that the

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authority so given was exceeded; and it can not be said, in the absence of an express prohibition, that this mode of dealing with the subject was improper.

"Again, the fact of the subsequent approval of the Treaty by the Assembly is satisfactory proof that that body approved not only the terms of the instrument, but also the manner in which the Executive had executed the authority conferred by the decree of the 5th February 1858. The time and manner of exchange of ratifications was before the Assembly, and it was fully aware that the time agreed upon for exchange had passed. Its action, under these circumstances, shows that it was of the opinion that the Treaty had been legally and in due time ratified by the President, in pursuance of the special powers conferred upon him.

"In any event, all irregularities would seem to have been effectually cured by this subsequent approval of the Constituent Assembly. *Ratihabitio retrotrahitur, et mandato equiparatur*, is a recognized maxim of municipal law; and the reasons of that rule may fairly be regarded as applying to cases like the present.

"That irregularities and defects in the formalities of ratification may be supplied and made good by subsequent acquiescence in and approval of the treaty, is laid down by Heffter (Droit International, § 87 *fin.*):

"'Mais il est constant qu'elle (*i. e.*, ratification) peut être supplée par des actes equivalents, et notamment par l'exécution tacite des stipulations arrêtées.'

"And this opinion is cited by Pradier-Fodéré in his translation of Grotius (Vol. II., p. 270, note 1). See also Hall's International Law, page 276.

"The second point—that the legislative sanction was not given until after the expiration of the forty days fixed by the Treaty for the exchange of the ratifications—seems clearly untenable. Costa Rica, and not Nicaragua, might have complained of this delay. Assuming that subsequent legislative approval was needed, Costa Rica might, if it had desired to do so, have declared the negotiations at an end on the expiration of the forty days. But it was not bound to do so. It had a perfect right to waive this limitation of time. Either party to a Treaty may extend the time of the other, either by express agreement or by acts indicating acquiescence. Nicaragua cannot be permitted to say, as she does in effect say in this branch of her argument—'it is true that this Treaty was approved unreservedly by both the executive and legislative branches of the Government; but such approval is worthless, as it was expressed not forty but forty-three days after the signature of the Treaty.'

"The *fact* of approval being established, the *time* of approval is immaterial, provided the other party by its acquiescence has seen fit to waive delay.

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"I conclude therefore that the *third* ground of objection stated by Nicaragua is untenable.

"And having examined in detail the three reasons urged by Nicaragua for holding the Treaty invalid, and finding all these reasons untenable, I conclude that the Arbitrator should decide in favor of the validity of this Treaty."

The Award. The award of the President was as follows:

"Grover Cleveland, President of the United States, to whom it shall concern, Greeting:

"The functions of Arbitrator having been conferred upon the President of the United States by virtue of a Treaty signed at the City of Guatemala on the 24th day of December one thousand eight hundred and eighty-six, between the Republics of Costa Rica and Nicaragua, whereby it was agreed that the question pending between the contracting Governments in regard to the validity of their Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight, should be submitted to the arbitration of the President of the United States of America; that if the Arbitrator's award should determine that the Treaty was valid, the same award should also declare whether Costa Rica has the right of navigation of the River San Juan with vessels of war or of the revenue service; and that in the same manner the Arbitrator should decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and should communicate to the other party within thirty days after the exchange of the ratifications of the said Treaty of the 24th day of December one thousand eight hundred and eighty six;

"And the Republic of Nicaragua having duly communicated to the Republic of Costa Rica eleven points of doubtful interpretation found in the said Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight; and the Republic of Costa Rica having failed to communicate to the Republic of Nicaragua any points of doubtful interpretation found in the said last-mentioned Treaty;

"And both parties having duly presented their allegations and documents to the Arbitrator, and having thereafter duly presented their respective answers to the allegations of the other party as provided in the Treaty of the 24th day of December one thousand eight hundred and eighty-six;

"And the Arbitrator pursuant to the fifth clause of said last-named Treaty having delegated his powers to the Honorable George L. Rives, Assistant Secretary of State, who, after examining and considering the said allegations, documents and answers, has made his report in writing thereon to the Arbitrator;

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"Now therefore I, Grover Cleveland, President of the United States of America, do hereby make the following decision and award:

"*First.* The above-mentioned Treaty of Limits signed on the 15th day of April one thousand eight hundred and fifty-eight, is valid.

"*Second.* The Republic of Costa Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment.

"*Third.* With respect to the points of doubtful interpretation communicated as aforesaid by the Republic of Nicaragua, I decide as follows:

"1. The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.

"2. The central point of the Salinas Bay is to be fixed by drawing a straight line across the mouth of the Bay and determining mathematically the centre of the closed geometrical figure formed by such straight line and the shore of the Bay at low-water mark.

"3. By the central point of Salinas Bay is to be understood the centre of the geometrical figure formed as above stated. The limit of the Bay towards the ocean is a straight line drawn from the extremity of Punta Arranca Barba, nearly true South to the Westernmost portion of the land about Punta Sacate.

"4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the Bay of San Juan del Norte from being obstructed; to keep the navigation of the River or Port free and unembarrassed, or to improve it for the common benefit.

"5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned.

"6. The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River

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or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.

"7. The branch of the River San Juan known as the Colorado River must not be considered as the boundary between the Republics of Costa Rica and Nicaragua in any part of its course.

"8. The right of the Republic of Costa Rica to the navigation of the River San Juan with men-of-war or revenue cutters is determined and defined in the Second Article of this award.

"9. The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same.

"10. The Republic of Nicaragua remains bound not to make any grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica, as provided in Article VIII. of the Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight. The natural rights of the Republic of Costa Rica alluded to in the said stipulation are the rights which, in view of the boundaries fixed by the said Treaty of Limits, she possesses in the soil thereby recognized as belonging exclusively to her; the rights which she possesses in the harbors of San Juan del Norte and Salinas Bay; and the rights which she possesses in so much of the River San Juan as lies more than three English miles below Castillo Viejo, measuring from the exterior fortifications of the said castle as the same existed in the year 1858; and perhaps other rights not here particularly specified. These rights are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded; where there is an encroachment upon either of the said harbors injurious to Costa Rica; or where there is such an obstruction or deviation of the River San Juan as to destroy or seriously impair the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same.

"11. The Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight does not give to the Republic of Costa Rica the right to be a party to grants which Nicaragua may make for inter-oceanic canals; though in cases where the construction of the canal will involve an injury to the natural rights of Costa Rica, her opinion or advice, as mentioned in Article VIII. of the Treaty, should be more than "advisory" or "consultative." It would seem in such cases

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that her consent is necessary, and that she may thereupon demand compensation for the concessions she is asked to make; but she is not entitled as a right to share in the profits that the Republic of Nicaragua may reserve for herself as a compensation for such favors and privileges as she, in her turn, may concede.

"In testimony whereof, I have hereunto set my hand and have caused the Seal of the United States to be hereunto affixed.

"Done in duplicate at the City of Washington, on the twenty-second day of March, in the year one [SEAL.] thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

"GROVER CLEVELAND.

"By the President:

"T. F. BAYARD,

"*Secretary of State.*"

Further Arbitration.

Though the foregoing award established the validity of the Treaty of Limits of 1858, and defined the boundary thereunder, yet, when the contracting parties came to consider the line thus determined, they were confronted with new difficulties. By interpretation of the Treaty of Limits, the President decided that the boundary between the Republics of Costa Rica and Nicaragua began "at the extremity of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858," the "ownership of any accretion to said Punta de Castilla" to be "governed by the laws applicable to that subject." On the question thus presented the commissioners of the two republics were unable to agree, it being perhaps practically impossible, owing to the shiftings of the sands, to determine where Punta de Castilla, which had since disappeared, actually lay in 1858. Another difficulty arose out of the shifting of the mouth of the San Juan River; and yet another out of the rules laid down in the award for the determination of the center of Salinas Bay.[1] In this dilemma the two governments accepted the mediation of the Government of Salvador, through whose good offices they concluded at San José, April 8, 1896, a convention for the demarcation of their boundary. By this convention another arbitral proceeding is instituted. Each of the contracting governments engages to appoint two engineers or surveyors for the purpose

[1] Mr. Rodriguez to Mr. Olney, December 26, 1896, For. Rel. 1896, 371.

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of tracing and marking the boundary "pursuant to the provisions of the treaty of April 15, 1858, and the arbitral award of the President of the United States." When these commissioners may be unable to agree, it is provided that the point or points in dispute shall be submitted to a fifth engineer, named by the President of the United States; that this engineer "shall have ample authority to decide any kind of dispute that may arise;" and that "his decision shall be final as to the operations in question."[1] The execution of this convention has been duly begun.

[1] For. Rel. 1896, 100–102.

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CHAPTER XLVIII.

THE MISIONES BOUNDARY: TREATY BETWEEN THE ARGENTINE REPUBLIC AND BRAZIL OF SEPTEMBER 7, 1889.

Treaty of Arbitration.

By a treaty concluded at Buenos Ayres September 7, 1889, the Argentine Republic and Brazil agreed to submit to the arbitration of he President of the United States their respective claims to a act of territory popularly called *Misiones*. The dispute as to ie ownership of this tract grew out of a difference as to the osition of two rivers. It was admitted (1) that the divisional ne between the two countries began, at the north, at the ver Paraná, opposite the mouth of the Iguaçû, and followed ie course of the latter river for some distance eastwardly;) that farther to the south it followed the course of the Uruiay, and (3) that between these rivers it was formed by two nnecting or practically connecting streams. But what were ie positions and courses of these streams? On this question .e two countries were unable to agree. Brazil maintained .at they were two streams called the Santo Antonio and epiry-Guaçû. The Argentine Republic said that they were o streams more to the east called the San Antonio-Guazú d the Pepiry or Pequiry-Guazú. Brazil replied that the reams claimed by the Argentine Republic under these names ere really the Chapecó and the Chopim, and that in 1888 the gentine Republic transferred one of the names still more to e east, finally resting upon the rivers Chapecó and Jangada. Of the territory thus bounded both sides claimed to have d possession. Its area was upward of 30,621 square kiloters, or 11,823 English square miles, or 991.3 geographical uare leagues.

Representatives of the Argentine Republic and Brazil.

The office of arbitrator having been accepted by the President,[1] the next step was the preparation and submission of cases. This task was committed, on the part of the Argentine vernment, to Dr. Don Estanislao S. Zeballos, envoy extraor-

[1] For. Rel. 1892, 1, 3, 17, 18.

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dinary and minister plenipotentiary of the Argentine Republic at Washington.[1]

The preparation of the Brazilian case was committed to a special mission, at the head of which was the Baron de Rio-Branco, son of the earlier Brazilian statesman of the same name.[2]

In due time the cases were presented to the arbitrator.[3]

The Argentine Case.

The case of the Argentine Republic opened with an expression of the idea that the claim of Brazil to the territory in dispute was an imperialist claim, conceived before the birth of the republic and maintained after that event by persons of imperialist sympathies, who lacked the spirit of republican fraternity. Proceeding, then, to the merits of the matter, the Argentine case contended—

Spanish Discovery and Settlement.

That Spain discovered and settled the territory in dispute and maintained possession of it against the aggressions of Portugal, sometimes peaceably and sometimes by force of arms, from the time of its discovery till 1810.

Under this head the historical narration began with the bull of Pope Alexander VI. of May 3, 1493, and the Treaty of Tordesillas of June 7, 1494, by which the line of division between the Portuguese and Spanish territories, as expressed in the papal bull, was modified. It was maintained that under these acts, and by first discovery and settlement, the territory in dispute originally belonged to Spain,[4] forming a part of the

[1] In addition to Dr. Zeballos the Argentine mission was at this time composed of four secretaries and a technical adviser, viz, Señor Don Aureliano Garcia, Dr. D. Carlos Aldas, Dr. D. Gregorio Uriarte, and Lieut. Commander D. Rafael Garcia Mansilla, and Col. George J. Rhode. The Argentine case was signed by Estanislao S. Zeballos, envoy extraordinary and minister plenipotentiary of the Argentine Republic, and the name of Josiah Quincy appeared upon it as of counsel.

[2] With the Baron de Rio-Branco there was associated in the special mission Gen. D. E. de Castro Cerqueira. Attached to the special mission were Dr. Olyntho de Magalhaes, secretary; Senhor Domicio da Gama, secretary; Dr. Domingos Olympio Braga Cavalcanti, secretary; Ch. E. Girardot, translator; Rear Admiral José Candido Guillobel, technical adviser. The case was written and signed by the Baron de Rio-Branco.

[3] The case of Brazil was communicated with a note to the Secretary of State, to be laid before the President. This is, as has been seen in various other cases, the proper course in such matters.

[4] Citing Works issued by the Hakluyt Society, The Conquest of the River Plate, No. LXXXI., London. Printed for the Hakluyt Society, 1891; A. de Varnhagen, Visconde de Porto Seguro, La Historia Geral do Brazil, I. 68, 69, 70, 71.

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region occupied by the Spanish forces in the sixteenth century.[1] In the latter part of that century the Jesuits explored the Rio de la Plata, and, attracted by the importance of the region, began to concentrate their efforts upon it. On January 30, 1609, Philip III. of Spain issued his royal cédula by which he provided that the Indians should be subdued by evangelical means. Another royal cédula of 1634 approved the occupation by the Jesuits of the interior provinces, in which the territory submitted to the arbitrator was situated.[2] During the seventeenth century Spain and Portugal entered into various treaties, but the treaties did not, so the Argentine case maintained, comprehend the territory in question; and the King of Spain continued to legislate for it.[3] "The seventeenth century ended," said the Argentine case, "leaving Spain the mistress and civilizer of the immense central regions of South America, of which the territory in controversy was an integral part." The Spanish possession was "respected by Portugal during the sixteenth and seventeenth centuries, in conformity with the fundamental treaty of Tordesillas;" and if some of the acts of the Portuguese seemed to have violated those boundaries, they "were properly accounted for by the government at Lisbon." Portuguese colonization "advanced very slowly from the coast of the Atlantic toward the region of its boundary with territory of the Crown of Spain."[4]

The eighteenth century, said the Argentine case, offered more of interest. Ever since the seventeenth century the Jesuit colonies on the north of the Rio Yguazú had suffered from the

[1] Historia del Puerto de Buenos Aires, by Eduardo Madero, Buenos Aires, 1892, p. 89: The Conquest of the River Plate; Historia Argentina del Descubrimiento, Poblacion y Conquista de las Provincias del Rio de la Plata, escrita por Rui Dias de Guzman en el año 1612; Herrera's Historia General de las Islas Occidentales, decade 8, book 4, chap. 12; and various manuscripts.

[2] Historia de Republica Jesuitica do Paraguay, desde o descobrimiento do Rio da Prata até nossos dias, anno 1861, pelo Conego Joao Pedro Gay, Vicario de San Borga nas Missoes Brazileiras, published in vol. 26 of the Revista Trimestral do Instituto Historico Geographico é Etnographico do Brazil, fundado no Rio de Janeiro, debaixo da immediata protecçao de S. M. I. o Senhor Dom Pedro II.

[3] Here the Argentine case referred to the royal decree of December 16, 1617, dividing the province of Rio de la Plata into two parts, one of which was said to embrace the territory in question: and to the royal decree of November 6, 1726, expressly placing under the government of Buenos Aires thirty Indian *pueblos*, which were alleged to have included that territory.

[4] In support of this statement the Argentine case cited Gay, in the Revista do Instituto Historico * * * do Brazil, XXVI. 762.

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hostilities of the hordes of semisavages from the country under the captaincy-general of San Vicente, in Brazil, who hunted the Indians in the Spanish territories for the purpose of selling them as slaves to the Portuguese colonies on the Atlantic. For the purpose of resisting these Mamelukes, as they were called, the Jesuits decided to concentrate their establishments between the rivers Uruguay and Paraná, abandoning the thirteen towns they possessed north of the Yguazú. This territory, however, continued under the legal dominion of Spain, according to the Treaty of Tordesillas; and its depopulation, far from prejudicing the exercise of Spanish sovereignty over the territory between the Uruguay and Paraná (including that in dispute), in which the Jesuits took refuge, only confirmed it.

The frequent conflicts between the irresponsible hordes of the Mamelukes and the peaceful Spanish colonists led the courts of Spain and Portugal, continued the Argentine case, to enter in 1750 into a boundary agreement. By this transaction, which was secret, Spain "ceded to Portugal some of its central territories, on the east of the Paraná and northeast of the Yguazú; and the Crown of Portugal renounced any pretension to possess posts on the banks of the Rio de la Plata," where it had "several times during two centuries endeavored to secure a foothold by force," but without success. This transaction was, said the Argentine case, traced on a map, which was prepared by the Portuguese Government before the treaty was reduced to writing, and which was known as the *Mapa de las Cortes*, or Map of the Courts. This map formed "another indestructible judicial foundation for Argentine right," for it showed that the territory in dispute was included in territory which was acknowledged to have belonged to Spain. The secret treaty of 1750 "gave up to Portugal the immense lands of La Guayra and others situated on the east of the government of the Rio de la Plata." But it was not carried into effect, and the territory in dispute remained under the dominion of Spain.

The Jesuits, continued the Argentine case, controlled the administration of the *Misiones*, in the name of the Crown of Spain, till 1768, when they were expelled under the royal cédula of February 27, 1767.[1] But the territories of the Jesuit

[1] Coleccion de Documentos Relativos á la Expulsion de los Jesuitas de la República Argentina y del Paraguay, en el reinado de Carlos III.; con introduccion y notas por Don Francisco Javier Brabo, Comendador de numero de la Real Orden Americana de Isabel la Catolica. Va precedida de la Autobiografia y retrato del Colector. [Madrid. Establecimiento tipografico de José Maria Perez. Corredera baja de San Pablo No. 27, 1872.]

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republic were not abandoned. By instructions of Count Aranda, minister of state of Spain, of March 1, 1767, it appeared that the King delegated his entire authority to the viceroys, presidents, and governors of the Indies and the Philippines.[1] The mayors and caciques of the thirty pueblos of Misiones accepted the authority of the King, as exercised by his governors.[2] The Guaraní Indians, who "occupied the precise territory now in controversey," submitted to the authorities of Corpus.[3] By the celebrated royal cédula of August 1, 1776, creating the viceroyalty of the Rio de la Plata and appointing Gen. Don Pedro de Ceballos commander in chief of the expedition sent out to expel the Portuguese from the colonies which they had usurped on the coast of Brazil, in violation of the Treaty of Tordesillas, it clearly appeared that the Jesuit Misiones, which by the royal cédula of 1726 belonged to the government of Buenos Ayres, remained in 1776 subject to the viceroyalty of the Rio de la Plata, of which Buenos Ayres was the capital.[4] The campaign of General Ceballos "was a rapid and successful one and the Portuguese were everywhere defeated." The dominion of the viceroy of Buenos Ayres "was fully reestablished from the Cordillera of the Andes on the west to the Atlantic Ocean on the east, and from the sources of the Amazon on the north to the Polar Sea on the south." Ceballos ordered a general census to be taken, including "the pueblos of Corpus, on the Paraná, and San Xavier, on the Uruguay, * * * which * * * exercised municipal jurisdiction over the disputed territory."

On October 1, 1777, said the Argentine case, a new boundary treaty—a celebrated document which affected all South America—was signed at San Ildefonso, but it was not executed because the Portuguese engineers refused to recognize the boundaries which it intended. For this reason the work of marking the boundary was suspended in 1791, but during the period from 1777 to 1800 the territory in dispute "remained under the jurisdiction of Spain and was directly governed by the viceroy of Buenos Ayres." No acts of jurisdiction, the Argentine case declared, were exercised in the territory by Brazil, nor did Brazil "even pretend to discuss the matter

[1] Brabo, 13 *et seq.*

[2] Brabo, 101, 199.

[3] Brabo, 255.

[4] Virreynato del Rio de la Plata, por Dr. Don Vicente Quesada, Buenos Aires, 1881, 42–46.

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until 1857." In 1856 Paraguay recognized "the Misiones and the territories situated to the *east of the river Paraná*, among which is the disputed territory, as belonging to the Argentine Republic by right and by its lawful acts of material occupation." This boundary between the Argentine Republic and Paraguay was afterward conclusively established by the triple alliance between Brazil, Uruguay, and the Argentine Republic of May 1, 1865, and the boundary treaty between the Argentine Republic and Paraguay of February 3, 1876.

Argentine Possession and Jurisdiction.

In 1810, said the Argentine case, the city of Buenos Ayres declared the authority of the King of Spain in South America to be at an end, and one of the first acts of the new government was to turn out the royalist governor of Misiones and replace him with Col. Don Tomas de Rocamora, who was then living in the territory, at the city of Yapeyú. In 1811 the Portuguese, under the pretext of assisting the King of Spain, attempted "a new occupation of the territories contiguous to the mouth of the Rio de la Plata and upon the Uruguay," from which they were dislodged by Ceballos in 1762; and they "occupied the left bank of the Rio de la Plata," which later belonged to Uruguay. The Prince Regent of Portugal, Don Juan, however, seeing "the impossibility of carrying out the enterprise," sent to Buenos Ayres a commissioner, Lieut. Col. Don Juan Rademaker, who on May 12, 1812, signed a treaty by which the contracting parties agreed to withdraw their forces into their respective territories, the boundaries to remain as they were before the Portuguese forces began their march toward the Spanish territory. By a decree of December 10, 1814, the national assembly at Buenos Ayres erected the city of Corrientes and the pueblos of Misiones into the province of Corrientes. In 1816 the "forces from Buenos Ayres operated in the territory of Misiones against the Portuguese of Uruguay, the revolted Indians, and the smugglers." In the general constituent congress, which assembled in the city of Tucuman on July 9, 1816, and proclaimed the independence of the Argentine nation, there were represented "the *Provincia Oriental*, the old Spanish county of *Los Tapes*, and the *Misiones*, as integral parts of the new nation." In 1816 Portugal attempted an invasion of the Spanish territories, but it was stopped in Uruguay; and in 1818 the Argentine plenipotentiary at Rio de Janeiro negotiated a treaty by which the "territories of Paraguay, Corrientes, and Entre

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Rios" were acknowledged "as belonging to Argentina." Subsequently the Argentine Government performed various acts of possession and defense of the territory of Misiones. The general constituent congress of 1826 adopted a national constitution, among the signers of which were delegates from the province of Misiones. The attempts of the Portuguese to obtain a foothold on the Rio de la Plata were finally defeated in 1827, and by a treaty of peace between the Argentine Republic and Brazil of August 27, 1828, the sovereignty of the former over the courses of the Paraná and Uruguay was confirmed "according to the titles and possession held by Spain," though the province of Montevideo was by an act of "spontaneous sacrifice" declared independent. During the long period of anarchy in the Argentine Republic which followed the war with Brazil the territory of Misiones continued "under the direct government of the province of Corrientes." The pueblos of Corpus on the Paraná and San Xavier on the Uruguay, "exercised full jurisdiction over the territory submitted to the arbitrator." By the political constitution of the State of Corrientes of 1864 the boundaries of the State were declared to be: "On the east, the Uruguay River; on the north, the Paraná River as far as the Pepiri-Guazú and San Antonio Guazú." And after citing various other jurisdictional acts, the Argentine case quoted a national decree of March 16, 1882, organizing the territory of Misiones into five departments, this decree being followed by the promulgation of various administrative measures.

Portuguese Aggressions.

Having contended that Spain, and the Argentine Republic as Spain's successor, had maintained a valid and effective title to the territory in dispute, the Argentine case discussed the "aggressions of the Portuguese on the territory of Spain" from 1596 to 1810. After the foundation by the King of Portugal of the captaincy-general of San Vicente, east of the line of the Treaty of Tordesillas, "the Portuguese and Mestizos," said the Argentine case, "settled the surrounding country, soon forming a characteristic race, a sort of nomadic tribe of adventurers and criminals." From the fact that their headquarters was San Pablo, which was "on the west of the captaincy of San Vicente, upon the frontier of the Spanish possessions," they were called *Paulistas*. "Properly speaking, they were subject to no authority, for the Portuguese authorities were incapable

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of controlling them." The territory of the captaincy-general of San Vicente became too narrow for them, and they invaded the territory of Spain. At first they limited themselves to attacking the Indians, but later on "their depredations covered a vast field of action," and they finally went west of the Paraná and threatened Asuncion. When the Jesuits began in 1600 "to organize their republic among the Guaraní Indians, the Paulistas prepared for hostilities, and from 1600 to 1650 their vandal acts assumed horrible proportions." The Spaniards resisted them, and in 1645 the Jesuits sent commissioners to Spain, Portugal, and Rome for the purpose of seeking aid in their struggle with the invaders. The acts of the Paulistas were condemned by the King of Portugal, and could not be considered as a ground of national title, the possessory right of Spain over the invaded territory remaining, though the Jesuits were forced to retreat. But it was along the seacoast, from Yguapé to Montevideo and La Colonia del Sacramento, that the national usurpation of Spanish dominion was attempted by the Portuguese. Till 1801 Spain "maintained its dominion over the left bank of the Uruguay; that is to say, over the seven *Misiones* called *orientales* (or eastern), which were founded on the territory of its old provinces—*del Tapé* and *del Campo*." But, three months after the Treaty of Badajoz, which closed the brief war between Spain and Portugal of 1801, "Portugal, without any previous declaration of war, invaded the eastern Misiones of Uruguay, thus flagrantly violating the boundary treaty of 1777."[1] The Portuguese attempts at usurpation continued till the treaty of peace of 1828, heretofore mentioned, by which the Portuguese agreed to retire within the boundaries of 1777.

Treaties Between Spain and Portugal.

Having described the discoveries, conquests, and possessions of Spain, the Argentine case discussed the treaties between Spain and Portugal from 1493 to 1777. When Portugal, said the Argentine case, after having been united to Spain for more than half a century, reassumed its sovereignty, it sought to divide with Spain the dominion of the basin of the Rio de la Plata, and ordered the erection of a fort on the left bank of that great estuary. Accordingly a fort was erected at Colonia de Sacramento in 1680, but it was captured by the Spaniards in the

[1] Southey, La Historia del Brazil, VI. 308; Visconde de Porto Segúro, Historia Geral do Brazil, II. 1057.

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following year and the colony continued in the power of Spain. This incident led to the conclusion of the provisional treaty of 1681, by the twelfth article of which Spain and Portugal agreed to adjust their boundaries on the line of the treaty of Tordesillas. In 1701, however, Spain, desiring to detach Portugal from England, Austria, and Holland, entered into a treaty with Portugal, ceding Colonia de Sacramento to the latter power.[1] Nevertheless, only two years later, Portugal joined the hostile coalition and thus entered into a state of war with Spain. The governor of Buenos Ayres attacked the colony, which in 1705 surrendered unconditionally. By the Peace of Utrecht of February 6, 1715, the interests of Spain were sacrificed. The Portuguese were allowed to regain the seat of the colony and its territory; and in 1723, taking advantage of the war of the Polish succession in which Spain took an active part, they sent to the Rio de la Plata an expedition which attempted to found a settlement in what is now the republic of Uruguay. The governor of Buenos Ayres, Gen. Don Bruno de Zavala, attacked and expelled them and founded on the site of the Portuguese settlement the city of Montevideo. In 1734 the Spaniards attacked the colony of Sacramento. These hostilities, however, were soon ended. Portugal gained an important advantage in the marriage of the Infanta Doña Barbara, sister of the Portuguese King, to the King of Spain, and secret steps were taken toward the negotiation of a definitive treaty which was concluded in 1750. This treaty "made a regular exchange of territories and fixed new rules for the location of boundaries, declaring null all those which had preceded it." It provided that each party should remain in possession of what it held at that time with the exception of what should be mutually conceded. Under this treaty, said the Argentine case, Portugal gained "enormous advantages, entirely disproportionate, and in truth incomprehensible." The lands which the treaty gave to Portugal "included probably one-fourth of the South American continent." But in none of the articles were mentioned the territories of *Misiones*, except that the seven Spanish settlements known in the diplomatic history of South America as "los siete pueblos de las Misiones Orientales del Uruguay" (the seven villages of the eastern Missions of the Uruguay) which lay on the eastern bank of the Uruguay were ceded to Portugal. The remaining twenty-three pueblos of the thirty mentioned

[1] Historia Geral do Brazil, II. 774.

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in the royal cedula of December 28, 1743, remained with Spain, and these included the territory in dispute.

Map of the Courts.

The treaty of 1750, said the Argentine case, was drawn with care; and it revealed "a generally exact knowledge of the places, woods, and rivers selected to serve as boundaries." The whole matter had been "maturely prepared by Portugal herself and reduced to the graphic form of a map, constructed in 1749, during the tedious period of the secret negotiations between the two sovereigns." This map, on which were red lines showing the boundary, was the famous *Mapa de las Cortes*, or Map of the Courts. Brazilians had not denied the existence of this map, but they had "recently expressed doubts as to its authenticity." In the collection of treaties by Borges de Castro[1] a "pretended copy" of the map was published, "evidently altered in favor of Portugal." It altered the tributaries of the river Uruguay, changing the name of the Uruguay-Pitá, one of the "guides of the line of demarcation," to Yribobá, and transferring the name of the former to another river. It also bore on its back an inscription different from the true one. The general opinion in the Argentine Republic was that the true map had disappeared from the archives at Madrid during the occupation of Napoleon; it had been searched for in vain by Argentine agents at Madrid and Lisbon. But copies of it had been found in France, Spain, and Portugal. It completely sustained the Argentine claim.

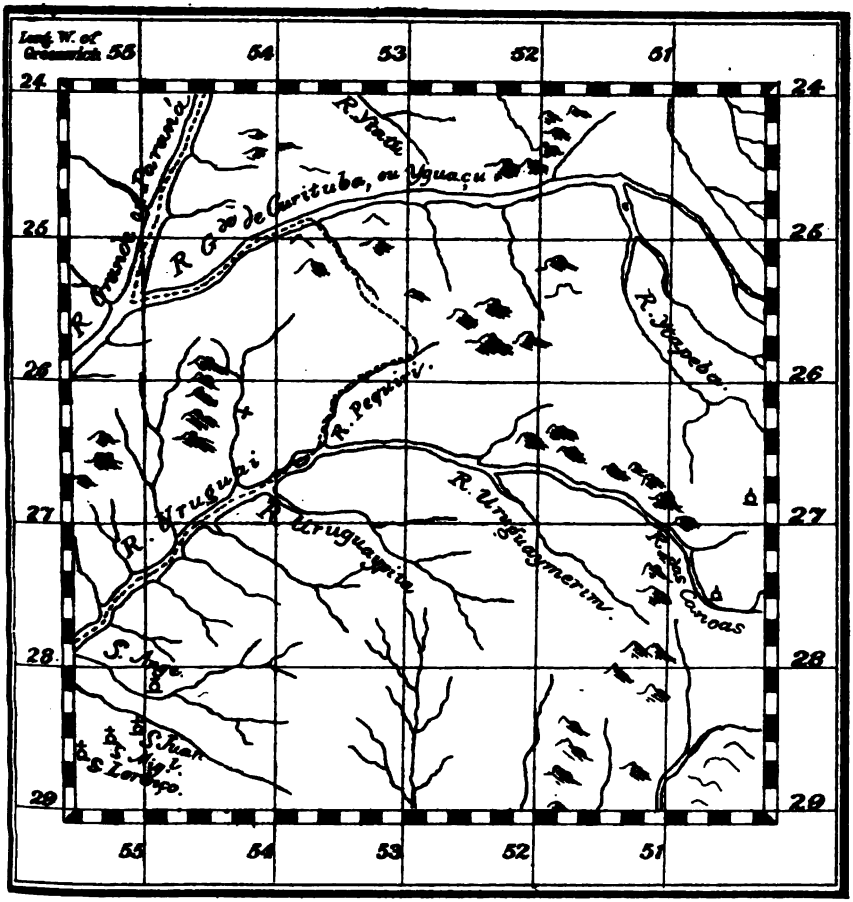
Treaty of 1751.

By an additional treaty of January 17, 1751, said the Argentine case, instructions were adopted to govern the surveyors of the line under the treaty of 1750. The surveyors were by these instructions divided into several detachments, the second of which was to run the boundary in the region in dispute. Its itinerary, as traced by the international compact, "evidently was," said the Argentine case, "as follows: Having met at the mouth of the Ybicuy, and having opened the *Mapa de las Cortes*, * * * the detachment was to follow the red mark up the river Uruguay until it reached the most important of its eastern tributaries delineated upon that map, the Uruguay-Pitá. * * * And still following up the Uruguay from the mouth of the Uruguay-Pitá, they were to find coming in upon the eastern bank of the former a river *caudaloso*, or carrying

[1] Colleção de Tratados, III., end of the volume.

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FROM THE MANUSCRIPT MAP, DATED 1749, CALLED THE MAP OF THE COURTS, USED BY THE PORTUGUESE AND SPANISH PLENIPOTENTIARIES IN THE NEGOTIATION OF THE TREATY OF LIMITS OF 1750.



IN THE ARGENTINE CASE IT WAS MAINTAINED THAT THE RIVER MARKED X, AND CALLED IN THAT CASE THE GUARUMBACA, WAS ERRONEOUSLY SURVEYED IN 1759 FOR THE PEQUIRI.

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much water, called the Pequiry or Pepiry." The surveyors, however, failed in their task. Instead of following the Map of the Courts, they closed it, and "accepted the childish remembrances of an Indian." They in fact traced a small stream, which was situated downstream from the Uruguay-Pitá, and which they called the Pepiry. The stream they surveyed was the Guarumbaca, and the Spanish commissioner "in a hesitating and undecided way" signed the paper which declared it to be the Pepiry or Pequiry of the treaty of 1750. On this "gross error" the Portuguese and Brazilians had founded their unjust claims. The true Pepiry was required, said the Argentine case, to possess these characteristics: "1. It must empty into the Uruguay above, that is to say to the east of, the river Uruguay-Pitá. 2. It must have a course SW. and NE. 3. It must be a river *caudaloso* (of large volume) and not a small stream. 4. It must have a wooded island in front of its mouth. 5. It must have a reef inside of its bar." The stream actually surveyed had "no reef near the mouth," but "there were a great many beginning half a league above its mouth;" it was not above the Uruguay-Pitá, which the surveyors confounded with another to the south, then called Mberuy, and later Guarita; and it was not *caudaloso*, but carried very little water. The surveyors violated both the letter and the spirit of the treaties and discarded the Map of the Courts.

Nullification of the Treaty of 1750.

The demarcation thus attempted possessed, said the Argentine case, "an irremediable organic vice; it was void. The Courts of Portugal and Spain, for this and analogous reasons referring to South America, agreed to nullify the treaty of 1750 and its results." This was effected by a treaty signed at Pardo February 12, 1761, and Spain regained her rights under the papal bull of 1493, the Treaty of Tordesillas of 1494, and the possession maintained by her soldiers and colonists since 1516.

Treaty of 1777.

October 1, 1777, Spain and Portugul concluded at St. Ildefonso a new boundary treaty, by which, said the Argentine case, Portugal admitted that it had no right to claim jurisdiction over the Rio de la Plata or the river Uruguay. In the third article, which related to the territory in dispute, the treaty added to the name Pepiry or Pequiry, which designated the boundary river in the treaties of 1750 and 1751, the qualificative *Guazú*, or large, referring to it as the Pequiry or Pepiry-Guazú. This circumstance was "of vital importance." It excluded the small

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stream Guarumbaca as the boundary. The fourth article of the treaty provided that the boundary from the Rio de la Plata up to the Uruguay should be "a line drawn so that it shall cover the Portuguese settlements up to the emptying of the river Pepiry-Guazú into the Uruguay, and shall likewise save and cover the Spanish missions and settlements of said Uruguay, which are to remain in the present state in which they belong, to the Crown of Spain." The Spanish settlements extended, said the Argentine case, as far as the river Uruguay-Mini on the northwest; on the southeast to the Matto Castelhano, a large forest situated on the sources of the Uruguay-Pitá; and on the north and west of the Uruguay to the territory submitted to arbitration. In order, therefore, to fulfill the requirements of the treaty and cover the possessions of Spain, following the rivers of greatest volume, "it was logical and necessary to follow the banks of the river Uruguay-Pitá in its sources, then separating from them and going toward the north to the Uruguay-Mini, and then toward the Pepiry or Pequiry-Guazú of the treaty of 1777." This interpretation was, the Argentine case maintained, confirmed by the eighth article of the treaty, which read as follows:

"The possessions of both Crowns, up to the entrance of the river Pequiry or Pepiry-Guazú into the Uruguay, having been already pointed out, the high contracting parties have agreed that the boundary line shall follow up the stream of the aforesaid Pepiry to its main source and thence by the highest ground, according to the rules stated in the sixth article,[1] shall continue to find the waters of the river San Antonio which drains into the Curitiba, otherwise called Yguazú."

Brazilians had, said the Argentine case, "pretended to find in this article some puerile foundation for their pretensions," because it gave the name of San Antonio to the stream whose watersheds corresponded to those of the Pequiry or Pepiry-Guazú to form the boundary. Since 1759, when the survey under the treaty of 1750 was made in the region in question, the river on the north that should correspond to the Pepiry had been called San Antonio "theoretically," "without any intention of subordinating the boundary to the names." The Map of the Courts, which was never nullified, "gave clearly and irrevocably two rivers as the basis by which to trace the boundaries—the Uruguay-Pitá and above this the Pepiry or

[1] Rules purely topographical.

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Pequiry-Guazú. It gave no name to the other river, nor did it give it any importance, leaving it subordinate to the Pequiry or Pepiry." Consequently the river called after 1759 the San Antonio "ought to be found in the necessary proximity and correlation of sources with the river which serves as the basis of the drawing—the Pequiry or Pepiry-Guazú." This interpretation was furthermore confirmed by the sixteenth article of the treaty of 1777, which required the demarcators of the boundary to attend to the actual possessions of the parties. Brazil had officially admitted the authority of the Map of the Courts; and if this were followed, the sources of the "San Antonio" should be sought, opposite to those of the Pequiry or Pepiry-Gauzú, in the sources of the San Antonio-Guazú, as Oyarvide and the Argentines maintained.

Treaty of 1778.

The treaty of 1777 was, said the Argentine case, intended to be perpetual, and this intention was confirmed by the Treaty of Guaranty of 1778, which was of vital importance, since it guaranteed the boundaries of the treaties of 1750 and 1777, declaring that the contracting parties guaranteed to each other "all the frontier and adjacencies of their dominions in South America, as it has already been expressed." That which had "already been expressed" was "the boundary line, the *red mark* of the *Mapa de las Cortes*, which in the zone of the present dispute follows the course of the river Pequiry or Pepiry in search of a river '*contravertiente*' (*i. e.*, one having its source opposite to the former and adjacent thereto), which empties into the Yguazú on the counter watershed."

Demarcation of 1789–1791.

The demarcators under the treaty of 1777 went upon the ground in 1789, and in 1791, after "three years of fruitless discussion," submitted the matter, said the Argentine case, to the deliberations of the two courts. The Portuguese commissioners insisted in running the boundary "along the *arroyos*, or small streams, mistakenly explored in 1759." The Spanish demarcators insisted on following the rivers of the Map of the Courts. The survey was unproductive of any other result than an increase of geographical knowledge and the exposure of the errors of the surveyors of 1759. Erroneous instructions were, the Argentine case maintained, given to the Spanish commissioners of 1789 by the viceroy of Buenos Ayres, Lieut. Gen. Don Juan José Vertiz, who acted under the influence of Don Custodio de Sáa

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y Faria, a Portuguese officer, who appeared at Buenos Ayres about that time and gained the confidence of the viceroy. The Government of Spain "openly opposed the errors of its subordinate." The Spanish commissioners, after arriving on the ground, "saw clearly that the viceroy of Buenos Ayres had made a mistake." Even the chief Portuguese commissioner betrayed a doubt as to the San Antonio of 1759, and admitted that the San Antonio could be the frontier line only on condition that its sources were opposite to those of the Pequiry or Pepiry-Guazú.[1]. But when the Portuguese demarcators and the Spanish demarcator "arrived at the true system of rivers, geographically and legally considered," said the Argentine case, "the chief of the Portuguese demarcators retreated and contradicted himself, thus showing that he considered himself defeated." Two of the demarcators, Oyarvide for Spain, and Chagas Santos for Portugal, went to the head waters of the Pepiry or Pequiry-Guazú in search of the river flowing into the Yguazú, but, as Oyarvide stated in his journal, the Portuguese geographer refused to go farther and abandoned Oyarvide in a desert region and at a great distance from the place where the provisions were stored. Oyarvide, however, "bravely continued his exploration, discovering the principal source of the San Antonio-Guazú and exploring it until he was certain that it flowed into the Yguazú."

The Uti Possidetis.

Having reviewed the attempts of Spain and Portugal to settle the boundary in question in the eighteenth century, the Argentine case proceeded to consider the relations of the Argentine Republic and Brazil to the subject after 1810. The Argentine Republic had, said the Argentine case, always maintained "that the question to be determined was one of law," and in this position Brazil had in various ways concurred. What was the principle of law applicable to the question? Spanish America had given the answer. "All the Republics," said the Argentine case, "from Venezuela to the Rio de la Plata, have maintained the boundaries that corresponded to the Spanish possessions at the time of their emancipation. They have legally inherited from Spain their territorial patrimony, and have taken their possessions under the boundaries agreed upon by Spain and Portugal in the treaties of 1750 and 1777." The republics of

[1] El Limite Oriental del Territorio de Misiones, Republica Argentina, by Meliton Gonzales: Montevideo, 1882.

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Venezuela, Colombia, Ecuador, Peru, Bolivia, Paraguay, Uruguay, and Argentina had all set up those treaties against Brazil as a basis for ascertaining their respective boundaries. That basis was the *uti possidetis* as delineated by the treaties. The empire of Brazil had involved itself in contradictions on the subject. In its discussions with Venezuela, Ecuador, Peru, and Uruguay it had rejected the treaties, while it had accepted them in its disputes with Paraguay and New Granada. On the other hand, in its controversy with France as to the boundary with French Guiana it forgot the deeds of its soldiers and invoked the treaties made prior to the emancipation of South America. In its dispute with the Argentine Republic, it had at one time rejected and at another accepted the ancient treaties; but in 1891 the house of representatives, discarding the entanglements of the imperial diplomacy, frankly and definitely admitted their validity.

Treaty of 1857.

The treaty of 1777, said the Argentine case, legally governed the boundary in question till 1857.[1] At that time the Argentine Republic, owing to the separation of the State of Buenos Ayres, was divided, and the government of the confederation had its seat at Paraná. At that "untimely moment," the councillor José Maria Silva Paranhos,[2] the minister plenipotentiary of Brazil near the government of Paraná, began a negotiation for the settlement of the question of Misiones; and on December 14, 1857, a treaty was concluded by the second article of which it was agreed "that the rivers Pepiry-Guazú and San Antonio," which were to form the boundary, were "those which were recognized [in 1759] by the demarcators of the treaty of January 13, 1750, made between Portugal and Spain." This agreement made "a deep and unfavorable impression on the Paraná." A committee of the Argentine senate reported the treaty favorably, but opposition soon developed, and the treaty was

[1] The Argentine case argued that the treaty of 1777 was not destroyed by the war between Spain and Portugal of 1801, for two reasons: (1) That war does not abrogate treaties which contain permanent declarations of right, such as those relating to boundaries and fisheries. On this point the Argentine case cited John Quincy Adams, as quoted in Wharton's Int. Law Dig. II., sec. 135. (2) That the peace of Badajoz, which put an end to the war, confirmed by its third article the preexisting boundaries between the two Crowns in Europe and in America, except as to the town of Olivenza.

[2] The first Baron Rio Branco.

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approved by the senate with an amendment to the effect "that the rivers Pepiry-Guazú and San Antonio," which were designated as forming the boundary, were "*those which are found farther east* with these names, according to the operation referred to in the second article." This amendment "frustrated the easy victory of the Brazilian negotiator;" the action of the senate "brought about the disapproval of the treaty by the executive power," and "the house of representatives deliberately indorsed the corrective action of the senate and sanctioned the modification of the second article." The amendment effected "a substantial modification" in the treaty,[1] since the eastern rivers referred to were those flowing into the Uruguay east of the Uruguay-Pitá, the "Pequiry-Guazú and San Antonio Guazú of Oyarvide, named arbitrarily Chapecó and Yangada by the modern Brazilian writers." Yet the Brazilian plenipotentiary "demanded in unequivocal terms the interchange of the ratifications of the treaty as sanctioned by Congress." "The Argentine president had", said the case, "ceded the territory in dispute to Brazil *on condition* that Brazil would put its armies, squadrons, and treasures under his orders, as they were placed at the orders of the same Argentine general for the overthrow of Rozas in 1852, so that he might attack and defeat the powerful State of Buenos Ayres, then separated from the nation, and which had resumed independent control of its foreign relations." Brazil "did not carry out its promise of furnishing military assistance, and General Urquiza, condemned by congress and by the country, yielded." The ratifications of the treaty were not exchanged.

Reopening of Controversy in 1876.

"From 1857 to 1865 Brazil did not," said the Argentine case, "bring up the question of the *Misiones*." In 1865 the Paraguayan war began, in which the Argentine Republic and Brazil became allies. The war lasted for four years; but as soon as it was over "the astute diplomats of the empire exerted their skill in intrigue" with a view to annex Paraguay. From 1870 to 1875, however, "the legal aspect of the question continued the same." But in 1876, the Argentine Republic being "demoralized by a recent civil war," the moment "seemed propitious to the Empire," and "the distinguished diplomat, Baron Aguiar d'Andrada, * * * was charged with the special mission of going to Buenos Ayres to open the discussion of the question of *Misiones*."

[1] Argentine evidence, II.

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On March 28, 1876, the Argentine Government proposed to the Brazilian plenipotentiary the appointment of commissioners who should "trace the frontier, bearing in mind that the demarcation of the dividing line should regard, as stipulated by the governments of Spain and Portugal on the 10th of October 1777, the preservation of that which each one possessed in virtue of the treaty cited." "This meant," said the Argentine case, "the application of the *Mapa de las Cortes* of 1749." Brazil did not accept this proposition, but during the negotiations it was established (1) "that the empire of Brazil feared the inherited treaties as a royal law applicable to the territories that had become independent from Spain and Portugal," and (2) "that the empire sustained the doctrine of *uti possidetis*"—both of which "points of view" were "favorable to the Argentine Republic." After the emancipation of the Spanish colonies "it became necessary to adopt a judicial criterion, and that was the *uti possidetis* of 1810;" but it was "proved that Brazil never possessed the territory in dispute," which had, in fact, been "held by Spain." "Between independent nations the *uti possidetis* signifies the possession of territories by one with the *tacit* or *express* consent of the other. It is *tacit* when a country knows that its territory is usurped and does not defend it, nor protest against such aggression, either through weakness or for any other reason. It is *express*, when it is authorized either by documents or international treaties, until a final solution is arrived at." Applying this test, the Argentine case said that the possessions of Spain and Portugal in the region in question were established by the red mark on the Map of the Courts, which was incorporated in the treaties of 1750 and 1777. Indeed, Spain possessed territories much to the east of that line. Nevertheless, the empire, notwithstanding its obligations to the Argentine Republic, maintained in the negotiations of 1876 an "unfriendly and astute attitude." Not only was the Argentine proposal rejected, but the negotiations were delayed by the imperial government. Baron de Cotegipe, then Brazilian minister for foreign affairs, affected to insist on the ratification of the treaty of 1857, which "was unfavorable to Brazil," though he "made a show of being ignorant of it. If the Argentine Government had proposed a ratification, * * * the empire would have rejected it," and have continued its policy of delay.

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Renewed Negotiations.

During the formidable civil war which began in the Argentine Republic in 1879, Brazil, said the Argentine case, made an unsuccessful attempt to occupy the disputed territory; but after the federalization of Buenos Ayres the republic made great progress in wealth and power. "Meanwhile Brazil was following an opposite road," and the monarchy was "beginning to decline." Under these circumstances "it was imprudent to think of international adventures." Baron de Cotegipe was put aside, and an opening was made for a compromise. In the *Diario Oficial* of Brazil of May 13, 1882, it was admitted that the military colonies of the empire were outside of the territory in dispute;[1] and the Brazilian plenipotentiary at Buenos Ayres, the Baron Araujo Gondim, acting under instructions, proposed "the opening of negotiations for a definite adjustment of the question." "The negotiation was prolonged until 1884 without any result. Brazil was gaining time." At the end of 1884 the Argentine plenipotentiary in Rio de Janeiro communicated to his government a paper prepared by the imperial minister of foreign affairs as a basis for a direct arrangement or compromise, and on January 5, 1885, he was instructed to negotiate for an equitable division of the territory, in accordance with the imperial proposal. The imperial government, however, pursuing its traditional policy of delay, insisted on another exploration of the territory, and a treaty for that purpose was signed in 1885. It was full of errors, owing to ignorance of the natural characteristics of the territory, but the surveys were proceeded with. In 1888, however, "matters became worse in Brazil," and "the Misiones question then entered a new period." "The Argentine Government, perceiving at last the double game which had preceded the negotiation of the treaty of postponement of 1885, had assumed a severe and dignified attitude toward the empire, and on its part closed all negotiation." The new Argentine minister at Rio de Janeiro was instructed, if he should be invited to confer on the subject, to "decline all intervention," and to say that any proposal which the imperial govern-

[1] It is stated in the Argentine case that Baron Cotegipe "energetically replied" to the government publication, in a letter published in the *Globe* of May 13, 1882, and that by the the subsequent international surveys the military colonies in question were found to be within the disputed territory. The Argentine case suggests that the colonies must have been of "a clandestine character."

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ment might be pleased to make should be presented through its plenipotentiary at Buenos Ayres. Subsequently he reported that the empire was inclined to arrange the matter, and the Argentine Government then proposed a compromise on condition (1) that the negotiations should be closed within thirty days, and (2) that, if no direct settlement should be made within that time, a convention should be signed on the last day of the stipulated term for the submission of the dispute to arbitration. On September 7, 1889, the treaty of arbitration was concluded, but negotiations for a direct settlement afterward took place at the suggestion of Brazil.

Action of the Brazilian Republic.

Such was the state of the matter, said the Argentine case, when on November 15, 1889, the republic of the United States of Brazil was proclaimed. The Argentine Republic was the first to recognize it.[1] A "feeling of confraternity" was exhibited. The minister of foreign relations of Brazil, Señor Bocayuva, proceeded to Montevideo to meet Señor Zeballos, the minister of foreign affairs of the Argentine Republic and its plenipotentiary *ad hoc;* and they signed at the Uruguayan capital a treaty for the division of the territory. This treaty was rejected by the "imperialist majority" of the house of deputies of Brazil. The Brazilian Government subsequently made confidential overtures for a new settlement, but the Argentine Government "resolved to insist that the matter should be immediately submitted to the President of the United States of America."

Alleged Possession by Brazil.

In a separate part the Argentine case discussed the "pretended possession by the empire of Brazil of the territory in dispute," and maintained that the territory had since the middle of the sixteenth century been in the possession of Spain and her successors. This state of things lasted, said the Argentine case, till 1845. During the nineteenth century the Paulistas continued "the same sort of life which had scandalized humanity and Portugal itself ever since 1560," smuggling and dealing in slaves. In these expeditions "the adventurers of San Paulo sometimes passed across the districts adjacent to the territory in dispute on the east," and soldiers traversed the same region when engaged in fights with wild Indians. "Thus arose, in 1838, the colony of Palmas as a simple halting place on the

[1] Decree of December 3, 1889.

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road of the Paulistas who traveled between the north of Brazil and the littoral of the republics of Argentine and Uruguay." "The imperial government at Rio de Janeiro was ignorant of the existence of Palmas for many years. The local government of San Paulo only supported it on account of rivalries concerning boundaries with another Brazilian State, that of Santa Catalina." It was not a "national establishment," and had no connection with the protection of the frontiers "against another nation." "The boundary question did not [then] exist." It had, said the Argentine case, been maintained by Brazil in 1884 that the conquests of Portugal in 1801 included the territory in dispute. But there was a declaration of the Brazilian council of state, made in 1847 in respect of the boundaries between the empire and Uruguay, which proved that the alleged conquests made during the war of 1801 were east of the territory in dispute.[1]

In the first discussion between the Argentine Republic and Brazil in regard to their boundaries, in 1856, the Brazilian plenipotentiary, said the Argentine case, "made no allusion to Palmas, nor did he make any mention whatever of the existence of Brazilian colonies within the territory in dispute. In reality they did not exist." The "action of San Paulo was confined to Palmas and the nearest districts, and the general belief was that Palmas was situated outside of the area embraced by the question of 1759 and 1789." And so "matters continued, the Argentine Republic possessing by inheritance from Spain the territory in controversy, and asserting its rights by the law relative to the treaty of 1857." When, in 1863, news was received at Buenos Ayres that "Brazilian employees from Palmas," charged with the construction of a road from Palmas to Corrientes, "had really entered the territory in dispute," the Argentine Government immediately directed (1) that a protest be addressed to the Brazilian Government; (2) that the government of Corrientes be directed to make an investigation; and (3) that the army of the republic be prepared for service. The protest was published in the memoir of the Argentine

[1] The declaration in question, as quoted in the Argentine case, stated that the Portuguese conquered the territory "from the Quarahim to the place where the river Peperi-Guassú empties into the Uruguay." In treating this declaration as proof that the Portuguese conquests were to the east of the territory in dispute, it is superfluous to point out that the Argentine case assumed that the Pepiry-Guazú was a river to the east of that claimed by Brazil.

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minister of foreign affairs for 1863.[1] At this time Brazil was involved "in the internal struggles going on in the republic of Uruguay," and as the result became involved in war with Paraguay. The Argentine Republic became the ally of Brazil, and the former's denial to Paraguay of "permission to cross the territory of *Misiones* with its armies" was the *casus belli* which brought the Argentine Republic into the general conflict of 1865–1870.

The territory of Misiones, said the Argentine case, "though national from its very origin," had for many years been attached to the local jurisdiction of the province of Corrientes. By a law of December 20, 1881, the Argentine congress confirmed the national possession, and by a decree of March 16, 1882, a new government was organized for the territory with the capital at Corpus, an old mission which was thereafter to be called Ciudad San Martin. Though the Brazilian colony of Campo-Eré had been "advanced into the center of that territory," yet the admission of the Brazilian cabinet in the *Diario Oficial* of May 13, 1882, heretofore referred to, that the Brazilian colonies were outside of the territory in question, indicated "an occupation without any legal force, which would inure at the proper time to the proper sovereignty."

The Case of Brazil: Question to be Decided.

The case of Brazil, after describing the geographical features of the contested territory, stated that it formed the greater part of the comarca, or judicial division, of Palmas, State of Paraná, United States of Brazil; that by the Brazilian census of December 31, 1890, the comarca of Palmas contained 9,601 inhabitants, of whom 9,470 were Brazilians and 131 aliens; that the contested part of the comarca then had 5,793 inhabitants, 5,763 being Brazilians and 30 aliens; and that among the latter there was not a single Argentine citizen. By Article V. of the treaty of arbitration the arbitrator was, said the Brazilian case, to pronounce in favor either of the rivers claimed by Brazil or of those claimed by the Argentine Republic, viz, the rivers Pepiry-Guaçû and Santo Antonio, "the

[1] The purport of the protest, which was dated February 13, 1863, was that "the determination of the boundary line, which must be drawn in accordance with existing treaties, not having been made, * * * the Argentine Government can not authorize, by remaining silent, acts of possession of Argentine territory, or of any territory that may belong to the Argentine Republic after the final determination of the boundary line."

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present boundary of Brazil," or the rivers Jangada (San Antonio Guazú) and Chapecó (Pequirí-Guazú), "the boundary claimed by the Argentine Republic."

The Rivers Pepiry and Santo Antonio.

The Pepiry-Guaçû was, said the Brazilian case, known under the names of Pepiry or Pequiry when Portugal and Spain, by the treaty of Madrid of January 13, 1750, determined the limits of their possessions in South America. The affluent of the Iguaçû which was to complete the divisional line was then unnamed. It was surveyed and marked by the Portuguese and Spanish commissioners in 1759, who called it the Santo Antonio, declaring that they reserved for the Pepiry or Pequiry the first of those names. From 1760, however, the Pepiry began to appear in the Portuguese maps under the name of Pepiry-Guaçû, and in the official Spanish maps sometimes by the latter name and sometimes as the Pequiry. By the treaty of El Pardo of February 12, 1861, Portugal and Spain annulled the treaty of 1750. October 1, 1777, they concluded the preliminary treaty of San Ildefonso, which was the last agreement between Portugal and Spain as to the limits of their possessions in South America. In this treaty the two affluents of the Uruguay and the Iguaçû were respectively designated as the Pepiry-Guaçû or Pequiry, and the S. Antonio. The instructions given by the Spanish Government to its commissioners stated that the boundary was to be traced along these same rivers, as previously defined. But in 1778 "the Spanish commissioners discovered on the right bank of the Uruguay, above the confluence of the Pepiry-Guaçû, and therefore more to the east and within the Portuguese territory, the mouth of another river, which had already appeared, although without a name, on the maps of the beginning of that century. Then, on the basis of alleged errors of the commissioners of the previous demarcation, they attempted to carry the boundary, not along the Pepiry-Guaçû and the S. Antonio," but along the river discovered in 1778, to the head waters of whatever river might be found, on the opposite slope of the intervening watershed, to flow into the Iguaçû. The sources of this river, which was to be substituted for the Santo Antonio, were not discovered till 1791. The Spanish commissioners then gave to it the name of the San Antonio-Guazú. To the affluent of the Uruguay, discovered by them in 1788, they gave the name of Pequiry-Guazú. It appeared on Portuguese and Brazilian maps of the end of the eighteenth and the beginning of the nineteenth cen-

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tury under the name of the Rio Caudaloso, but its Indian name of Chapecó finally prevailed. Till 1888, said the Brazilian case, the Brazilian and Argentine governments in fact supposed that it was the river locally known as the Chopim, which flows northeasterly and empties into the Iguaçû above the mouth of the Santo Antonio. The survey of 1888 showed that the S. Antonio-Guazú of 1791 was really the Jangada, which discharges into the Igauçû much more to the east.

Bases of Decision.

The questions raised by the Spanish commissioners in 1788 had not, said the Brazilian case, been solved, when the King of Spain, by his manifesto of February 28, 1801, declared war against the Queen of Portugal, her kingdoms and dominions. The treaty of peace concluded at Badajos, June 6, 1801, did not restore either the *status quo ante bellum* or the treaty of limits of 1777. Portugal retained the territories it had conquered in Rio Grande do Sul, and they were, as the Brazilian Government maintained, definitively incorporated into Brazil. On this question, however, the two governments had differed. Brazil had always maintained that the *uti possidetis* of the period of the independence of the South American nations and such provisions of the treaty of 1777 as were not in conflict with that *uti possidetis* were the only guides as to limits between Brazil and the adjoining states of Spanish origin. The Argentine Government, on the other hand, had asserted that the colonial *uti possidetis* could be invoked only in respect of boundaries between the Spanish-American republics, and that the treaty of 1777 was in full force as to the boundaries between Brazil and the Argentine Republic. But as the Brazilian and Argentine Governments were agreed that the principal boundaries of the two countries were to continue to be formed by the fluvial lines of the Uruguay and the Iguaçû, the question of the nullity or validity of the treaty of 1777 was of no practical importance in the pending controversy, since the war of 1801 in no way modified the extent of the domain of Portugal or of Spain in the zone comprised between those two rivers. Brazil based its rights (1) upon the fact that, as early as the seventeenth century, the territory to the east of the river Pequiry or Pepiry, afterward Pepiry-Guaçû, was under the sway of the Paulistas and formed an integral part of Brazil; (2) upon the *uti possidetis* of the period of independence, which was the same as was recognized by the Spanish missionaries when, from the seventeenth until the middle of the eighteenth

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century, they maintained to the west of the Brazilian Pequiry a post of observation to give warning of the movements of the Paulistas, and which was "recognized by Spain in the treaty of 1750, and admitted by the Argentine Government" down to 1881; and (3) upon the special position of that territory, which was indispensable to Brazil for purposes of security and defense, and for the preservation of inland communication between Rio Grande do Sul and the other States of the Brazilian union. Brazil accepted, however, all the historical documents upon which the Argentine Republic sought to found its claim, viz, the treaties of 1750 and 1777, the instructions issued to the demarcating commissioners, and the so-called Map of the Courts of 1749.

Brazil had, said the Brazilian case, been represented as the heir of Portuguese usurpations.

Treaty of Tordesillas.

Some of the defenders of the Argentine cause, recurring to the heated discussions of the colonial period, continued to speak of the celebrated meridian "line of demarcation." Pope Alexander VI. by his famous bull of May 4, 1493, had divided the world by a meridian traced a hundred leagues to the west of the Azores and Cape Verde Islands, the lands discovered to the east to belong to Portugal, and to the west to Spain. The treaty of Tordesillas of June 7, 1494, approved by Pope Julius II. (bull of January 24, 1506), had placed this meridian 370 leagues to the west of the Cape Verde Islands. The determination of this imaginary line gave rise till the eighteenth century to many controversies, which it would be useless to narrate. It sufficed to say that, according to what was known at the present day, a meridian 370 leagues west of the Cape Verde Island of Santo Antonio would be in longitude 48° 35′ 25″ west of Greenwich, on the hypothesis, little favorable to Brazil,[1] that there were 16⅔ of those leagues to the degree,[2] and not 15, as Columbus, Amerigo Vespucci, and other navigators, Spanish or in the service of Spain, reckoned at the time of the discovery of the New World.[3] On the same hypoth-

[1] Viscount de Porto-Seguro (Varnhagen), Historia Geral do Brazil, 2d ed. 69.

[2] Enciso, Suma de Geographia que trata de todas las partidas y provincias del mundo, 1519; e Grancisco Falero (Falleiro), Del tratado de la esphera y del arte del marear * * * 1535.

[3] De orbe novo Petri Martyris ab Angleria, Alcala, 1530, fol. lxxviii. verso: " * * * Si computationem leucarum sumpserimus *nautarum hispanorum more, 15 continet quisque gradus leucas:* ipsi vero contra omnium opinionem aiunt gradum continere leucas 17 cum ¼."

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esis, the line in the opposite hemisphere would correspond to 131° 24′ 35″ of longitude east of Greenwich. Counting the leagues at the rate of 17½ to the degree, as the Spaniards afterward wished, which was an anachronism, since such a rule of computation did not exist when the treaty of Tordesillas was concluded,[1] the line west of Santo Antonio would be 47° 29′ 05″ west of Greenwich.[2]

There was no doubt, said the Brazilian case, that the Portuguese in Brazil occupied territory to the west of that line, but their occupation was effected in good faith during the seventeenth and the beginning of the eighteenth century, when reckonings of longitude could not be made with the same accuracy as at the present day, and the exact measure of an equatorial degree was not known. The old maps of South America located that continent much more to the east than it was. Spain also overstepped her allotted hemisphere, as was shown by her occupation of the Philippine Islands, which, as well as the Moluccas, were within the Portuguese limits. It would, said the Brazilian case, be "more loyal and dignified and truthful to admit that both Portuguese and Spaniards were then acting in good faith, and to forget errors and contradictions which have no connection with the present controversy." If the line of demarcation had, as the Spaniards maintained in the sixteenth century, passed between Java and Sumatra, "nearly the whole of South America would be within the 180 degrees of longitude attributed to Portugal." One of Spain's most renowned ministers of state, the Count de Floridablanca, "recognized the inadvertence of those who, in the seventeenth century, thought it possible to restore the line of Tordesillas."[3]

Enlargement of Brazilian Boundaries.

Indeed it was, said the Brazilian case, from 1580 to 1640, while the Crowns of Spain and Portugal were united, that the frontiers of Brazil, which were not even then defined, the true position of

[1] Varnhagen, Examen de quelques points de l'Histoire Geographique du Brésil, Paris, 1858, p. 36.

[2] These calculations were made starting from the western point of the Island of Santo Antonio, 17° 5′ 30″ north latitude and 27° 42′ 30″ of longitude west from Paris (Greenwich west of Paris 2° 20′ 14″). A league of 16⅔ to the equatorial degree = 6.678m, 396. The 370 leagues in latitude 17° 05′ 30″ give 23° 13′ 09″. The league of 17½ to the degree = 6.360m, 377. In the same latitude they give 22° 06′ 48″.

[3] Memorandum presented to Carlos III. of Spain (October 10, 1788) by Count de Floridablanca (Vol. 59 of the Biblioteca de Autores Españoles). Transcribed in Vol. IV. of the Case of Brazil, pp. 129–133, and translated in Vol. III. pp. 137–141.

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the line of Tordesillas being unknown, began to be enlarged. June 14, 1637, Philip IV. of Spain, who was also Philip III. of Portugal, created the captaincy of Cabo do Norte and annexed it to Brazil, designating as its northern boundary the river Vicente Pinçon, then also known as the Oyapock. August 16, 1639, Pedro Teixeira, under the instructions of the same King, took possession of the left bank of the Napo, establishing there the western boundary of the Portuguese dominions, north of the Amazonas. Coincidently, continued the Brazilian case, "the Brazilians of S. Paulo, called Paulistas, continuing their expeditions into the interior, drove out the Spaniards and their Jesuit missionaries from the positions they occupied in territories considered to be within the Portuguese demarcation, on the Upper Paraguay; to the east of the Paraná, between the Paranapanema and the Iguaçû; and, more to the south, to the east of the Uruguay. The revolution for the independence of Portugal in 1640 found Brazil increased in the north by the territories that were annexed to it by the King of Spain, to the west and south by those which had been conquered by the Paulistas." In the treaty of peace of February 13, 1668, by which the independence of Portugal was recognized, "nothing was stipulated as to boundaries in America. Article 2 provided for a mutual restoration of the strongholds conquered 'during the war,' the two kingdoms to keep the 'boundaries and frontiers they had before the war.'" In 1680 the Portuguese, under instructions from Lisbon, occupied the left bank of the river Plate, which they considered to be the southern boundary of Brazil, and there founded, almost opposite Buenos Ayres, Colonia do Sacramento. In the same year this settlement was, by order of the governor of Buenos Ayres, seized by a numerous army of Spaniards and Guarany Indians. For this occurrence Carlos II. of Spain sent to Lisbon, as his ambassador extraordinary, the Duke of Giovenazzo, charged to give the fullest satisfaction; and by the provisional treaty of May 7, 1681, Colonia was restored to Portugal, it being agreed that the question of right should be examined by commissioners. The old discussion as to the true position of the meridian of Tordesillas was then renewed, but without result. During the War of the Succession the fortress of Colonia again fell (1705) into the possession of the Spaniards. The Treaty of Utrecht of February 6, 1715, restored it "with its territory" to Portugal, the King of Spain reserving

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the right within a year and a half to offer an equivalent, which the King of Portugal might or might not accept, for the "territory and Colonia" (article 7). The governor of Buenos Ayres restored only Colonia and the land within cannon shot of the fortress. The Portuguese Government contended that the "territory and Colonia" included all the left bank of the river Plate. In reality, the text of the treaty was not clear. From 1735 to 1737 the fortress was again besieged by the Spaniards; but a Portuguese expedition from Colonia occupied and fortified the bar of the Rio Grande do Sul and established the military posts of Tahim, Chuy, and S. Miguel. In the territory of Rio Grande do Sul there already existed, to the north of the Jacuhy, several Portuguese settlements founded by Brazilians of Laguna, Curityba, and S. Paulo. By the armistice signed at Paris on March 16, 1737, the Portuguese and Spanish governments agreed to issue orders for the cessation of hostilities in America, and to preserve the *status quo* till a definitive settlement should be made.

Treaty of 1750.

These continual disputes and hostilities led the two governments to enter into the treaty of Madrid of January 13, 1750, the first agreement between them in which appeared the Pepiry or Pequiry. The apparent negotiator on the part of Portugal was Maj. Gen. Thomaz da Silva Telles, Viscount de Villa Nova de Cerveira, ambassador extraordinary at Madrid, and on the part of Spain the minister of state, D. Joseph de Carvajal y Lancaster; but the actual exponent of the cause of Portugal and Brazil was the celebrated Brazilian statesman and diplomatist Alexandre de Gusmão.[1] It was resolved that in place of imaginary lines, the boundaries should be determined by rivers and mountains, and that each of the contracting parties "*should remain in possession of what it held at that date*, excepting such mutual cessions as might be made." Spain agreed, said the Brazilian case, to recognize "all the Portuguese possessions in America and to surrender the territory on the left bank of the Uruguay to the north of the Ibicuhy in exchange for Colonia do Sacramento and the territory contested on the left

[1] He was then private secretary to King D. João V., a member of the colonial council (Ministro de Conselho Ultramarino), and a member of the Royal Academy of History. He had been secretary to the Portuguese embassy at Paris, and envoy extraordinary at Rome. While at the latter post he refused the title of prince which was offered to him by the Pope. He was born in Santos in 1695, and died at Lisbon in 1753.

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bank of the river Plate." Article V. embraced the western boundary of the territory in dispute, and was as follows:

"From the mouth of the Ibicuí, the line shall run up *the course of the Uruguay until reaching the river Pepiri, or Pequiri, which empties itself by the western bank of the Uruguay; and it shall continue up the bed of the Pepiri as far as the principal source thereof; from which it shall follow along the highest ground to the principal head of the nearest river that may flow into the Rio Grande do Curituba, otherwise named the Iguaçû.* The boundary shall continue along the bed of the said river nearest to the source of the Pepiri, and afterward, along that of the Iguaçû, or Rio Grande do Curituba, until the point where the same Iguaçû empties itself by the eastern bank of the Paraná; and from that mouth it shall go up the course of the Paraná, to the point where the Igurey joins it on its western bank."

The positions of rivers and mountains were not, said the Brazilian case, described in the treaty, because they were indicated in the map used by the plenipotentiaries, copies of which were about to be given to the demarcating commissioners. The Pepiry or Pequiry was referred to merely as an affluent of the right bank of the Uruguay, called in the treaty the western bank, according to the local usage arising from the fact that the general direction of the river there was north and south. The Pepiry or Pequiry was adopted as the boundary because, among other reasons, following the idea of choosing indisputable landmarks, it was, said the Brazilian case, "the first important affluent of the right bank of the Uruguay immediately above its Great Falls (Salto Grande). They preferred the tributary of the Iguaçû nearest to the Pepiry, not only because it was necessary to seek in that region a natural line in a northerly direction, but also because this affluent would certainly have its mouth a little above the Great Falls of the Iguaçû (Salto Grande do Iguaçû). And in the Paraná, when the line had to incline to the west, seeking the basin of the Paraguay, they chose the Igurey, the first affluent below the Great Falls of the Paraná (Salto Grande do Paraná), or Salto das Sete Quédas (Cataract of the Seven Falls). In this manner the three Great Falls of the Uruguay, Iguaçû, and Paraná would become so many natural and indestructible landmarks. * * * The fourth of the points of deflection was also well indicated by the mouth of the Iguaçû. In respect to the Pepiry there was, moreover, the circumstance that this river emptied itself not only very near the Great Falls (Salto Grande), but also in the region in which the Uruguay, coming

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from its head waters in a westerly direction, bends rapidly to the south. As, starting from that river, the divisional line went toward the north seeking the course of the Paraná, the choosing of affluents that should speedily connect the two great fluvial boundaries was naturally suggested. To follow beyond the Great Falls and the Pepiry, continuing up the course of the Uruguay, would be to change the direction entirely to the east, as the Argentines now wish to do, and therefore to turn more and more away from the objective, which was the north and the Paraná."

The Map of the Courts.

As to the manuscript map of 1749, called the Map of the Courts, the Brazilian case, far from rejecting it, claimed it as a Portuguese map, prepared in duplicate in Lisbon, and sent from that capital to Madrid. To the two originals the plenipotentiaries gave the name of "Mappas Primitivos" (first maps), because in 1751 three copies were made at Lisbon and three at Madrid, to be exchanged and given to the demarcators of the boundary. Of the two originals, one had been preserved in the French foreign office, and of this original a copy accompanied the Brazilian case. Between the copies made at Lisbon and those made at Madrid there were variances which arose as follows: On the originals there was a red line showing the limits of the coterminal Portuguese and Spanish dominions. This red line, beginning at Castilhos Grandes, ran to the head waters of the Rio Negro, along which it proceeded to the Uruguay. Under the treaty, however, the boundary did not follow the Rio Negro, but ran from its head waters to the source of the Ibicuí. In the three copies prepared at Lisbon the red line of the original was preserved; in the three made at Madrid the red line was drawn according to the treaty. When it came to exchanging the copies, the plenipotentiaries of the two courts, in order to preserve a true record of the matter, signed a declaration marked A, which was indorsed on the originals, to the effect that the maps so indorsed were used in the negotiation of the treaty, and that the red line upon them was not in accord with the treaty. On the three Lisbon copies they signed a declaration marked B, which also stated that the red line in them was not in accord with the treaty. On the Spanish copies they signed a declaration marked C, which merely stated that the red line drawn upon them pointed out and passed through the places where the demarcation was to be made. But in each of the

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declarations, on the originals as well as on the copies, it was stated that the red line was to be observed only so far as it was in conformity with the treaty. None of the three Spanish copies, which, after the exchange, were deposited at Lisbon, had been preserved there, but it was, said the Brazilian case, doubtless from one of these copies that Borges de Castro obtained the Map of the Courts reproduced in the third volume of his *Colleçâo de Tratados*, a circumstance which probably accounted for the variance between that map and the originals.

Instructions of 1751.

January 17, 1751, the plenipotentiaries of Portugal and Spain signed at Madrid various instruments, among which were (1) a treaty of instructions to the commissioners charged with the marking of the boundary from the extreme south of Brazil to Matto-Grosso, and (2) a protocol, also styled a treaty, warning the commissioners against the possible inaccuracies of the map used in the discussion of the question of limits. In none of the instruments was there any reference whatever to the Pepiry or to the river Uruguay-Pitâ. The commissioners were directed in the instructions not to "take into consideration any small portion of territory, provided the line is located by the most visible and lasting natural boundaries," and to "decide on and carry out what may seem to them to be the best, provided they attain the principal object, which is the execution of the treaty with sincerity and good faith, without forced interpretation or excuse, and in a manner becoming the service of their majesties." In the protocol concerning the map there was the following passage:

"Whereas we have been governed by a manuscript geographical map in drawing up this treaty and the instructions for its execution; for this reason a copy of the said map is to be supplied to each party of commissioners of each sovereign, for their guidance, all signed by us, inasmuch as by it, and in accordance with it, all the expressions are explained. We likewise declare that although according to the information of both courts we hold all things noted in the said map as very probable; admitting also that some of the territories demarcated have not been visited by persons now living, and that others have been taken from the maps of trustworthy persons who have travelled through them, though, perhaps, with little skill to represent them by sketch, on which account there may be some notable variations upon the ground, both in the situations of mountains, and in the origins and courses of rivers, and even in the names of some of them, because it is customary for each nation in America to give them different names, or for other

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reasons: It is the will of the contracting sovereigns, and they have agreed, that any variation there may be shall not stay the course of the execution, but that it shall proceed as, in accordance with the treaty, the mind and intention of their majesties is manifested in the whole of it, and more particularly in Articles VII., IX., XI., and XXII., according to which the whole shall be punctually executed."

Special Instructions of 1758, and the Interpolation as to the Pepiry.

Commissioners to make the survey were appointed in 1751; and they were divided into three parties, to the second of which was assigned the duty of marking the boundary between the Uruguay and the Iguaçû. The Portuguese Government appointed as principal commissioner in the southern division Gen. Gomes Freire de Andrada, afterward Count de Bobadella, and the Spanish Government the Marquis de Val de Lirios. Meanwhile great opposition to the treaty of limits—an opposition not relating to the present territory in dispute—had arisen; and this and other causes delayed the demarcation, so that the second party did not begin its labors till 1759. The defenders of the Argentine claim had, continued the Brazilian case, constantly asserted that in the special instructions given to these commissioners on July 27, 1758, the river Pepiry was distinguished by these features: "A full-flowing river, with a bushy island opposite its mouth, a large reef within its bar, *and that the latter is upstream from the Uruguay-Pitá.*" In the report presented in 1892 to the Argentine congress, Minister Dr. Zeballos, relying on inaccurate information, wrote as follows: "The instructions given to the demarcators charged to trace the lines agreed upon, described the river Pequiri in these terms: 'A full-flowing river, with a wooded island opposite its mouth, a large reef fronting its mouth, which mouth is upstream of the Uruguay-Pitá, a southern affluent of the Uruguay.'" The facts appeared to be that on November 13, 1789, the Spanish commissioner Alvear, while engaged in a survey hereafter to be noticed, said, in an official letter addressed to his Portuguese associate, Roscio, that the map of 1749 located the Pepiry above the Uruguay-Pitá, and that in 1788 this Pepiry had been found "with the features that characterize it, being *full-flowing, with a wooded island opposite its mouth, and a large reef within its mouth.*" Alvear did not speak of instructions; he merely applied to the old Pepiry of the treaty of 1750 the features characteristic of the river discovered in 1788, artfully

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insinuating that in 1759 the Pepiry was known by those features. This, however, led two other Spanish commissioners, Jurado and Requena, to say, in 1800, in their report on the question of limits: "The features by which in the said instruction and the map following it, drawn by mutual agreement, the Pepiri-Guazú was described, were: A full-flowing river, with a wooded island in front of its mouth, a large reef in front of its mouth, and that this mouth is upstream of the Uruguay-Pitá." Another Spanish report, written in 1805, inspired by the insinuation of 1789 and the addition of 1800, said: "A full-flowing river, with a wooded island opposite its mouth, a reef within its mouth, and situated upstream of the Uruguay-Puitá." Subsequently Oyarvide, in a report written at the beginning of this century, and Cabrer in another finished at Buenos Ayres in 1835, reproduced the invention of Alvear, but did not venture to repeat the supposed passage of the instructions of 1751 and 1758. The report of 1892 of the department of foreign affairs of the Argentine Republic, "adopting a supposed quotation by one of the numerous writers who have discussed this question in the press," gave a different wording from those of 1800 and 1805; "and it is thus," continued the Brazilian case, "that the invention of 1789, passing through successive additions and transformations, reaches the presence of the arbitrator in the final form in which it is about to be destroyed."

The Brazilian case then proceeded to show that in the special instructions given to the commissioners of the second party on July 27, 1758, no such passages as those above quoted appeared. The agent of Brazil had found in the archives at Simancas the Spanish text of the special instructions, of which he produced a duly authenticated copy. It said nothing as to the mouth of the Pepiry being above the Uruguay-Pitâ, nor as to any island or reef. Thus disappeared, said the Brazilian case, "one of the two documents" on which the Argentine Government based its case, the other being the Map of the Courts.

Contents of the Special Instructions of 1758.

By the third article of the special instructions the commissioners were instructed as follows:

"The commissioner of His Catholic Majesty shall go to the village of S. Nicolas, and see that the canoes, guides, and rowers are ready, so that when the commissioner of His Most Faithful Majesty arrives, they may at once proceed together to that of *S. Xavier, where they shall embark upon the*

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rafts they will have constructed there with the canoes, and they shall ascend the Uruguay until they meet, on its western bank, the mouth of the river Pequirí, or Pepirí, which they shall enter, continuing up its stream as far as its principal source, or as far as the canoes can reach. From this point they shall send a party on foot to survey on the highest ground the principal head of the nearest river that flows into the Yguassû, upon discovering which, if they find that the canoes can be carried on men's shoulders, the commissioner of His Catholic Majesty shall send a canoe which shall return by the same river with the information, and with the order that the boats which shall be ready on the Paraná go up that river at once to await them at the mouth of the Iguaçú, and in the mean time the provisions and canoes shall be conveyed by land to the nearest river that empties itself into the Yguassû."

By the fourth article the commissioners were instructed that in the determination of "the principal heads" of the Pepirí, and of the river nearest it emptying into the Iguaçû, they should seek those whose waters were most abundant, but that if the want of horses and baggage, or the necessity of having their provisions and canoes carried on the shoulders of Indians prevented such a determination, they should proceed in the spirit of their general instructions (of 1751) and do what was equitable.

By article 5 they were to descend "the river nearest to the Pepirí as far as its mouth in the Iguaçû," and to descend the latter "as far as its Salto," when they were to proceed overland to the Paraná.

Article 6 was as follows:

"Art. 6. If the head of the river that empties into the Iguaçû, and which is believed to be near that of the Pepirí, is not found, or if the distance between them is so great, or the ground so rough that they think the canoes can not be conveyed overland, they shall take their observations at the spot they are able to reach, and they shall return down the course of the Uruguay as far as the village of Concepcion, or as that of S. Xavier, whence they shall proceed overland to that of La Candelaria, and, embarking there, they shall go up the course of the Paraná as far as the mouth of the Iguaçû, which they shall ascend as far as its Salto (falls), and carrying overland the canoes they may have taken with them, or building others there, if they can not carry them, they shall go up the latter as far as the mouth of some river that may be with a slight difference in the same longitude in which they consider the heads of the Pepirí to be; and, navigating along it as far as they can they shall take the necessary observations in order that they may trace upon the map they are to construct a line connecting the two points observed."

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By article 7 they were instructed to go "from the place which they reach," down the stream in question and the Iguaçû, to the mouth of the latter in the Paraná.

Demarcation of 1759–1760; the Pepiry.

An examination of the proceedings of the commissioners in 1759 and 1760 would, said the Brazilian case, show that they exactly carried out their instructions. February 1, 1759, they started from San Xavier. February 5 they passed the mouth of the Mbororé, the Spanish commissioners saying in their diary: "It is also the extreme point reached by land by the Indians of Misiones, who do not venture to go beyond it for fear of the Caribs." February 20 they passed the mouth of the Guanumbaca. Next day they passed the mouth of the Paricay, the Spanish commissioners recording that it was "the farthest point reached by the Indians of some villages of Uruguay," when coming to gather *maté*. As far as the Itacaray the commissioners had several Indian guides, but from that point on only one, Francisco Xavier Arirapy. Leaving the Great Falls of the Uruguay March 4, 1759, they reached on the 5th, five miles above those falls, the mouth of the Pepiry, which was identified by the Indian guide. In view of the fact, however, as the Spanish commissioners stated in their diary, that the river so identified was not in the same latitude as the Pepirí of the map of the courts, and, instead of being above the Uruguay-Pitâ, as represented on that map, was below it, the commissioners, "in order to ratify this map, *and to remove any sort of doubt* which might be raised against the testimony of the guide who *was the only one, not merely among those present, but among the inhabitants of all the villages of Misiones, who could give any evidence, there not then remaining any other Indian who had navigated the river above the falls*," resolved to ascend the Uruguay on the following day and make a plan of the section. Proceeding accordingly, they found on the opposite bank of the Uruguay "about two and one-third leagues" above the Pepirí, as the Spanish diary stated, "a large river which the guide said was the Uruguay-Pitâ, the farthest point to which his knowledge extended." After ascending this river for a short distance, the commissioners on March 6 returned to the Uruguay, which they ascended till interrupted by the falls. Having got back on the 8th of March to the Pepirí or Pequiry, the commissioners drew up and signed a formal declaration, recognizing and identifying the stream as the Pepirí of Article V. of the treaty of limits. They also made a clearing, in the

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middle of which they left a tree standing, on which they placed a cross with the letters "R. F. Anno de 1759," carved on the arms.

The Santo Antonio.

From this point a party was sent to ascend the Pepiry and discover the sources of the stream flowing in the opposite direction into the Iguaçû. March 29, this party came to a fork in the Pepiry, where the river divided into two branches. To the smaller branch, coming from the northeast, they gave the name of the Pepiry-Mini. The larger branch, coming from the northwest, they ascended till on March 31, 1759, they found the channel obstructed by a fall. They had then traveled 24½ leagues from the mouth of the Pepiry. They then decided to go back, and, in accordance with article 6 of their special instructions, to go down the Uruguay and ascend the Iguaçû, in order to find the river opposite the Pepiry. July 10, 1759, the commissioners entered the Iguaçû. Above the Great Falls of the Iguaçû the explorers found a stream whose sources they thought could not be far from those of the Pepiry. It was decided that two geographers should ascend this stream, to which was given the name Santo Antonio. In order however that other surveys might not be delayed, the exploration of the S. Antonio was ultimately left to the Spanish geographer, Francisco Millau. He ascended the S. Antonio as far as the falls called Salto de S. Antonio, afterward Salto Patricio. He continued his explorations beyond, but, finding need of assistance, which the commissioners were then unable to give, was recalled. He had then gone beyond the S. Antonio, and had descended for some distance a river which he supposed to be the Pepiry. He returned down the S. Antonio and rejoined the commissioners December 30, 1759, at their encampment on that river. Maps were made to show the work accomplished. The degrees of longitude were not marked on them, owing to the lack of observations. But the Pepiry was marked on them as the Pepiry-Guaçû to distinguish it from its tributary the Pepiry-Mini, the word *guaçû* meaning large, and the word *mini* small. It was then customary thus to distinguish the principal river from its affluent, where both had the same name. Thus, from 1760 the old Pepiry or Pequiry came to be called the Pepiry-Guaçû, though it was also often called the Pequiry on Spanish maps.

Objections to the Demarcation of 1759–1760.

To the demarcation of 1759 the Argentine Government had, said the Brazilian case, objected, (1) that the commissioners surveyed a false Pepiry, (2) that they left their work incomplete, and (3) that they mistook for the sources of the

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Pepiry, which Millau supposed that he had found, those of another river which flowed into the Paraná. The second and third objections were well founded in fact, but nothing of importance could be deduced from them. The only objection of importance was the first, since the S. Antonio was indisputably the river which formed, with the Pepiry actually adopted, the most natural direct line between the Uruguay and the Iguaçû. As to the first objection, it was to be observed that the commissioners were instructed to adopt "the most visible and lasting natural boundary," without taking "into consideration any small portion of territory." It had also been shown that the description of the Pepiry which the commissioners were supposed to have disregarded—"a full-flowing river with a wooded island in front of its mouth, a reef within its mouth and upstream of the Uruguay-Puita"—was not in their instructions. Nevertheless, all these supposed features might be found in the Pepiry of 1759, except its being above the Uruguay-Pitâ.

The Bearing of the Map of the Courts.

The alleged passage in the commissioners' instructions having been shown not to exist, the only other document on which the Argentine objection rested was, said the Brazilian case, the Map of the Courts of 1749. But this, too, supported the Brazilian claim, since it could be shown that the commissioners of 1759 surveyed the Pepiry of the Map of the Courts, and that the river of the recent Argentine pretension was much to the east. In order to establish these positions the Brazilian case entered into an historical examination of the cartography of the region in the sixteenth and seventeenth centuries. The first document, said the Brazilian case, in which mention was made of a tributary of the Uruguay called the Pepiry was *La Argentina*, a chronicle of the provinces of the river Plate written by the Paraguayan Rui Diaz de Guzman, and concluded in 1612. The first map in which an affluent of the right bank of the Uruguay appeared under the name of the Pepiry was that which the Jesuits of Paraguay presented to Father Caraffa, who was prefect-general of the Society of Jesus from 1645 to 1649.[1] This map contained nothing favorable to one side or the other. It was deservedly praised by d'Anville, but at the time when it was made information in regard to the Upper Uruguay

[1] It was engraved at Amsterdam by Gerard Coeck, and published in Vol. XI. of the *Atlas Major* of Johan Blaeuw, Amsterdam, 1662.

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was very vague, as was shown by the fact that the Great Falls did not appear in it. The second map of the Jesuits came in 1722.[1] This map was engraved at Rome in 1726, and was dedicated to the prefect-general, Tamburini. In this map there appeared for the first time in the Upper Uruguay the Great Falls and the rivers *Uruguay-Pitã* and *Uruguay-Miní*, affluents of the left bank, besides other unnamed tributaries. It was therefore the first map in which the positions of the Pepiry and the Urugnay-Pitã could be certainly determined, for, while it was easy to confuse the names of rivers and to transfer them from one to another, there was, said the Brazilian case, "*only one Salto Grande* (Great Falls) *in all the Upper Uruguay.*" None of the maps from 1722 to 1750 embodied any new information as to the course of the Uruguay, or as to the names and positions of its affluents. In 1730 a second edition of the map of 1722 was published at Augsburg by Seutter. In 1732 Petroschi engraved at Rome "*the third map sent from Paraguay by the Jesuits of that province*, and presented by them to Father F. Retz, general prefect of the society." In 1733 d'Anville, basing his work on the three maps of the Jesuits of Paraguay, composed his *Carte du Paraguay*, appended to Vol. XXI. of the *Lettres Édifiantes et Curieuses écrites des Missions Etrangeres, par quelques Missionnaires de la Compagnie de Jesus.*[2] In 1748 the map of South America by d'Anville was published. These were, said the Brazilian case, the only maps between 1722 and 1750 in which were given "the Uruguay, the *Great Falls*, the *Pepiry*, the *Uruguay-Pitã* or *Puitã*, and the *Uruguay-Miní*." In all of them the Uruguay-Pita *appears below the Great Falls of the Uruguay*, as an affluent of the left bank, and, lower still, on the opposite bank, is the Pepiry of the Jesuits. "Therefore," said the Brazilian case, "the *Pepiry of the Jesuits is a river situated in the present Argentine territory of Misiones;* it is not the *Pepiry* or *Pequiry* of the map of 1749, since this *is the first river above the Great Falls*, and still less can it be the Chapecó (Pequiry-Guazú of the Argentines) because this is much more distant from the Great Falls (Salto Grande) and from the

[1] At this point the Brazilian case discussed and pronounced erroneous certain statements in the pamphlet by Dr. Zeballos, entitled *Misiones*, in regard to the maps of G. Sanson (1668), and Guillaume de l'Isle (1703).

[2] "Le Paraguay | ou les RR. PP. de la Compagnie de Jesus | ont répandu leurs Missions | par le Sr d'Anville | Géographe du Roi | Octobre 1733." There is a Spanish edition, of 1757, of this map in the translation of the *Edifying Letters.*

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Pepiry of the maps of the Jesuits and d'Anville." Moreover, according to Father Pedro Lozano, chronicler of the Society of Jesus in Paraguay,[1] the Uruguay-Pitã *was a river whose mouth lay below the Great Falls*, and he also described the Pepiry as being below those falls. It thus appeared that the Pepiry of the Spaniards, like the Uruguay-Pitã of the Spaniards, prior to 1749, was a stream below the Great Falls of the Uruguay. In the Map of the Courts the Pepiry or Pequiry appeared as a stream above those falls. This was accounted for by the fact that this map was of Portuguese origin, and gave as the Pepiry the Pequiry of the Brazilians of S. Paulo, the first river above the Great Falls. On the same map, however, the mouth of the Pepiry is above that of the Uruguay-Pitã, while, on the ground, the commissioners of 1759, following the information given by the guide Arirapy, found the Uruguay-Pitã above the Pepiry. This circumstance the Brazilian case explained thus: In the maps of the Jesuits, both the Pepiry and the Uruguay-Pitã have their mouths *below the Great Falls*. The Portuguese Government, in the map of 1749, while locating the Pepiry or Pequiry, according to the information of the Paulistas, above the Great Falls, made no change in the position which the maps of the Jesuits and those of d'Anville ascribed to the Uruguay-Pitã. The divisional line did not pass along the latter river, and hence its position on the map was not a point of importance or even of interest. After 1750, the Jesuits of the missions gave the name of Pepiry to the first river above the falls, no doubt preferring as a boundary the Brazilian Pequiry or Pepiry, more to the east, to their old Pepiry below the falls. In reality, when the commissioners in 1759 made their journey from S. Xavier in search of the Pepiry, all the old names of the affluents of the left bank of the Uruguay, as given in the maps of the Jesuits and in the descriptions of Lozano, had been changed. The names *Yaguarape, Nucorá, S. Juan, Yriboba, and Uruguay-Pitã* were not then known below the Great Falls. The commissioners of 1759 did not, said the Brazilian case, change the position of the Pequiry or Pepiry of the Map of the Courts; *but the name of Uruguay-Pitã had changed its place.* It had been transferred from a river whose mouth, according to that map, was 41 kilometers, or 22 miles below the Great Falls, to another which discharged itself 22 kilometers, or 11.8 miles, above those falls

[1] History of the Conquest of Paraguay, Rio de la Plata, and Tucuman.

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and above the mouth of the Pepiry. To this second Uruguay-Pitã, now the Guarita, the Spanish commissioners gave, after 1788, the name of Mberuy, removing then to another river more to the east the name of Uruguay-Pitã, and wishing, after these two successive removals, to find *above the mouth of the third river of that name* the Pequiry, or Pepiry, whose mouth, according to the Map of the Courts, was indeed above an Uruguay-Pitã, *but above the Uruguay-Pitã of the maps of the Jesuits and of d'Anville, which was below the Great Falls and below the point where the Uruguay turns to the south.* The position of the Pepiry, or Pequiry, was perfectly determined in the map of 1749 by the "unalterable and immovable landmark of the Great Falls (Salto Grande)." The name Uruguay-Pitã was found neither in the treaty of 1750, nor in the general instructions of 1751, nor in the general instructions of 1758; but, if the commissioners of 1759 had been charged with the survey of the Uruguay-Pitã, it would have been their duty to look for it where the Map of the Courts located it, below the Great Falls, especially as the names of places were so variable in that region. The really important point to be determined in the demarcation of 1759 was, said the Brazilian case, whether the Pepiry or Pequiry of the map of 1749 was the Pepiry, afterward called the Pepiry-Guaçû, pointed out by the Indian Arirapy and then surveyed, or whether it was the Chapecó, to which the Spanish commissioners after 1789 gave the name of Pequirí-Guazú. A comparison of longitudes, said the Brazilian case, gave the following results:

	W. of Greenwich.		
1. Longitude of the mouth of the Pepiry-Guaçû, the Brazilian boundary:			
(*a*) On the map of the Brazilian-Argentine Joint Commission (No. 25 A)	53°	48′	19″
(*b*) On that of 1749 of the Plenipotentiaries, according to M. Emile Levasseur (No. 8 A)	53°	46′	22″
Difference between these two longitudes	0°	01′	57″
2. Longitude of the mouth of the Chapecó (Pepiry-Guazú, according to the Argentines), boundary claimed by the Argentine Republic. (Map of the Brazilian-Argentine Joint Commission)	52°	59′	55″
Difference between this longitude and that of the mouth of the Pequiry or Pepiry in the map of 1749 referred to above, according to M. E. Levasseur	0°	46′	27″

"Therefore," said the Brazilian case, "the river which the map of 1749 designates as the boundary is not the Chapecó

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or Pequirí-Guazú, as the Argentine Republic asserts; it is the Pepiry-Guaçû, the old Pequiry of the Brazilians of S. Paulo, the boundary of Brazil since the XVII. century."

A comparison of the distances gave the following results:

	Leagues.	Miles.	Kilometers.
1. Distance (along the windings of the river) from the Great Falls of the Uruguay to the mouth of the Pequiry or Pepiry, afterwards Pepiry-Guaçû, the Brazilian boundary:			
(*a*) In the map of 1749 of the Plenipotentiaries	1.8	5.5	10.2
(*b*) According to the diary of the demarcators of 1759 (1 league and ½)	1.6	5.0	9.2
(*c*) In the map of the Brazilian-Argentine Joint Commission	1.5	4.5	8.3
2. Distance (along the windings of the river), according to the map of the Joint Commission, from the Great Falls of the Uruguay to the mouth of the Chapecó (the Pequirí-Guazú of the Argentines), the boundary claimed by the Argentine Republic	26.9	80.7	149.5

"Therefore," said the Brazilian case, "the river along which, in the map of 1749, the red line passes which marks the boundary defined in the treaty of 1750 is the Pepiry-Guaçû which Brazil defends, and not the Pequirí-Guazú of the Argentine pretension."

Treaty of 1777; Demarcation of 1759–60 Ratified.

Having thus answered all the objections to the demarcation of 1759–60, the Brazilian case proceeded to show that it was approved and ratified in 1777. By a treaty signed at El Pardo February 12, 1761, the treaty of 1750 was annulled. This, as the Brazilian case maintained, was due on the one hand to the intrigues of the Jesuits, as well as on the other to the reluctance of the Portuguese to surrender Colonia do Sacramento. In 1762 war broke out between Spain and Portugal, in consequence of European complications. By the Peace of Paris of February 10, 1763, it was provided that, as to the Portuguese colonies in America, the *status quo ante bellum* should be restored. This stipulation, however, was not carried out in South America, and war between the two crowns continued there. But in 1776 a committee was appointed, by order of the King of Spain, to consider the question of limits. This committee consulted, among others, Don Francisco de Arguedas, the Spanish commissioner under whom the Pepiry and S. Antonio were surveyed in 1759; and it used in its deliberations the map of South America compiled and engraved by Olmedilla, cosmographer to the King of Spain. Negotiations followed between Spain and Portugal, resulting in the Preliminary Treaty of Limits signed at San Ildefonso October 1, 1777.

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This treaty restored in the region now in question the boundary of 1750, and in so doing clearly adopted the demarcation of 1759–60. This might be seen, said the Brazilian case, by placing side by side Article V. of the treaty of 1750 and Article VIII. of the treaty of 1777, thus:

TREATY OF 1750.	TREATY OF 1777.
Art. V.—From the mouth of the Ibicui, the Line shall run up the course of the Uruguay until reaching the River Pepiri, or Pequiri, which empties itself by the Western bank of the Uruguay; and it shall continue up the bed of the Pepiri as far as the principal source thereof; from which it shall follow along the highest ground to the principal head of the nearest river that may flow into the Rio Grande de Curitiba, otherwise named Iguaçú. The Boundary shall continue along the bed of the said river nearest to the source of the Pepiri, and, afterwards, along that of the Iguaçú, or Rio Grande de Curitiba, until the point where the same Iguaçú empties itself by the Eastern bank of the Paraná; and from that mouth it shall go up the course of the Paraná, to the point where the Igurey joins it on its Western bank.	Art. VIII.—The dominions of both Crowns being already defined as far as the entrance of the River Pequiri or Pepiri-Guaçú into the Uruguay, the two High Contracting Parties have agreed that the divisional line shall follow up the course of the said Pepiri-Guaçú as far as its principal source; and thence along the highest ground, under the rules given in Article VI., it shall continue until it meets the waters of the River Santo Antonio, which empties itself into the Grande de Curitiba, otherwise named Iguaçú, running downwards along the latter until it enters the Paraná by its Eastern bank, and continuing thence up the said Parana to the point where the River Ygurey joins it on its Western bank.

Comparing these texts in the light of the fact that the demarcators of 1759 gave to the Pepiry the designation of the Pepiri-Guaçû, and called the connecting affluent of the Iguaçû the S. Antonio, it appeared that the negotiators of the treaty of 1777, Souza Coutinho on the part of Portugal and the Count de Floridablanca on the part of Spain, fully adopted the demarcation of 1759, which had then been entered on various maps, including that of Juan de la Cruz y Olmedilla of 1775, compiled and engraved by order of the King of Spain.[1] In

[1] The Brazilian case said that this map had been severely criticised by Dr. Zeballos in the pamphlet Misiones, in which Olmedilla was said to be merely an engraver. The Brazilian case quoted various testimonies as to Olmedilla's great reputation as a geographer as well as engraver, and adverted to the fact that a copy of his map, now in the rooms of the American Geographical Society at New York, was used by Humboldt in his travels in South America.

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this map the distance between the sources of the Pepiry and those of the S. Antonio was correctly given as about 17,500 metres, or 9½ miles, almost exactly the distance found to exist by the Brazilian–Argentine joint commission of 1887.

Spanish Instructions of 1778-1779.

The instructions given by the Spanish Government for the demarcation of the boundary under the treaty of 1777 "defined," said the Brazilian case, "with the greatest clearness the positions of the rivers Pepiry-Guaçû and S. Antonio," precisely as Brazil claimed them to be. In order to establish this fact, the Brazilian case made a comparative analysis of the diary of the Spanish commissioners of 1759, the royal instructions of June 6, 1778, signed by the secretary of state for the Indies, Don José de Galvez, and the instructions, drawn with greater detail, by General Vertiz, viceroy of the provinces of the river Plate, and approved by Carlos III. on January 6, 1779. The last-named instructions, however, with a view to facilitate the arrival of the commissioners "at the mouth of the river Pepiri-Guazú," directed them to "*guide themselves by the course of the river Uruguay-Puitá, as far as its confluence with the river Uruguay, because at the distance of two leagues and one-third, following the bank of the river Uruguay in a westerly direction*, the mouth of the river Pepirí will be found on the opposite side." The specification of the distance of two and one-third leagues between the mouth of the Uruguay-Pitã and that of the Pepiry-Guaçû clearly showed that the instructions referred to the Uruguay-Pitã whose mouth was surveyed in 1759, that is to say, the second river to whose mouth the name of Uruguay-Pitã was given.

Proceedings of the Commissioners: The Pepiry-Guaçû Identified.

The commissioners, however, at first proceeded by mistake down the old Trigoty, which the Guaranis of Misiones supposed to be the Uruguay-Pitã, and, having reached the Uruguay, proceeded down the latter in order to find the Pepiry-Guaçû, which, according to their instructions, should have been two and one-third leagues downstream; but, as their starting point was erroneous, they did not reach the true Pepiry-Guaçû, but went down as far as the Apitereby, and, returning upstream, concluded that the river now called das Antas was the Pepiry-Guaçû. But, when they returned to their principal encampment, the surveyors, finding the diary of the demarcation of 1759, learned that they had been misled.

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The commissioners, Cabral (Portuguese) and Varela (Spanish) then sent the surveyors, Saldanha (Portuguese) and Gundin (Spanish), back to search for the true Pepiry-Guaçû, giving them for that purpose an extract from the diary of 1759. Saldanha descended the Rio de Picada (the old Trigoty and false Uruguay-Pitã), entered the Uruguay and proceeded downstream. Gundin, before descending the Uruguay, went upstream, and on August 4 discovered a river at which he left the inscription: "*Te Deum laudamus. August 4, 1788.*" On July 26 Saldanha had discovered the mouth of the true Uruguay-Pitã, and on the 28th that of the Pepiry-Guaçû. August 30, 1788, Gundin arrived and also recognized the river as the true Pepiry-Guaçû of the treaty, nailing to a tree a plate of copper which Varela had given him for that purpose, and upon which were engraved the following words: "*Hucusque auxiliatus est nobis Deus. Pepirí-Guazú, 1788.*" The inscription put up by Saldanha on July 28 was this: "*Sine auxilio tuo, Domine, nihil sumus. Pepirí-Guasú. 1788.*" Thus, by common accord, was the mouth of the Pepiry-Guaçû of the treaty recognized.

Question raised by the Spanish Commissioner in 1789.

But in the following year the Spanish commissioner Varela raised, said the Brizilian case, the question at last to be decided by arbitration, by asserting that the demarcation of 1759 was erroneous and that the Pepiry or Pequiry of the treaty of 1750 was the river discovered by Gundin August 4, 1788, because that river was upstream of the Uruguay-Pitã. In this way there came to be a third Uruguay-Pitã even more to the east than the second, of 1759; and it was claimed that the Pepiry-Guaçû should be transferred farther to the east. This pretension gave rise to a heated discussion between the second (or adjunct) commissioners, Roscio (Portuguese) and Diego de Alvear (Spanish). The latter, under the instructions of his chief Varela, insisted upon a joint survey of the river discovered by Gundin, which the Portuguese called Caudaloso. The principal Portuguese commissioner permitted the exploration to be made with a view to obtain the consent of the Spaniards to a complete survey of the true Pepiry-Guaçû. The survey of Gundin's river was made by Chagas Santos (Portuguese) and Oyárvide (Spanish). The latter gave to the river the name of Pequirí-Guazú, which was never recognized by the Portuguese. Alvear, in his instructions to Oyárvide of November 17, 1789, directed the latter to "survey the river

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which we believe to be the true Pepiry-Guaçû, discovered by our geographer * * * D. Joaquin Gundin," and to endeavor to ascertain whether there was in the immediate neighborhood "another river whose head waters lie near and can be connected with those of our Pequirí, and which, flowing toward the north, shall empty into the Iguaçû," saying, in conclusion, "The existence of such a river, which is very probable, may induce the courts to choose it as a boundary instead of the San Antonio."[1] Chagas Santos accompanied Oyárvide only as far as the source of the Rio Caudaloso or Pequirí-Guazú. Oyárvide, continuing, discovered, June 17, 1791, the sources of a river to which he gave the name of San Antonio Guazú. The survey of the S. Antonio of the treaty had been made by Chagas Santos and Oyárvide in 1788, and that of the Pepiry-Guaçû, from its mouth to the source of an eastern branch, by Joaquin Felix da Fonseca (Portuguese) and Cabrer (Spanish) in 1789. Cabrer in his diary stated that, being unable to find the mark placed at the principal source of the S. Antonio, he and Fonseca had concluded that the Pepiry-Guaçû had been improperly named and that they wrote upon the copper plate which Gundin had set up there the following words: "*Pepiri proedato nomine vocor, 1790.*" This, said the Brazilian case, could not have been done with Fonseca's knowledge. He had positive orders not to touch the inscriptions placed there in 1788. Veiga Cabral, in his report of the survey made by Fonseca, said nothing as to the "*Pepiri proedato nomine vocor*," nor did it appear in the report of Cabrer, transcribed by Oyárvide,[2] nor was it quoted by Alvear in his discussion with Roscio. Cabrer, in fact, wrote his diary many years after the conclusion of the survey.

Nonapproval of the Spanish Government.

The Spanish Government did not, said the Brazilian case, commit to its commissioners the task of correcting errors of the previous demarcation, and it never took into consideration the change proposed by them in the line defined by the treaty of 1777. Oyárvide, in his *Memoria*, said: "The year 1796 having come without any solution of the contention as to the drawing of the divisional line from the Uruguay to the Iguazu * * *."[3] And in his diary: "The Court of Madrid never replied. Why, we do not know, but it is very easy to

[1] Calvo, IX. 200.
[2] Calvo, IX. 289.
[3] Oyárvide, Calvo, X. 67.

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infer. Nor did they ever acknowledge the receipt of the plans and geographical maps which were sent there even in triplicate for information regarding the demarcation."

Misuse of the Term "Misiones."

In the region of the river Plate, said the Brazilian case, the controversy between Brazil and the Argentine Republic was commonly called the question of *Misiones*, a designation which certain recent Brazilian writers had adopted. From the Argentine point of view the designation was proper, since the controversy turned upon the question what was to be the eastern boundary of the Argentine territory of Misiones; but from the Brazilian and historical point of view it was improper, since the territory in dispute never formed part of the old missions of the Society of Jesus in Paraguay, afterward called by the Spaniards *Provincia de Misiones*. In the seventeenth century the Spaniards of Paraguay founded to the east of the Paraná and north of the Iguaçû, in the region called *Provincia de Guayra*, two small cities, Guayra or Ciudad Real and Villa Rica. At the beginning of the same century the Jesuits of Paraguay began to convert the Guarany Indians in that region. The missions and cities of the Guayra were bounded by the Iguaçû on the south and the Paranapanema on the north, the Paraná on the west, and the Serra dos Agudos on the east. Besides the missions of the Guayra, the Jesuits had, in 1630, three missions to the west of the Paraná, five between the Paraná and the Uruguay (including Assumpcion del Acaraguay or Acarana, the nearest they had to the Pepiry), and three to the east of the Uruguay. In 1630 and 1631 the Paulistas, led by Antonio Raposo Tavares, attacked and destroyed, in the province of Guayra, the missions of S. Miguel, S. Antonio, Jesus Maria, San Pablo, San Xavier, S. Pedro, and Concepcion de los Gualachos. "We have come," said they, "to drive you out of all this region, because these lands are ours, and not those of the King of Spain." Collecting then at Loreto and S. Ignacio Miní the fugitive Indians of the other missions, the Jesuits resolved to abandon the province of the Guayra and to settle in the territory lying between the Paraná and the Uruguay. The transmigration of the 12,000 remaining catechumens was effected in 1631, under the direction of Fr. Montoya. In 1632 the Paulistas took Villa Rica and Ciudad Real; and in the following year, when they were marching to the mouth of the Iguaçû, the missions of Santa Maria Mayor, near the Salto Grande (Great Falls) of that river, and that of the Natividad of the Acaraig were hastily evacuated. From

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1633 the Paulistas remained masters of all the territory to the east of the Paraná and to the north of the Iguaçû. In 1631 the Jesuits of Paraguay began to extend their settlements to the east of the Uruguay, where they had, as before stated, three missions. In 1636 they had fifteen, included between the Uruguay on the west, the Ijuhy (then Iiuii), and the Serra Geral on the north, the Ibicuhy (then Ibicuity) and the Jacuhy (Igay) on the south, and the Taquary (at that time Tebicuary) on the east. All these settlements were taken by the Paulistas, under the command of Raposo Tavares, or abandoned by the Jesuits and their Indians after stubborn fights at Jesus Maria and S. Christoval in 1636, and at Caáro, Caázapáguaçû, Caázapáminí, and S. Nicolas, in 1638. Retiring then to the west, the Jesuits founded between the Uruguay and the Paraná the missions of Santo Thomé, Apostoles, San Carlos, S. José, Candelaria, Martyres, S. Cosme, Sant' Ana, S. Nicolas, and S. Miguel. That of Assumpcion, founded in 1630 on the right bank of the Uruguay and of the Acaraguay or Acarana, was transferred in 1638 to the mouth of the Mbororé. The chronicles and accounts, either printed or manuscript, of the Jesuits of Paraguay and those of S. Paulo, in Brazil, all testified, said the Brazilian Case, that shortly after the Spaniards and their missionaries were driven from the province of the Guayra, all the territory bounded on the east by the Paraná and on the south by the Uruguay was under the sway of the Paulistas. After 1638 they freely overran all the lands stretching to the south and east of the Uruguay. Subsequently they were occupied in the discovery and working of gold mines in the interior of Brazil (Minas Geraes and Goyaz) and in the west (Matto Grosso). The Jesuits were thus able to return to the east bank of the Uruguay, removing thither in 1687 the missions of S. Nicolas and S. Miguel, and creating five others: S. Luiz Gonzaga (1687), S. Borja (1690), S. Lorenzo (1691), S. Juan Bautista (1698), and S. Angel (1706). After 1706, said the Brazilian case, the eastern and northern boundaries of the Spanish occupation in the territory called Misiones never varied. To the south, forests inhabited by savages closed all communication with the territory in dispute. To the west and north of the Paraná, S. Xavier, on the right bank, and Corpus, on the left, continued to be, as they had been since 1641, the most advanced Spanish positions, and the nearest to the Brazilian frontier on the Pequiry or Pepiry, afterward Pepiry-Guaçû. The affluent Mbororé remained the boundary of the Spanish possessions on

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the Upper Uruguay. Thence, upward, the Indians of Misiones did not venture overland. In 1759 they still went up in their canoes as far as the Itacaray, but in 1788 they no longer went so near the Brazilian frontier. Until the middle of the eighteenth century the Jesuits of Misiones maintained on the Uruguay, near the Yabotí, or Pepiry-Miní—above the Itacaray, but to the west of the Salto Grande of the Uruguay, and therefore of the Pepiry or Pequiry—a post of observation to give notice of the movements of the Brazilians of S. Paulo, or Paulistas. The Spaniards of the second demarcation were unable to find a single guide who knew the Uruguay above the mouth of the Cebollaty (now Turvo), much less the contested territory. No document existed, said the Brazilian case, by which, except when they went with the Portuguese to make the demarcation under the treaties of 1750 and 1777, the presence of Spaniards in this territory during the three centuries comprising the colonial period could be proved.

Route of Cabeza de Vaca.

In some modern Spanish and Argentine maps, said the Brazilian case, the route was erroneously marked along the Iguaçû of the famous Spanish expedition led by Alvar Nuñez Cabeza de Vaca, adelantado and governor of the Rio de la Plata, which, setting out at the end of 1541 from the coast of Santa Catharina, continued by land as far as the city of Asuncion of Paruguay, and reached its destination in the following year. On Map VI. of the *Atlas de la Confédération Argentine*, by Martin De Moussy, the course was marked along the northern bank of the Iguaçû; the *Carta Geographica de la Provincia de Corrientes*, dated 1865, and the map of Cabrer of 1802, represented it as passing along the southern bank, and therefore through the contested territory. But, said the Brazilian case, on the map of Cabrer itself there was a note by the author exactly describing the itinerary. Both Brazilian and Argentine writers had been led into error as to the route of the expedition by confusing two rivers of the same name—one the Pequiry, an affluent of the left bank of the Paraná, and the other the affluent of the right bank of the Uruguay. By the Commentaries of Pero Hernandez, secretary to Cabeza de Vaca,[1] it appeared that

[1] Comentarios de Alvar Nuñez Cabeça de Vaca adelantado y gouernador de la prouincia del Rio de la Plata. Scriptos por Pero Hernandez scriuano y secretario de la prouincia. * * * Valladolid, 1555 in 4°. The Congressional Library has this edition, as well as a French translation, published in 1837, by Ternaux Compans.

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the expedition started from the river Ytabucû, now Itapucû, on the littoral of Santa Catharina, ascended the range of mountains called Serra do Mar, went through the table-land of Curityba, crossed over from the left to the right bank of the Iguaçû, thence over the Tibagy (Tibagi), and, after following the left bank of this affluent of the Paranapanema, crossed several rivers, among them *the Pequiry, an affluent of the Paraná*, and continuing in a southerly direction, parallel to the course of the latter river, reached the right bank of the Iguaçû immediately above its Salto Grande (Great Falls). It then proceeded down the Iguaçû as far as its confluence with the Paraná, and crossed the latter river and the Paraguay. The most ancient chronicler of Paraguay and the river Plate, Rui Diaz de Guzman, had also correctly described the route of the expedition. The Dutch and French cartographers of the sixteenth and seventeen centuries at once noted on their maps of Paraguay the rivers, settlements, and principal geographical and ethnographical names mentioned by Hernandez.[1] Lozano stated in 1745 that no Spaniards ever saw the Pepiry;[2] and the Pepiry of Lozano and the Jesuits was a river below the Great Falls of the Uruguay, in the Argentine territory of Misiones. The territory in dispute, declared the Brazilian case, "was indisputably discovered by Brazilians, and was always an integral part of Brazil."

Date of the Argentine Claim.

The Argentine claim to the Brazilian territory to the east of the Pepiry-Guaçû and of the Santo Antonio was, said the Brazilian case, of very recent date. The Brazilian case reviewed the history of the unratified Brazilian-Argentine treaty of limits of December 14, 1857, and maintained that, as the act of approval of the Argentine congress referred to the rivers "lying more to the east bearing those names [Pepirí Guaçû and Santo Antonio], as shown by the operation referred to in Article II. of the

[1] Among others the maps of Paraguay by Jodocus Hondius, J. Janssonius, and G. Blaeu, in which the following names are met with, as first given in the *Comentarios:* Ytabuca (Ytabucû in the *Comentarios*), Anniriri (Añirirí), Cipopay (Cipoyay), Tocanguazu (Tocanguacú), Tibagí, Taquarí, Abangobí, Tocanguzir (Tocangucir), in latitude 24° 30′ according to the *Comentarios*, Piquirí affluent of the Paraná, and the river Yguaçû, Iguaçû, with its Salto (Falls). All modern historians who have written on the expedition have treated the *Comentarios* as the only incontestable source of information. (Historia Argentina por Luis L. Dominguez, 4th edition, Buenos-Ayres, 1870, p. 58).

[2] Hist. de la Conquista del Paraguay, Lib. I. Cap. 2.

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same" (i. e., the rivers "which were surveyed in 1759 by the delimitation commissioners under the treaty of January 13, 1750"), it must, in order to have any meaning at all, have referred to the rivers actually surveyed and adopted, as distinguished from the Pepiry of the Jesuits below the Great Falls of the Uruguay. There were no rivers embraced in any operation of 1759 east of those actually adopted—the rivers defended by Brazil. It was not strange, therefore, that Brazil should have insisted upon the exchange of the ratifications of the treaty as approved by the Argentine congress. From 1859 to 1876 negotiations were suspended, but in the latter year they were renewed. It was not however till 1881, declared the Brazilian case, that the pretension of the Argentine Government was clearly defined. A decree of the Brazilian Government, No. 2052, of March 16, 1859, had ordered two military colonies to be erected to the east of the Chapecó and Chopim in the province of Paraná. In 1881 the minister of war took measures to give it effect. Thereupon, a report having been published to the effect that two colonies were about to be established to the west of those rivers, the Argentine minister at Rio de Janeiro made some oral representations on the subject. The incident did not give rise to any exchange of notes, but it revealed the fact that the Argentine Republic considered the territory to the east of those rivers contestable, and assigned as the eastern boundary of the Argentine pretension the rivers Chapecó and Chopim. The Argentine Republic thus revived the question raised in 1789 by the Spanish commissioners of the second demarcation.

Brazilian Settlements.

Nevertheless, the Argentine Government could not, said the Brazilian case, have been ignorant of the settlements of the Brazilians in those regions, since it had a legation at Rio de Janeiro, and official documents made the facts public as early as 1841. In 1841 the president of the province of S. Paulo, Raphael Tobias de Aguiar, announced in his report to the provincial legislative assembly the occupation of Campo de Palmas by two expeditions from Curityba, then the chief town of a comarca forming a part of that Brazilian province. These expeditions were preceded by three others, namely, one from Palmeiras in 1836, uner the lead of Father Ponciano José de Araujo, rector of that parish, and José Joaquim de Almeida, afterward a colonel in the national guard; and two from Guarapuava, having as leaders José Ferreira dos Santos and Pedro

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de Siqueira Côrtes. In 1840 a company of the military police of S. Paulo ("Municipaes Permanentes") was detached to Campo de Palmas under Capt. Hermogenes Carneiro Lobo. This company was created by an act of March 16, 1837, of the provincial legislative assembly of S. Paulo for the special purpose of occupying Campo de Palmas.[1] And the persons composing the different expeditions being in hot dispute concerning the division of the land, Lawyer João da Silva Carrão, afterward minister of state and senator of the empire, and Maj. Pinto Bandeira were chosen as arbitrators to settle the difficulty. April 4, 1840, they started from Curityba, and they arrived at Campo de Palmas on the 28th of May, remaining there until August. In the same year Commander Carneiro Lobo founded on the banks of the stream Cachoeira the village called from that time Capella de Palmas. Campo Erê, founded in 1840, was the most advanced post of the Brazilians in the territory in dispute. In 1840 37 farms were established in Campo de Palmas, which in 1850 had nearly 36,000 head of cattle. In 1850 Campo Erê had 5 farms. The lands owned by the farmers of that place were registered by the collector of Palmas in 1855 and 1856. In 1841 and 1844 Gen. Antero de Brito, president of Santa Catharina, another Brazilian province, protested against the exercise of jurisdiction by the authorities of S. Paulo in Campo de Palmas, maintaining that all the territory to the east of the Pepiry-Guaçû and of the Santo Antonio belonged to the province of Santa Catharina. The protest of Santa Catharina became public and gave rise to discussions. The report of the president of S. Paulo of 1841 was also a public document, printed and distributed. By the act of August 29, 1853, the general legislative assembly of the empire detached from the province of S. Paulo the

[1] In the *Revista do Instituto Historico e Geographico do Brazil* (Review of the Historical and Geographical Institute of Brazil), Vol. XIV. year 1851, pp. 425 to 438, is to be found an account, the translation of whose title is: "An account of the discovery of Campo de Palmas in the Comarca of Coritiba, province of S. Paulo, of its colonization, and of some events which occurred there to the present month of December 1850, written and presented to the Historical Institute by Senhor Joaquim José Pinto Bandeira."

At page 430 the following occurs: " * * * but as the provincial assembly, by a law of 16th March, 1837, had created a company of military police (municipaes permanentes), in order that it might make on the part of the government the discovery of these plains, the government ordered it to be sent there to protect the farmers."

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comarca of Curityba, raising it to a province with the name of Paraná, and the province of Santa Catharina claimed from Paraná the territory to the south of the Iguaçû and to the east of the Santo Antonio and the Pepiry-Guaçû, which it formerly claimed from S. Paulo. By an act, No. 22, February 28, 1855, of the legislative assembly of Paraná the settlement of Palmas was made a parish. Another act of the same assembly, of October 9, 1878, raised Palmas to a town. Later, by other acts of the legislative assembly of Paraná, Palmas was raised to a comarca, and in this district a second parish was created whose seat was the village of Boa Vista. All these public acts, said the Brazilian case, passed without protest from the Argentine Government.

Argentine Maps.

For seventy years the Portuguese maps, then Brazilian maps, and generally, all the foreign maps, gave, said the Brazilian case, as the boundary between Brazil and the provinces of the river Plate, afterward the Argentine Confederation and Argentine Republic, the Pepiry-Guaçû and the Santo Antonio, as claimed by Brazil. The Argentine Government not only remained silent, but it even authorized or assisted in the publication of maps which represented the divisional line as running along those rivers, e. g., the *Mappa de la Republica Argentina*, by the engineers Allan and Campbell, dated 1855, "and printed by order of the Argentine Government;" the *Confederacion Argentina*, of 1863; the *Provincia de Corrientes*, of 1865; the well-known *Atlas de la Confédération Argentine*, by V. Martin de Moussy, "an indisputably official publication;" and the map of 1875, made by the engineers A. de Seelstrang and A. Tourmente, at Buenos Ayres, specially for the Argentine central commission at the Philadelphia exhibition in 1876, and appended to a book which was profusely distributed at the time in the United States and in Europe by the agents of the Argentine Government. These facts led the Argentine minister for foreign affairs November 20, 1889, to request his colleague, the minister of public instruction, "to order a strict revision of the text-books of national geography," so that new editions might be "in accord with the rights" of the republic. In consequence, the Argentine Government, November 20, 1889, promulgated a decree denying the authority on questions of limits of all maps that were not approved by its department of foreign affairs.

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Concluding Observations.

After briefly reviewing the prior negotiations, the Brazilian case took up the treaty of September 28, 1885, for the survey of the rivers Pepiry-Guaçû, Santo Antonio, and Chapecó, and of the Chopim, supposed to be the San Antonio-Guazú of Oyárvide. The joint commission entered upon its labors in 1887 and concluded them in 1890. It was then ascertained that the S. Antonio-Guazú of Oyárvide was the river Jangada. The Argentine commission proposed to survey this river, but the Brazilian refused, because the treaty and the instructions of 1885 designated the Chopim. The Brazilian Government, however, agreed that the survey should be made. September 7, 1889, was concluded the treaty of arbitration. Some days after its ratification the republic was proclaimed in Brazil, and, at the request of the Argentine minister at Rio de Janeiro, the provisional government agreed to the division of the contested territory, an idea favored by the government of Buenos Ayres since 1881. January 25, 1890, a treaty which divided the territory of Palmas between the contracting parties was signed at Montevideo by representatives of the provisional government of Brazil and representatives of the Argentine Republic. In the Argentine Republic "this solution was received with great enthusiasm." In Brazil "it produced a sentiment of the deepest grief, and raised unanimous and vehement protests." Thus, said the Brazilian case, according to the phrase of an illustrious writer, the question of the territory of Palmas "passed through the great test of the Judgment of Solomon." The special commissioners elected by the Brazilian congress to report upon the treaty of Montevideo recommended that it be rejected and that recourse be had to arbitration. This report was approved at the sitting of August 4, 1891, by 142 ayes to 5 noes.

The Award.

February 6, 1895, there was delivered to the representatives of the contending parties, at the Department of State in Washington, by the Secretary of State, the following award of the President, as arbitrator:

"The Treaty concluded September 7, 1889, between the Argentine Republic and Brazil for the settlement of a disputed boundary question provides, among other things, as follows:

"'ARTICLE I.

"'The contention about the right that each one of the High Contracting Parties judges to have to the territory in dispute between them, shall be closed within the term of ninety days

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to be counted from the ending of the survey of the land in which the headwaters of the rivers Chapeco or Peqiriguazu and Jangada, or San Antonio-Guazú are found. The said survey is understood to end the day on which the commissions appointed by virtue of the Treaty of September 28, 1885, shall present to their governments their reports and plans referred to in Article IV. of the same treaty.

"'ARTICLE II.

"'Should the time specified in the preceding Article expire without an amicable solution being reached, the question shall be submitted to the Arbitration of the President of the United States of America, to whom the High Contracting Parties shall address themselves within the next sixty days, requesting him to accept that Commission.

"'ARTICLE V.

"'The boundaries shall be established by the rivers that either Brazil or the Argentine Republic has designated, and the arbitrator shall be invited to decide in favor of one of the Parties, as he may deem just, and in view of the reasons and the documents they may produce.

"'ARTICLE VI.

"'The decision shall be pronounced within the term of twelve months, counting from the date of the presentation of the expositions, or from the latest one, if the presentation be not made at the same time by both Parties. It shall be final and obligatory, and no reason shall be alleged to obstruct its enactment.'

"The High Contracting Parties having failed to arrive at an amicable solution within the time stipulated as aforesaid, have, in accordance with the alternative provisions of the Treaty, submitted the controverted question to me, Grover Cleveland, President of the United States of America, for Arbitration and Award under the conditions in said Treaty prescribed.

"Each Party has presented to me within the time and in the manner specified in Article IV. of the Treaty, an Argument, with evidence, documents and titles in support of its asserted right.

"The question submitted to me for decision under the treaty afore-aid is, which of two certain systems of rivers constitutes the boundary of Brazil and the Argentine Republic in that part of their adjoining territory which lies between the Uruguay and Yguazu Rivers. Each of the designated boundary systems is composed of two rivers having their sources near together and flowing in opposite directions, one into the Uruguay and the other into the Yguazu.

"The two rivers designated by Brazil as constituting the boundary in question (which may be denominated the Westerly System) are a tributary of the Uruguay and a tributary of

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the Yguazu, which were marked, recognized and declared as boundary rivers in 1759 and 1760 by the Joint Commission appointed under the treaty of January 13, 1750, between Spain and Portugal, to locate the boundary between the Spanish and Portuguese possessions in South America. The affluent of the Uruguay is designated in the report of those commissioners as the Pepiri river (sometimes spelled Pepiry). In certain later documents put in evidence it is called the Pepiri-Guazu. The opposite river flowing into the Yguazu was named the San Antonio by the said Commissioners, and it retains that name.

"The two rivers claimed by the Argentine Republic as forming the boundary (which may be denominated the Easterly System) lie more to the east and are by that Republic called the Pequiri-Guazu (flowing into the Uruguay) and the San Antonio-Guazu (flowing into the Yguazu). Of these two rivers last aforesaid, the first is by Brazil called the Chapeco and the second the Jangada.

"Now, therefore, be it known, that I, Grover Cleveland, President of the United States of America, upon whom the functions of Arbitrator have been conferred in the premises, having duly examined and considered the arguments, documents, and evidence to me submitted by the respective Parties pursuant to the provisions of said Treaty, do hereby make the following decision and award:

"That the boundary line between the Argentine Republic and the United States of Brazil in that part submitted to me for arbitration and decision, is constituted and shall be established by and upon the rivers Pepiri (also called Pepiri-Guazu) and San Antonio, to wit, the rivers which Brazil has designated in the argument and documents submitted to me as constituting the boundary, and hereinbefore denominated the Westerly System.

"For convenience of identification, these rivers may be further described as those recognized, designated, marked and declared as the Pepiri and San Antonio, respectively, and as the boundary rivers, in the years 1759 and 1760, by the Spanish and Portuguese Commissioners in that behalf appointed pursuant to the treaty of limits concluded January 13, 1750, between Spain and Portugal, as is recorded in the official report of the said commissioners. The mouth of the affluent of the Uruguay last aforesaid, to-wit, the Pepiri (also called Pepiri-Guazú) which, with the San Antonio, is hereby determined to be the boundary in question, was reckoned and reported by the said commissioners who surveyed it in 1759 to be one and one-third leagues upstream from the Great Falls (Salto Grande) of the Uruguay, and two-thirds of a league above a smaller affluent on the same side called by the said Commissioners the Ytayoa. According to the map and report of the survey made in 1887 by the Brazilian-Argentine Joint Commission, in pursuance of the treaty concluded September 28, 1885, between the Argentine Republic and Brazil, the distance from

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the Great Falls of the Uruguay to the mouth of the aforesaid Pepiri (also called Pepiri-Guazu) was ascertained and shown to be four and one-half miles as the river flows. The mouth of the affluent of the Yguazu last aforesaid, to-wit, the San Antonio, was reckoned and reported by the said commissioners of 1759 and 1760 to be nineteen leagues upstream from the Great Falls (Salto Grande) of the Yguazu, and twenty-three leagues from the mouth of the latter river. It was also by them reported as the second important river that empties itself on the south bank of the Yguazu above its Salto Grande; the San Francisco, about seventeen and one-fourth leagues above the Great Falls, being the first. In the report of the Joint Survey made in 1788 under the treaty of October 1, 1777, between Spain and Portugal, the location of the San Antonio with reference to the mouth and the Great Falls of the Yguazu agrees with that above stated.

"In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done in triplicate at the City of Washington on the fifth day of February in the year one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.] "GROVER CLEVELAND.

"By the President:

"W. Q. GRESHAM,

"*Secretary of State.*"

Reception of the Award.

February 6, 1895, the Baron de Rio Branco announced the decision of the arbitrator to his government. He received in reply, under date of February 7, from Senhor Carlos de Carvalho, Brazilian minister for foreign affairs, the following telegram:

"The government has received with great satisfaction your telegram announcing the favorable solution of Misiones question. Appreciating your work and that of the special mission, we congratulate you in the name of the country. Present thanks to members of the mission."

On the same day the President of the republic, Senhor Prudente de Moräes, extended the thanks of the nation in the following terms: "In the name of the Brazilian nation I thank you for your never to be forgotten services for the recognition of its rights."

Senhor Carlos de Carvalho also sent to Señor Garcia Mérou, the Argentine minister to Brazil, then at Petropolis, the following telegram:

"The question which has just been settled in a manner honorable to South American civilization, being eliminated from

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the friendly relations between our two countries, the cultivation of those relations will receive a stimulus in the direction of their highest utility, as is demanded by republican liberty and counseled by the interest of both peoples, who will remain more closely united by having a settled boundary line.

"I cordially press the hand of your excellency."

The Argentine minister telegraphed an appropriate reply, in these terms:

"Accept my thanks for your telegram. I regard the question under arbitration which has just been decided as a triumph of both our nations, which, equally strong, patriotic, and virile, have sought on the ground of right and justice a noble solution of controversies which can never be definitively settled by the transitory and ephemeral right of force. This high example given to the sister nations of America by the two countries which, in civilization and power, stand at the head of the South American continent, will in the future bear its fruit as an honorable international precedent.

"This long-standing controversy being ended, nothing can impede the union every day closer of our peoples, called to great and prosperous destinies. I know the sentiments of your excellency in this respect, as your excellency knows mine, and, relying on them, I return the cordial pressure of your hand extended to me, and repeat the expressions of my sincere friendship."

February 12, 1895, President Moräes sent the following telegraphic message to the President of the Argentine Republic:

"A great popular meeting, attended by the Argentine minister, congratulates the two friendly nations on the peaceful solution of the long standing question of the Misiones. Accept my own congratulations for such happy event; receive my affectionate salutations."

The President of the Argentine Republic replied:

"The friendly demonstrations of the Brazilian people toward our own, of which your excellency is so kind as to give me notice, are cordially responded to by the latter. Both peoples have the honor of showing to the world a practical application of the principle of international arbitration, and the Argentine nation, although not favored in the decision of the high judge to whom the solution of the ancient controversy was intrusted, congratulates itself on the disappearance of the only possible cause of dissension with its former ally, with which its constant desire is to bind closer its relations with the ties of friendship and common interest.

"Please accept the expression of my sentiments of affection and high consideration."

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The mass meeting above referred to sent a message to the Baron de Rio Branco, from which the following is an extract:

"The Brazilian and Argentine Republics, in celebrating the victory of peace and right by arbitration, are offering a great and fruitful example to the other American nations. The heart of the nation, throbbing with joy, welcomes throughout the country the glad news of the happy event which puts an end, in a manner so honorable to both nations, to a long-standing controversy."

In the course of his reply, the Baron de Rio Branco said:

"I am sure that the award of the illustrious American, who, animated by an equal regard for both nations, has so carefully and conscientiously exercised his functions as arbiter, has been received with satisfaction in the Argentine Republic, and that this happy and honorable event will tend, as all Brazilians desire, to tighten the bonds of friendship which unite us to our former allies of Caseros and Paraguay."

The representatives of the Argentine Republic and Brazil expressed to the Secretary of State of the United States, in official notes, their appreciation of the President's services as arbitrator, and in due time conveyed in the same manner the thanks of their respective governments.[1]

Question as to the Exchange of Cases.

By Article IV. of the treaty of arbitration, it was provided that each contracting party should, within twelve months from the day of the receipt of the arbitrator's acceptance, present to him a statement, or case, "accompanied by all documents and titles tending to the defense of its right," and that, "this being done, no further addition can be made, except at the request of the arbitrator, who will have the right to order all necessary information." No stipulation was made for an exchange of cases; but after the cases were presented the representative of Brazil proposed to the representative of the Argentine Republic that they should be mutually exchanged. This proposition was

[1] Mr. Juan S. Attwell, chargé d'affaires ad interim of the Argentine Republic at Washington, in a note of May 7, 1895, inclosed a copy of an instruction to Dr. Zeballos from the minister for foreign affairs, in which the latter said: "Although the decision does not favor the interests of this government, His Excellency the President, accepting it as is required by our agreement with the Government of Brazil, instructs me to announce to him [the President of the United States], through your Excellency, his acceptance, and at the same time to return his thanks for additional service rendered to the republic."

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declined, on the ground that the treaty did not authorize it.[1] The representative of Brazil then applied, through the Department of State, to the arbitrator, asking him to direct an exchange of cases, on the ground that such exchange was proper, if not essential, (1) in itself, in order to insure a certain and satisfactory termination of the litigation, and (2) under the treaty to enable the respective representatives to prepare themselves to give any information which the arbitrator might order. On this application the arbitrator omitted to render any decision, and the exchange of cases was not made. The application was thus practically denied. In view of this fact it is manifestly advisable, if an exchange of cases is desired, to make an express provision for it in the treaty.

[1] The representative of the Argentine Republic also replied that he had on a previous occasion suggested that authority should be obtained for an exchange, but that the representative of Brazil was not then inclined to cooperate in the measure. The understandings of the two representatives on this particular subject were not in accord, but this difference did not affect the main question.

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CHAPTER XLIX.

ARBITRATIONS BEFORE UNITED STATES MINISTERS.

1. The Cravairola Boundary.

Subject of Controversy.

By a convention signed at Berne December 31, 1873, the governments of Italy and Switzerland agreed to submit the controversy between them as to the national ownership of the Alp of Cravairola to the decision of two commissioners and an umpire. As umpire, Mr. George P. Marsh, United States minister at Rome, was chosen, and he was authorized by his government to accept the appointment.[1] Of the subject of controversy Mr. Marsh gave the following description:[2]

"The Alp, a mountain pasturing ground of Cravairola, which is the debatable district, is an irregular triangle, containing about 4,500 acres, lying on the eastern slope of the mountain chain which forms the watershed between the Italian valley of the Toceia, or Tosa, and the Swiss valley of the Maggia, in the canton Ticino. The Tosa and the Maggia both empty into Lago Maggiore, the former near Pallanza, the latter near Locarno. The height of the pastures of Cravairola above the sea is from 4,500 to 9,000 feet, and they are accessible by rugged mule paths from the town of Crodo, in the Val Tosa, and from that of Campo, in the Val Maggia, and the lowest passage from Crodo being over a ridge nearly 7,000 feet above that village. The surface of the Alp is everywhere steeply inclined to the east, and much of it is bare rock, but it contains valuable pastures and a certain extent of evergreen forest. There are no dwellings upon the Alp, except a few rude huts, occupied by the herdsmen and dairymen from the 24th of June to the 8th, and sometimes 15th, of September, the severity of the climate rendering the district uninhabitable during the rest of the year. From the Swiss village of Campo the lower limit of the Alp may be reached by a path, barely practicable, in three or four hours. The products of pastoral industry can be transported over the crest of the mountain by men, and to

[1] Mr. Fish, Sec. of State, to Mr. Marsh, August 4, 1874, MSS. Dept. of State.

[2] Mr. Marsh to Mr. Fish, September 15, 1874. (For. Rel. 1875, II. 749.)

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some extent by mules; but the timber from the forest can be carried to market only by floating it down the torrent Rovano, which arises in the Alp, and thence by the river Maggia to the lake."

Arbitral Proceedings.

Mr. Marsh's first meeting with the arbitrators was held at Milan. It was there agreed that, before entering upon any discussion, the arbitrators, the umpire, and the agents should visit the territory in dispute. They accordingly traversed the Alp and inspected it, and returned to Milan by way of Val Maggia and Lago Maggiore without having been forty-eight hours out of the Kingdom of Italy. It was then arranged that the arbitrators should examine the testimony and the arguments, and notify Mr. Marsh in case they should be unable to agree. Mr. Marsh then left Milan, but soon received a telegram requesting his return, as the arbitrators could not agree. He returned September 16, 1874, and immediately entered upon his duties as umpire. The proofs of the parties and the arguments of the agents were laid before him, and he devoted eight days to their examination and the preparation of a decision, which he pronounced in Italian on Wednesday, the 23d of September.

The Award.

Mr. Marsh expected when his decision was pronounced to send an English translation of it to his government, but he omitted subsequently to send either a translation or the original text. For the following authentic copy of the original I am under obligations to the Italian Government and the United States embassy at Rome:

[1] *LODO PRONUNZIATO DAL SOPRA-ARBITRO GIORGIO P. MARSH, 23. SETTEMBRE 1874.*

Parere di Giorgio P. Marsh, arbitro supremo nel "Compromis arbitral concernant la fixation définitive de la frontière Italo-Suisse au lieu dit: Alpe de Cravairola" concluso tra i governi d' Italia e della Svizzera, addí 31 Dicembre mille ottocento settanta-tre.

L' Onorevole Comm. Enrico Guicciardi, Senatore del Regno d' Italia e l' onorevole Consigliere degli Stati Hans Hold, Colo-

[1] DECISION OF ARBITRATION PRONOUNCED BY THE UMPIRE, GEORGE P. MARSH, SEPTEMBER 23, 1874.

Opinion of George P. Marsh, umpire under the arbitral agreement concerning the definite fixing of the Italian-Swiss frontier at the place called: Alpe de Cravairola, concluded between the governments of Italy and Switzerland on the 31st of December one thousand eight hundred and seventy-three.

The Honorable Commissioner Enrico Guicciardi, Senator of the Kingdom of Italy, and the Honorable Councillor of the States, Hans Hold,

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nello dello stato maggiore federale Svizzero, debitamente nominati dai respettivi governi d' Italia e della Confederazione Svizzera, arbitri per la definitiva determinazione del Confine Italo-Svizzero nel luogo detto *Alpe Cravairola*, avendo per mezzo di un istromento in data tredici luglio mille ottocento settanta quattro ed in virtù del quarto articolo del suddetto "Compromis Arbitral" scelto il sottoscritto come Arbitro Supremo pel caso ch' essi non potessero addivenire ad una soluzione di detta questione; ed i medesimi arbitri avendo debitamente dichiarata nel verbale e notificata al detto arbitro suprema l' impossibilità in cui trovavansi di venire ad un accomodamento; il sottoscritto avendo accuratamente considerato gli argomenti e le prove addotte dalle alte parti contrattanti mediante i loro rispettivi agenti, procede e pronunzia sulla propostagli questione la seguente sentenza:

La questione sottoposta a questo Tribunale Arbitrale dai due governi interessati è formolata come segue nel primo articolo del *Compromis Arbitral* dietro l'autorità del quale il Tribunale agisce:

"La ligne frontière susmentionnée qui [sépare le territoire italien du territoire de la Confédèration Suisse] doit-elle, comme l'estime la Suisse, suivre le faite de la chaine principale en passant par la corona de Groppo, Pizzo dei Croselli, Pizzo Pioda, Pizzo del Forno—Pizzo del Monastero;—ou bien doit-elle, comme l'estime l'Italia quitter la chaine principale au sommet désigné Sonnenhorn Δ 2788^{m} pour descendre vers le ruisseau de la vallée de Campo en suivant l'arête secondaire nommé Creta Tremolina [ou Mosso del Lodano 2556^{m} sur la carte suisse] rejoindre la chaine principale au Pizzo del Lago Gelato"?

Colonel of the Swiss federal staff, duly nominated by the respective governments of Italy and the Swiss Confederation, arbitrators for the definite determination of the Italian-Swiss frontier at the place called *Alpe Cravairola*, having, by means of an agreement dated July thirteen one thousand eight hundred and seventy-four and in virtue of the fourth article of the above-mentioned "arbitral agreement," selected the undersigned as umpire in case they could not reach a solution of the said question; and the same arbitrators having duly declared in a report and notified the said umpire that they found it impossible to reach an agreement; the undersigned having carefully considered the arguments and the proofs submitted by the high contracting parties through their respective agents, proceeds and pronounces on the subject submitted to him, the following decision:

The question submitted to this Arbitral Tribunal by the two interested governments is formulated as follows in the first article of the arbitral agreement, by which authority the Tribunal acts:

Ought the frontier line above mentioned [which divides the Italian territory from the territory of the Swiss Confederation] to follow, according to the opinion of Switzerland, the summit of the principal chain by passing by the Crown of Groppo, Peak of the Croselli, Peak Pioda, Peak of the Furnace, Peak of the Monastery; or ought it, according to the opinion of Italy, to leave the principal chain at the specified summit of Sonnenhorn Δ 2788^{m} in order to descend towards the stream of the valley of Campo by following the secondary ridge called Creta Tremolina [or Mosso del Lodano 2556^{m} on the Swiss map], to meet the principal chain at the Peak of the Frozen Lake"?

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Non risulta chiaro al sottoscritto se le alte parti contratanti abbiano inteso di autorizzare gli arbitri a determinare una linea di frontiera dietro considerazioni di mera convenienza ovvero se si aspetti che risolvano la questione secondo i principi dello stretto diritto. Egli è quindi necessario esaminare le considerazioni e gli argomenti da essi presentati tanto riguardo alla convenienza quanto rispetto al diritto.

In primo luogo adunque riguardando alla semplice convenienza e lasciando da parte per ora la questione del diritto:

Nell' interesse della Svizzera si insiste sul fatto che il territorio conteso è molto più accessibile dalla Valle Maggia che non dal Val Antigorio, che quindi può essere più convenientemente e più vantaggiosamente amministrato dalle autorità Svizzere che non dalle italiane, le quali non possono accedervi che per tre mesi dell' anno, e che in conseguenza tutti i diritti e gl' interessi dei possidenti relativi si alle persone che alle proprietà, possono essere più efficacemente protetti dalle istituzioni e dalle autorità giudiziarie ed esecutive della Svizzera che non da quelle dell'Italia.

Si adduce inoltre che per mancanza di controllo legale e di sorveglianza degli attuali occupanti il suolo, le condizioni fisiche del territorio corrono rapidamente a rovina, diminuendo la estensione dei pascoli e delle praterie per la invasione dei cespugli alpini, che secondo le regole di una savia amministrazione debbono essere stirpati,—e per il continuo diluvio del suolo dovuto ad un taglio indiscreto dei boschi che debbono essere preservati, ed alla negligenza dei possessori nel prendere le opportune misure per prevenire il male mediante nuove piantagioni, rinzollando la terra sciolta intorno alle sorgenti

It is not clear to the undersigned whether the high contracting parties have intended to authorize the arbitrators to determine a frontier line with a view to mere convenience or whether it is expected that they should solve the question strictly according to the principles of right. It is therefore necessary to examine the considerations and arguments presented by them as well with regard to convenience as with respect to right.

In the first place therefore, considering simply convenience and leaving aside for the present the question of right:

In the interest of Switzerland the fact is insisted on, that the contested territory is much more accessible from the Valle Maggia than from the Val Antigorio; that therefore it can be more conveniently and more advantageously administered by the Swiss authorities than by the Italian, the latter being able to approach it only during three months of the year; and consequently that all the rights and interests of the residents, both as to person and as to property, can be more effectually protected by the institutions and the judicial and executive authorities of Switzerland than by those of Italy.

It is also alleged that for want of legal control and of oversight of the actual occupants of the soil, the physical condition of the territory is rapidly deteriorating, by the diminution of the extent of pastures and grazing grounds, by the invasion of Alpine bushes, which, according to the rules of a wise administration, ought to be eradicated,—and by the continuous deluging of the soil due to an injudicious cutting down of forests that ought to be preserved and to the negligence of the owners in not taking proper measures to prevent the evil by new planting, settling

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e sulle rive dei torrenti e costruendo barriere nei letti dei medesimi.

Di più si osserva che soverchie ed irregolari flottazioni dei legnami tagliati su quell' Alpe, giù nei torrenti pei quali le acque si scaricano nella Maggia cagionano mediante le numerose chiuse un cumulo straordinario d' acque, le quali precipitandosi giù per la valle, quando si aprono le dette chiuse, recano grave ingiuria non solo alle sponde dei torrenti nell' Alpe stessa ma in maggiore proporzione a quelle delle Rovana nel Comune di Campo.

Si aggiunge che l' azione di quel torrente produce già effetti dannosissimi sul regime della Maggia—che la violenza e le devastazioni del torrente stesso vanno continuamente crescendo per le summentovate cagioni e si crede perfino che una sensibile influenza ne derivi sul letto del Lago Maggiore allo sbocco della Maggia, quindi sulla navigazione di una parte del medesimo.

Si insiste poi sul fatto che questi danni già tanto contrari agli interessi della popolazione svizzera e del suo territorio possono essere prevenuti solo mediante l' applicazione all' Alpe di Cravairola dei moderni metodi concernenti l' economia forestale e la regolazione delle acque.

Or questo, dicesi, può difficilmente esser fatto dal governo Italiano, a motivo dell' inaccessibilità del territorio dalla parte italiana dei monti, e perchè l' Italia non ha sufficiente interesse nel proteggere i boschi ed il suolo di quell' Alpe da costituire un motivo adequato al suo intervento in siffatta impresa; ed infine perchè la spesa per l' applicazione di tali misure fatta dall' Italia sarebbe molto maggiore che se venisse compiuta dalla Svizzera come parte del suo regolare sistema forestale.

the loose earth around the springs and the edges of the torrents and constructing barriers in the beds of the same.

It is moreover observed that the excessive and irregular floating of timber, cut on those Alps, down in the torrents whose waters are discharged in the Maggia occasions, owing to the numerous enclosures, an extraordinary accumulation of water, the descent of which down through the valley, when those enclosures are opened, causes grave injuries not only along the edges of the torrents in the Alp itself, but in a greater proportion along those of the Rovana in the commune of Campo.

It may be added that the movement of that torrent already produces most damaging effects on the course of the Maggia, that the violence of the torrent and its devastations are constantly increasing for the abovementioned causes, and that it is even believed that it has a sensible influence upon the bed of Lake Maggiore at the mouth of the Maggia, and hence upon the navigation of a part of the same.

The fact is insisted upon that these damages, already so prejudicial to the interests of the Swiss population and its territory, can be prevented only by the application to the Alp of Cravairola of modern methods concerning forestal economy and the regulating of the waters.

Now this, it is said, can hardly be done by the Italian government, on account of the inaccessibility of the territory from the Italian side of the mountains, and because Italy has no sufficient interest in the protection of the forests and soil of these Alps to make it an adequate subject for her intervention in such an undertaking; and lastly because the cost of the application of such measures if taken by Italy would be far beyond their cost to Switzerland as a part of her regular forestal system.

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Forse non è fuori luogo l' osservare qui che quantunque la Svizzera, nel caso ove il conteso territorio venisse assegnato all' Italia, non potesse addottare nessuna misura di sicurezza e di miglioramento nei limiti dell' Alpe medesima, pur nondimeno nel caso di tale assegnamento, il quarto Articolo della convenzione delle Isole Borromee dell' anno 1650 diventerebbe nullo in virtù dell' articolo settimo della medesima convenzione e che in conseguenza la Svizzera sarebbe libera di proibire la flottazione di legnami da quell' Alpe ed il loro passagio attraverso il territorio svizzero, e di dar forza a tale proibizione colla confisca del legname stesso o con qualche altro mezzo legale e così proteggere le sponde della Rovana dai danni provenienti da quella cagione.

Per quanto concerne i fatti sovracitati convien ricordare che nell' argomento dell' avvocato Scaciga della Silva, messo innanzi dagli agenti italiani, si asserisce che la forza produttiva dell' Alpe è già diminuita di una metà; e dalle relazioni degli agenti delle due parti risulta che la diminuzione è di gran lunga maggiore. Oltre a ciò riesce evidente da una superficiale ispezione del territorio e dei possessi del Comune di Campo che i danni fisici, i quali sono risultati oppur si temono da una cattiva amministrazione del suolo e dei boschi dell' Alpe, non sono stati esagerati dai rapporti degli agenti della Svizzera.

Si suggerisce infine che dietro i principi generali della politica economia egli è convenientissimo che il conteso territorio sia assegnato a coloro che possono trarre maggior profitto e che l' Alpe di Cravairole sarebbe di maggior valore per gli abitanti dei communi svizzeri adiacenti di quel che può essere per possessori così distanti como quelli di Crodo. E questo

Perhaps it is not out of place to observe here that though Switzerland, in case the contested territory should be assigned to Italy, could not adopt any measure of safety or of improvement within the limits of these same Alps, yet, in case of such an assignment, the fourth Article of the Convention of the Borromee Islands of the year 1650 would become annulled in virtue of Article seven of the same Convention, and, consequently, Switzerland would be free to prohibit the floating of timber from those Alps across Swiss territory, and to enforce such prohibition by the confiscation of the timber itself or by any other legal means, and thus to protect the banks of the Rovana from damages occurring from that cause.

In connection with the above-mentioned facts, it is proper to remember that in the argument of Lawyer Scaciga della Silva, submitted by the Italian agents, it is asserted that the productive power of the Alps is already diminished by half; and from the reports of the agents on both sides it appears that the diminution has been going on for a long time. Besides, it is evident by a superficial inspection of the territory and of the landed property of the Commune of Campos, that the physical damages that have resulted or those that are feared from a bad administration of the soil and forests of the Alps, have not been exaggerated in the reports of the Swiss agents.

Finally, it is suggested that, according to the general principles of political economy, it is most expedient that the contested territory should be assigned to those who can derive the most profit from it, and that the Alp of Cravairola would be of greater value to the inhabitants of adjacent Swiss communes, than it could be to owners so distant as those of Crodo.

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argomento acquista maggior forza dalla giá fatta osservazione che cioè sta in potere della Svizzera di addottare severe misure legali per la protezione del suo territorio ed in tal modo di togliere ai legnami dell' Alpe ogni valore mercantile nelle mani degli occupanti italiani.

Queste osservazioni, che sono qui imperfettamente adombrate ed altri analoghi argomenti che si potrebbero addure, paiono al sottoscritto di non lieve peso, ed egli è pienamente convinto che se si potesse trovare un soddisfacente compenso pei comuni ed i particolari italiani, occupanti ora l'Alpe di Cravairola, gli interessi dei due stati sarebbero effettivamente promossi dalla cessione alla Svizzera della sovranità e della proprietà del territorio in discorso. Fortunatamente i due stati hanno pochi o nessun interessi opposti oppur rivali; al contrario vi è solidarietà d' interessi fra di essi. Ciascun dei due trae vantaggio dalla materiale prosperità e dal progresso politico e sociale dell' altro; ed il rimuovere da essi ogni causa di dissentimento e di irritazione è altamente vantaggioso ad ambedue.

Se dunque risultasse chiaro che gli arbitri hanno la facoltà di dirigersi dietro considerazioni di mera convenienza e se essi od altri arbitri fossero autorizzati a fissare un compenso agli attuali proprietari del suolo, il sottoscritto non esiterebbe nel dire che la sovranità e la proprietà dell' Alpe devono essere concesse alla Svizzera e che un giusto equivalente deve essere accordato agli attuali occupanti per il trasferto della proprietà.

Ma i termini del "Compromis" non implicano in nessun modo in se stessi un siffatto potere degli arbitri e l' assenza di ogni provvedimento per il compenso degli attuali proprietari del suolo conduce il sottoscritto a credere che le alte parti contrat-

And this argument acquires greater force from the observation already made, viz, that it is in the power of Switzerland to adopt severe legal measures for the protection of her territory and by such means to deprive Alpine timber of any mercantile value in the hands of Italian residents.

These observations, here imperfectly sketched, and other analogous arguments which could be adduced, seem to the undersigned to be of no light weight, and he is fully convinced that if a satisfactory compensation could be found for the communes and the Italian private citizens, residing at present in the Alp of Cravairola, the interests of the two countries would be effectively promoted by the cession to Switzerland of the sovereignty and ownership of the debated territory. Fortunately, the two countries have few or no opposite or even rival interests; on the contrary, there is solidarity of interests between them. Each of the two derives advantage from the material prosperity and the political and social progress of the other; and the removal from them of any cause of dissension and irritation is highly advantageous to both.

If therefore it were clear that the arbitrators had the power to follow considerations of mere convenience, and if they or other arbitrators were authorized to fix a compensation for the present owners of the soil, the undersigned would not hesitate to say that the sovereignty and the ownership of the Alp ought to be ceded to Switzerland and a just equivalent granted to the actual residents for the transfer of the property.

But the terms of the agreement do not in any way imply that such a power is conferred on the arbitrators; and the absence of any provision for the indemnity of the present owners of the soil induces the under-

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tanti non intendevano conferire ai loro arbitri una siffatta autorità. Per di più è opinione del sottoscritto che la estensione delle istituzioni delle leggi e delle amministrazioni svizzere a quel territorio mentre i proprietari del medesimo continuerebbero a rimaner soggetti del regno d' Italia, e risiederebbero per la massima parte dell' anno in quel paese, condurebbe a gelosie, dissensi e contese senza fine e più nocive alla pace ed all'armonia dei due stati che con la presente poco soddisfacente condizione del territorio; e secondo tutte le probabilità darebbe luogo a più questioni internazionali di quel che qualunque decisione di questo tribunale ne potrebbe sciogliere nei limiti della sua competenza.

La questione di convenienza non può quindi essere considerata qual base fondamentale per una decisione, ma può solo servire di criterio sussidario in mancanza di altri mezzi per arrivare ad una fondata conclusione.

Veniamo dunque alla questione di mero *diritto*.

È inteso ammettersi che certi comuni di Valdossola o piùtosto di una diramazione di detta valle, il Val Antigorio, ebbero l'incontestato possesso e l' usufrutto di certi parti dell' Alpe di Cravairola per circa quattro secoli, e di altre parti del medesimo per un periodo di tempo più lungo ancora, e ciò sotto pretenione di un titolo di assoluta proprietà sopra un suolo acquistato con danaro, titolo accompagnato da varii atti ufficiali più o meno importanti dell' autorità pubbliche italiane, i quali atti sono interpretati dagli agenti italiani come prove dell' esercizio della sovranità su quel territorio per parte dell' Italia.

Gli agenti della Svizzera reclamano l' alto dominio sull' Alpe di Cravairola come parte del Val Maggio che i XII cantoni

signed to believe that the high contracting parties did not intend to confer upon their arbitrators such authority. Furthermore, it is the opinion of the undersigned, that the extension of Swiss institutions, laws and administration to the territory while the owners of the same continued to be subjects of the Kingdom of Italy and to reside for the most part of the year in that country, would give rise to jealousies, dissensions and endless disputes, and would prove more hurtful to the peace and harmony of the two countries than the present unsatisfactory condition of the territory; and according to all probabilities would give rise to more international questions than any decision of this tribunal could settle within the limits of its competency.

The question of convenience cannot therefore be considered as a fundamental basis for a decision, but can only serve as a subsidiary criterion in case of failure of the means to reach a well-grounded conclusion.

We now reach the question of mere *right*.

It is understood to be admitted that certain communes of Valdossola, or rather of a part of that valley, the Val Antigorio, had the incontestable possession and use of certain parts of the Alp of Cravairola for nearly four centuries, and of other parts of the same for a period of time much longer still, and this under the claim of a title of absolute ownership over land acquired by money, a title accompanied by various official acts, more or less important, of Italian public authorities, which acts are interpreted by the Italian agents as proofs of the exercise of sovereignty over the territory on the part of Italy.

The agents of Switzerland claim high dominion over the Alp of Cravairola as being part of Val Maggia which the XII. Cantons acquired by

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acquistarono per conquista nel 1513 e per trattato nel 1516 in appoggio a siffatta pretesa insistono sul principio di geografia politica che, per lo meno in mancanza di evidenza del contrario, lo sparti-acqua dev' essere preso come limite di giurisdizione tra gli stati limitrofi e conseguentemente che la denominazione "*Val Maggia*" nel trattato del 1516 dev' essere considerata come abbraciante tutti i bacini minori che sboccano nella valle principale.

Di più essi pretendono che nelle circostanze del caso certi procedimenti dell' anno 1554 per la determinazione dei limiti orientali dell' Alpe Cavairola costituiscono da se stesso un riconoscimento obbligatorio della sovranità e dell' alto dominio della Svizzera sul territorio in questione.

Questi sono i punti cardinali presentati al nostro esame.— Altri argomenti minori addotti dalle parti saranno indicati nel corso della discussione.

Numerosi documenti sono stati presentati dalle rispettive parti, i quali tutti sono stati ponderati, ma il sottoscritto ne indicherà solo qui quanto gli parrà avere una sostanziale relazione coll' argomento.

I documenti messi innanzi dall' Italia, sono:

"Sentenza del 1° luglio 1367 del Vicario di Matterello riullante per causa di reciprocità una vendita fatti al Comune di Crodo di una parte di Cravairola."

"Istromento del 24 Febbraio 1406 di vendita di una parte dell' Alpe Cravairola in territorio di Cravairola."

"Investiture del 10 giugno 1454 di tre parti dell' Alpe di Collobiasco, in territorio di Cravairola."

conquest in 1513 and by treaty in 1516, in support of which claim they insist upon the principle of political geography that, at least in the absence of proof to the contrary, the watershed must be taken as the limit of jurisdiction between adjoining states, and consequently that the denomination "Val Maggia" in the treaty of 1516 must be considered as embracing all the smaller basins that drain into the principal valley.

Moreover they claim that, among the circumstances of the case, certain proceedings of the year 1554 for the determination of the eastern limits of the Cravairola Alp, constitute in themselves a binding acknowledgment of the sovereignty and of the high dominion of Switzerland over the territory in question.

These are the cardinal points submitted to our examination. Other minor arguments presented by the parties will be mentioned in the course of discussion.

Numerous documents have been presented by the respective parties, which have all been studied, but the undersigned will only mention here such as he considers have a substantial relation to the argument.

The documents brought forward by Italy, are:

"Judgment of the 1° of July 1367 of the Vicar of Matterello, annulling a sale made by the Commune of Crodo of a part of Cravairola, on the ground of reciprocity."

"Deed of sale of the 24th of February 1406, of a part of the Cravairola Alp in the territory of Cravairola."

"Conveyance on the 10th of June. 1454, of three parts of the Alp of Collobiasco, in the territory of Cravairola."

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"Istromento del 20 aprile 1497 ove si legge: '*busco existente et jacente in et supra territorio et dominio de Crodo nell' Alpe Cravairola.*'"

Questi documenti anteriori tutti alla conquista svizzera ed al trattato del 1516 sono presentati dagli agenti italiani allo scopo di dimostrare per l' esercizio della giurisdizione e per legale descrizione che il *locus in quo* era independente dalla giurisdizione del Val Maggia ed appartenente al Comune di Crodo. L' Italia mette pure innanzi un fascicolo intitolato "*Jura Crodensium et Pontemaliensium contra Campenses Vallis Madiæ*" contenente una relazione dei processi compiutisi nel 1554 per fissare i limiti dell' Alpe di Cravairola, nonchè vari altri documenti relativi a tale delimitazione.

Gli agenti della Svizzera ne appellano all' istromento del 17 marzo 1420 per il quale una terza parte dell' Alpe di Cravairola "*jacente in territorio Vallis Madiæ*" fu venduta al Comune di Crodo; ed all' istromento dell' 8 Dicembre 1490 che cede al Comune di Crodo l' Alpe di Collobiasco "*esistente e situata nel dominio delli nomini di Valmaggia ove si dice in Cravairola.*"

La Svizzera sostiene che questi termini implicano in sè un riconoscimento della giuridizione del Val Maggia, e adduce inoltre il trattato concluso nel 1516 tra Francesco I e la Confederazione Elvetica nel quale il Val Maggia è reconosciuto appartenere alla Svizzera.

Essa si appoggia pure sopra un documento già accennato, intitolato: "*Copia positionis terminorum anni 1554,*" contenuto nel fascicolo intitolato: "*Jura*" referentesi alla determinazione dei limiti orientali dell' Alpe di Cravairola, documento che gli Svizzeri dicono provare una sottomissione del Comune di

"Deed of April 20, 1497, which reads: '*busco existente et jacente in et supra territorio et dominio de Crodo* in the Cravairola Alp.'"

These documents, all prior to the Swiss conquest and the treaty of 1516, are presented by the Italian agents for the purpose of proving by the exercise of jurisdiction and by legal descriptions that the *locus in quo* was independent of the jurisdiction of the Val Maggia and belonged to the commune of Crodo. Italy also brings forward a pamphlet entitled "*Jura Crodensium et Pontemaliensium contra Campenses Vallis Madiæ,*" containing a relation of the proceedings during 1554 to define the limits of the Alp of Cravairola, besides various other documents relating to such delimitation.

The agents of Switzerland appeal to the deed of March 17, 1420, by which a third part of the Alp of Cravairola "*jacente in territorio Vallis Madiæ*" was sold to the commune of Crodo; and to the deed of December 8, 1490, which cedes to the Commune of Crodo the Alp of Collobiasco "*existing and situated in the dominion of the men of Valmaggia, said to be in Cravairola.*"

Switzerland maintains that these words imply an acknowledgment of the jurisdiction of Val Maggia, and adduces besides the treaty concluded in 1516 between Francis I. and the Helvetian Confederation in which Val Maggia is recognized as belonging to Switzerland.

This country also relies on a document already mentioned, entitled: '*Copia positionis terminorum anni 1554,*" contained in the pamphlet entitled "*Jura*" referring to the determination of the eastern limits of the Alp of Cravairola, which document the Swiss say proves a submission of

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Crodo alla giuridizione di un tribunale Svizzero, in una materia implicante l'alto dominio sul territorio in questione.

Essendo ammesso che soggetti del regno d'Italia sono in possesso di quel suolo sotto la protezione della giuridizione italiana conviene anzitutto esaminare le principali prove colle quali questo diritto è impugnato dalla Svizzera e le testimonianze contrarie a dette prove.

Nella "*Copia positionis terminorum anni 1554*," viene esposto che "*quædam differentia, lis et quæstio juridica*" erano sorte tra le autorità di Crodo e quelle di Campo "*causa et occasione confinium Alpis Cravairolæ ipsorum de Crodo, et dominii ipsorum de Campo cumque fuerit*, etc., *quod litigando in jure coram Magnific. D. Christophorum Quintoni de Friburgo et Honor. Comm. Vallis Madiæ*," etc., e che le parti vennero d'accordo alla conclusione che alcuni cittadini di Crodo, nominati nel documento dovessero definire i limiti per mezzo di segni permanenti, il che fù fatto. Nella sottoscrizione od attestato del notaio il documento è chiamato "*Instrumentum definitionis dominii.*"

Si sostiene dagli agenti svizzeri che questi procedimenti sono necessariamente un riconoscimento per parte del Comune di Crodo della giurisdizione delle autorità svizzere sulla materia. Su questo punto bisogna osservare che benchè "*la differentia et lis*" implichi la questione dei limiti dell'Alpe di Cravairola, non siamo informati qual fosse la natura della lite. Forse è stato in origine un processo contro cittadini di Crodo arrestati sopra territorio preteso da Campo, a cagione della violazione del medesimo ed in tal caso i magistrati Svizzeri di Campo dovevano naturalmente insistere sul diritto di giurisdizione.

the Commune of Crodo to the jurisdiction of a Swiss tribunal, in a matter involving the high dominion over the territory in question.

It being admitted that subjects of the kingdom of Italy are in possession of the soil under the protection of Italian jurisdiction, it is proper, first of all, to examine the principal proofs with which this right is impugned by Switzerland, and the testimony opposed to these proofs.

In the "*Copia positionis terminorum Anni 1554*" it is stated that "*quædam differentia, lis et quæstio juridica*" had arisen between the authorities of Crodo and those of Campo "*causa et occasione confinium Alpis Cravairolæ ipsorum de Crodo, et dominii ipsorum de Campo cumque fuerit*, etc., *quod litigando in jure coram Magnific. D. Christophorum Quintoni de Friburgo et Honor. Comm. Vallis Madiæ*," etc., and that the parties agreed to the conclusion that certain citizens of Crodo, named in the document, should define the limits by means of permanent signs, which was done. In the subscription or attestation of the notary the document is called "*Instrumentum definitionis dominii.*"

The Swiss agents contend that these proceedings are necessarily an acknowledgement on the part of the Commonwealth of Crodo of the jurisdiction of the Swiss authorities in the matter. On this point it must be observed that although "*la differentia et lis*" imply the question of the limits of the Alp of Cravairola, we are not informed as to what was the nature of the litigation. Perhaps it was originally a suit against citizens of Crodo arrested on territory claimed by Campo, on account of the violation of the same, and in that case the Swiss magistrates of Campo would naturally insist on the right of jurisdiction.

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Molti altri supposti possono essere fatti per dimostrare che una comparsa del Comune di Crodo dinnanzi un magistrato Svizzero se può essere presuntivamente non è necessariamente un riconoscimento della competenza di detto magistrato. In questo caso possiamo anche supporre che un componimento amichevole era stato accettato perchè erano sorte delle obbiezioni contro la giurisdizione del magistrato stesso. Comunque sia stato, nessuna adiudicazione dell' oggetto in questione venne fatta dal magistrato, la vertenza essendo stata accomodata mediante un accordo tra le parti.

Nell' abile ed igegnoso argomento degli agenti Svizzeri si sostiene che l' espressione *ipsorum di Crodo* indica semplicemente il diritto di proprietà, mentre le parole "*et dominii ipsorum hominium de Campo*," significano la giurisdizione di *alto dominio* e di più che la stessa voce *dominii* nell' "*Attestatu Instrumentum deffinitionis dominii*" è meramente espressione casuale usata dal notaio, e non dalle parti, nel senso di semplice proprietà.

Se questa costruzione può essere sostenuta essa è importante come ammissione della sovranità di Val Maggia per parte di persone forse non autorizzate dai loro governi, ma pur tuttavia probabilmente ben informate relativamente alla effettiva giurisdizione. Ma il notaio che sottoscrisse il documento, secondo tutte le probabilità l' ha pure esteso ed è improbabile ch' egli abbia usata quella espressione in due sensi diversi nello stesso istromento. Secondo i principi di legale interpretazione, una stessa parola usata più d' una volta dallo stesso scrittore nello stesso istromento dev' essere presa come avente sempre il medesino significato, ammeno che il contrario apparisca dal contesto. Nel caso attuale, il sottoscritto non trova nel con-

Many other suppositions could be made to demonstrate that an appearance of the Commune of Crodo before a Swiss magistrate may constitute a presumption but not necessarily an acknowledgment of the competency of said magistrate. In this case we can also suppose that a friendly arrangement had been accepted because objections had arisen to the jurisdiction of the magistrate himself. Howsoever it was, no indication of the nature of the question was made by the magistrate, the difference having been adjusted by an agreement among the parties.

In the able and ingenious argument of the Swiss agents it is averred that the expression *ipsorum di Crodo* indicates simply the right of proprietorship, while the words "*et dominii ipsorum hominium de Campo*," signify the jurisdiction of *high dominion*, and moreover that the same word *dominii* in the "*Attestatu Instrumentum deffinitionis dominii*" is merely a casual expression used by the notary and not by the parties, in the sense of simple ownership.

If this construction can be sustained, it is important as an admission of the sovereignty of Val Maggia on the part of persons perhaps not authorized by their governments, but still probably well informed as to effective jurisdiction. But the notary, who subscribed the document, according to all probabilities, also extended it, and it is improbable that he would have used the same expression in two different senses in the same document. According to the principles of legal interpretation, the same word used more than once by the same writer in the same document must be taken as having always the same meaning, unless the contrary appears from the context. In the present case, the undersigned does not find in

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testo una ragione sufficiente per credere che il notaio intendesse di usare la voce *dominium* in diversi sensi nei due periodi nei quali essa ricorre; quindi egli ebbe in mente di parlare di *alto dominio* nell' *attestatu.*

Seguendo questa interpretazione i procedimient in questione assumerebbero l' aspetto di un tentativo di una finale definizione della questione di sovranità territoriale e di giurisdizione.

Ma independentemente da ciò il sottoscritto opina che come questione grammaticale le parole *Alpis Cravairolæ* e *dominii* sono nella stessa categoria, essendo ambedue genitivi posti dopo *confinium*, il primo indicante nominatamente un certo territorio, ed il secondo segnante un' altro territorio mediante un termine descrittivo che indica semplicemente *terre di* proprietà senza nessuna allusione alla sovranità e senza includere affatto il primo tratto di territorio. Con altre parole, l' Alpe di Cravairola è una porzione del suolo situato da un lato dei limiti, ed il *dominium de Campo* è un' altra porzione di suolo situata dall' altro lato dei medesimi limiti. In fatti dall' esame dei diversi documenti addotti e di altri dello stesso periodo il sottoscritto non trova che risulti alcuna differenza bene stabilita tra *territorium* e *dominium.* Questi vocaboli sembrano essere stati usati indistintamente nel senso di proprietà o di sovranità secondo l' argomento ed in conformità col contesto degli atti.

Ma qualunque sia la costruzione grammaticale od il senso logico della parola, quale è usata in questo documento, il fasciculo *Jura* contiene altri documenti di grande importanza tendenti a dimostrare che qualunque fosse il sentimento che nutriserro le parti di questa transazione relativamente al valore

the context a sufficient reason for believing that the notary intended to use the word *dominium* in different senses in the two paragraphs in which it occurs; therefore if he meant to speak of *alto dominio* in the body of the deed, it must be supposed that he was alluding to *alto dominio* in the *attestatu.*

According to this interpretation, the proceedings in question would assume the aspect of an attempt at a final definition of the question of territorial sovereignty and jurisdiction.

But, independently of this, the undersigned opines that as a grammatical question the words *Alpis Cravairolæ e dominii* are in the same category, being both genitives placed after *confinium*, the first indicating by name a certain territory, and the second designating another territory by means of a descriptive term which simply indicates land by its ownership, without any allusion to the sovereignty and without including in fact the first tract of territory. In other words, the Alp of Cravairola is a portion of the soil situated on one side of the boundary, and the *dominium* of Campo is another portion of the soil situated on another side of the same boundary. In fact, from the examination of the several documents submitted and from others of the same period the undersigned finds no well-defined difference between *territorium* and *dominium.* These words seem to have been used indiscriminately in the sense of ownership or of sovereignty according to the argument and in conformity with the context of the acts.

But whatever may be the grammatical construction and the logical sense of the word which is used in this document, the pamphlet *Jura* contains other documents of great importance tending to demonstrate that, whatever was the opinion entertained by the parties to this transaction

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di essa, i loro superiori, i respettivi governi di Milano e della Svizzera, le diedero il valore di una convenzione internazionale per la fissazione dei limiti della giurisdizione territoriale tra i due stati.

L' istromento che segue la *copia Partitionis* nel fascicolo *Jura*, è una communicazione ufficiale del governo Milanese al Commissario o Podestà di Domodossola in data 16 febbraio 1555. Essa stabilisce che "gli Ambasciatori delli Signori dei XIII Cantoni Svizzeri, * * * si sono doluti come alli mesi passati alcuni di quella terra e sua giurisdizione sono andati in Valle Maggia, giurisdizione di predetti Signori, e violentemente hanno strappato alcuni termini *posti alli confini tra l' una e l' altra giurisdizione* e piantati più oltre di quello erano soliti stare."

Ora in questa frase i termini sono evidentemente quelli piantati nel mese di giugno dell' anno antecedente, cioè i limiti tra l' alpe di Cravairola e le terre del Comune di Campo, e *l' una e l' altra giurisdizione* può difficilmente significare altro che la giurisdizione della Svizzera esercitata dalle autorità del Val Maggia e limitata a ponente dei termini posti nel 1554 e la giurisdizione di Milano esercitata dalle autorità di Domodossola e limitata a levante dei medesimi termini.

Nell' ordine del tempo segue un communicato ufficiale del governo di Milano diretto "*all' egregio jurisconsulto Castilioneo ed al Podestà di Domodossola*" relativo alla disputa "*inter Domodossolanos subditos nostros et homines Vallis Madiæ subditos Helvetiorum de finibus.*"

as to its value, their superiors, the respective governments of Milan and of Switzerland, gave it the value of an international convention for the definition of the limits of the territorial jurisdiction between the two countries.

The document that follows the *Copia Partitionis* in the pamphlet *Jura*, is an official communication from the Milanese government to the Commissary or Mayor of Domodossola, dated February 16, 1555. It sets forth that "the Ambassadors of the Lords of the XIII Swiss Cantons have complained as in the preceding months, that parties from that land and its jurisdiction went to Valle Maggia, under the jurisdiction of the aforesaid Lords, and violently tore down certain terminal posts *placed on the confines between one and the other jurisdiction* and planted them beyond the place where they formerly stood."

Now, in this sentence, the *terminal posts* were evidently those planted in the month of June of the preceding year, that is, the limits between the Alp of Cravairola and the lands of the Commune of Campo, and "*one and the other jurisdiction*" can hardly mean other than the jurisdiction of Switzerland, exercised by the authorities of Val Maggia and west of the posts placed in 1554, and the jurisdiction of Milan, exercised by the authorities of Domodossola and limited to the east of these same posts.

According to date there follows an official communication from the government of Milan addressed "*to the Eminent jurisconsult Castilioneo and to the* Podestà (Mayor) of Domodossola" relative to the contest "*inter Domodossolanos subditos nostros et homines Vallis Madiæ subditos Helvetiorum de finibus.* This is followed by five or six other communications of the year 1556 from the same source and on the same subject, all insisting on the reestablishment of the limits of 1554 and all using the same expressions to indicate the contending parties.

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Seguono cinque o sei altre communicazioni dell' anno 1556 della stessa sorgente e sullo stesso argomento, tutte insistenti sul ristabilimento dei limiti del 1554 e tutte serventiesi della stesse espressioni per indicare le parti litiganti.

Fra questi ve n' è uno (N° 14) del 19 giugno 1556 in cui si allude alla "*Controversia finium inter dictum Commune Crodi* et *Commune loci di Campo*" e si usano le espressioni "*fines inter ipsa Communia*" e "*termini inter ipsa Communia.*"

È cosa molto rimarchevole che in nessuna di queste carte, tranne quella del 1554, è neppur fatta menzione dell' Alpe Cravairola, ma la controversia è sempre indicata come concernente i limiti, non già di possessi esteri di Crodo, ma dei rispettivi comuni; è come già fu detto le lagnanze degli Ambasciatori svizzeri delli 16 febbraio 1555 indicavano espressamente i termini posti nel 1554 come limite tra *le rispettive giuridizioni.* Da questi fatti pare risultare chiaramente che sebbene non sia evidente se le parti immediate de la transazione la considerassero come argomento di così grave importanza, i due governi supremi del Val Maggia e del Val d' Ossola nel mezzo del secolo XVI e per circa cento anni dopo convenivano nel ritenere l' accordo del 1554 come una definitiva fissazione dei limiti tra i loro rispettivi territori.

Non v' ha prova che in occasione della transazione del 1554 una pretensione di giurisdizione sia stata fatta innanzi dalle autorità di Val Maggia o dei XIII Cantoni, nè apparisce che in alcuna epoca prima o dopo quella data fino all' anno 1641, la Svizzera abbia asserita una supremazia qualunque o l' alto dominio sopra quel territorio. Ma per altra parte risulta che i governi dei due paesi convennero nell' accomodamento del 1554, come definitivo.

Among these, there is one (No. 14) of June 19, 1556, in which allusion is made to the "*Controversia finium inter dictum Commune Crodi et Commune loci di Campo*"; and the expressions "*fines inter ipsa Communia*" and "*termini inter ipsa Communia*" are used.

It is very remarkable that in none of these maps, except the one of 1554, is mention made of the Alp of Cravairola, but the controversy is always described as concerning the limits, not of possessions foreign to Crodo, but of the respective communes; and, as already stated, the complaints of the Swiss ambassadors of the 16th of February, 1555, mention particularly the terminal posts placed in 1554 as limit between the *respective jurisdictions.* From these facts it seems clearly to result that, although it is not evident that the immediate parties to the transaction considered it as an argument of great importance, the two supreme governments of the Val Maggia and the Val d'Ossola, in the middle of the XVIth century and for nearly one hundred years after, agreed to retain the covenant of 1554 as definitely fixing the limits between their respective territories.

There is no proof that at the time of the transaction of 1554 a claim of jurisdiction was made by the authorities of Val Maggia or by the XIII Cantons, nor does it appear that at any period before or after that date till the year 1641, that Switzerland asserted any supremacy or high dominion over that territory. But on the other hand it appears that the governments of the two countries accepted the settlement of 1554 as definitive.

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In relazione con questo fatto di nessun reclamo per parte della Svizzera, egli è bene notare un' analogo stato di cose relativamente al governo di Val Maggia. Nessun documento di qualsiasi natura è prodotto dai registri del Val Maggia, è non vi è prova che il Comune di Campo in verun tempo del periodo storico sia mai stato possessore dell' Alpe di Cravairola.

Havvi una probabilità meramente intrinsica che in qualche remota età quell' Alpe sia stata proprietà di quel comune ed i due documenti nei quali l' Alpe è descritta come appartenente al *dominium* di Val Maggia aggiungono forza a questo supposto. Ma questi documenti non sono atti nei quali il Val Maggia sia stato parte attiva e non vi ha in essi alcuna prova positiva di sorta, dimonstranti che le autorità di Val Maggia abbiano mai esercitato o reclamata la giurisdizione sull' Alpe di Cravairola fino al 1641. È una supposizione molto probabile che in quei tempi rozzi in cui generalmente prevaleva la legge del più forte, e pochi proprietari potevano mostrare qualche titolo delle loro terre o della loro giurisdizione, salvo il titolo di possesso, il trasferrimento del suolo ad abitanti di Val Antigorio fosse considerato come implicante con sè, anche la sovranità. E per quanto abbiamo i mezzi di saperlo, la Svizzera sembra essere convenuta in questo punto di vista per più di cento anni dopo l' acquisto di Val Maggia.

Nel 1641, Oswaldo di Schiaffusa, Commissionario, Balivo di Val Maggia, o per ordine dei suoi superiori o per motivi personali, non si sa, convoca un' assemblea di delegati dei Comuni di Crodo, di Pontimaglio, e di Campo per comporre le differênze sorte relativamente all' Alpe di Cravairola. Dietro questa

In connection with the fact that no claim was made by Switzerland, it is well to notice an analogous state of things relative to the government of Val Maggia. No document of any nature whatever is produced from the records of Val Maggia, and there is no proof that the Commune of Campo was at any time in the historic period in possession of the Alp of Cravairola.

There is a merely intrinsic probability that in some remote age this Alp may have been the property of that commune and the two documents wherein the Alp is described as belonging to the *dominium* of Val Maggia add force to this supposition. But these documents are not acts to which Val Maggia was an active party, and there is in them no positive proof of that kind, showing that the authorities of Val Maggia ever exercised or claimed jurisdiction over the Alp of Cravairola till 1641. It is a very probable supposition that in those rough times during which the law of the strongest generally prevailed, and few owners could show title-deeds to their lands or their jurisdiction, save the title of possession, the transferring of the soil to the inhabitants of Val Antigorio may have been considered as in itself implying also the sovereignty. And as far as we have the means of knowing it, Switzerland seems to have acquiesced in this point of view for more than a hundred years from the acquisition of Val Maggia.

In 1641, Oswald of Schaffhausen, Commissioner, Bailiff of Val Maggia, whether by order of his superiors or for personal reasons no one knows, called an assembly of the delegates of the Communes of Crodo, Pontimaglio, and Campo to adjust the differences arising in relation to the Alp of Cravairola. Pursuant to this convocation certain citizens of Crodo

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convocazione alcuni cittadini di Crodo e di Pontimaglio convennero con lui e co' suoi compagni sull' Alpe addi 2 ottobre 1641 e dichiararono ch' essi non erano autorizzati dai loro Comuni, ma che avrebbero fatta relazione ai medesimi, acciochè una delegazione fosse nominata per trattare l' argomento. In quella occasione il Commissario Oswaldo "in faccia ai sudditi di Antigorio ha protestato che la giurisdizione sopradetta dell' Alpe è sua e che non può nè deve tralasciarne gli atti che si giudicheranno necessari per il mantenimento della giurisdizione dei suoi Ill^mi Signori dei XII Cantoni della Serenissima Repubblica Elvetica." Questo come fu osservato, è il primo reclamo formale conosciuto di sovranità su quell' Alpe per parte della Svizzera. Se esso fu fatto dietro ordine della Svizzera e non fu fatto meramente personale del Commissario, si ha diritto di supporre che gli archivi della Svizzera forniscano la prova del fatto; ma nessuna prova di questo genere viene presentata.

Questo reclamo fu sovente ripetuto duranti gli anni seguenti e ne risultarono un maggior eccitamento ed una crescente irritazione. Non è necessario seguir la storia di questi fatti, perocchè nel 1650, una convenzione tenutasi alle isole Borromee dalle autorità dei due governi riconobbe i limiti del 1554, fece varie concessioni alle due parti, e specialmente questa, di autorizzare il popolo di Crodo a trasportar i legnami dell' Alpe per mezzo della Rovana nel Val Maggia, provvedimento, osservasi, affatto superfluo se quell' Alpe fosse stato territorio Svizzero. Un' altro provvedimento trattava in sostanza tutte le dispute e risse anteriori come non avvenute, ed infine un' articolo concepito in questi termini: "*E questa provvisione abbi a durare sin tanto sarà deciso il punto della giurisdizione sopra la detta Alpe al quale per nessuna delle dette cose s' intende far pregiudizio.*"

and of Pontimaglio met him and his companions on the Alp on the 2d of October 1641 and declared that they were not authorized by their communes, but that they would make a report to them, in order that a delegation might be named to discuss the subject. On that occasion, Commissioner Oswald "in the presence of the subjects of Antigorio, protested that the jurisdiction over the Alp was his, and that he could not and must not neglect the acts that would be judged necessary for the maintenance of the jurisdiction of his illustrious Lords of the XII Cantons of the Most Serene Helvetian Republic." This, as has been observed, is the first formal claim that is known of the sovereignty of the Alp by Switzerland. If this was done in obedience to orders from Switzerland and not merely personally by the Commissioner, it would be right to suppose that the archives of Switzerland could furnish the proof the fact; but no proof of this kind has been presented.

This claim was often repeated during the following years and the result was a greater excitement and a growing irritation. It is not necessary to follow the history of these facts, because in 1650 a convention held at the Borromean Islands, by the authorities of the two governments, recognized the limits of 1554, made several grants to the two sides, and especially this one, of authority to the people of Crodo to carry the timber of the Alp by means of the Rovana into Val Maggia, a provision, it must be observed, entirely superfluous had this Alp been Swiss territory. Another provision did away with suits growing out of all previous quarrels and riots; and lastly an article conceived in these words: "And this provision shall last till the point of the jurisdiction over the said Alp is decided, and no prejudice is intended to any of the above mentioned cases."

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Il sottoscritto comprende il termine *provvisione* come applicantesi a tutta la materia della Convenzione e non già ad un articolo o ad alcuni articoli particolari. La convenzione non decise nulla relativamente alla giurisdizione, ma lasciò la questione come la trovò, e naturalmente questo punto, nello stato in cui trovavasi allora, dev' essere giudicato dietro i fatti e le leggi connesse alla storia precedente.

Dopo il 1650 vi furono altri numerosi tentativi, più o meno serii d' ambo le parti di stabilire una giurisdizione sul conteso territorio, ma nell' opinione del sottoscritto, essi non hanno un carattere abbastanza concludente per iscioglière materialmente la causa nè da un lato nè dall' altro, e dobbiamo riferirci per una decisione ai diritti delle parti, quali erano all' epoca della Convenzione del 1650.

Riepilogando.—L' evidenza del titolo dell' Italia consiste nell' acquisto del suolo prima del 1500 da Comuni ora appartenenti al regno d' Italia e nell' incontestato possesso del territorio per parte dei medesimi Comuni fino al giorno d' oggi; in certi atti di giurisdizione che diconsi essere stati compiuti dalle autorità ufficiali di Domodossola relativamente al suolo dell' Alpe, atti che si allegano non già come concludenti nella loro natura, ma che sono considerati come presunzioni di qualche valore per la evidenza del fatto, finchè non sieno confutati; nei procedimenti del 1554, del 1555 e del 1556, che dicesi trattino della fissazione dei termini per una delimitazione territoriale e giurisdizionale, e sieno stati accettati come tali da ambedue i governi per quasi un secolo senza questione, e finalmente nell' assenza di qualsiasi reclamo di alto dominio o di giurisdizione per parte della Svizzera o dei suoi dipendenti prima dell' anno

The undersigned understands the term "provision" as applying to the whole subject matter of the Convention, and not only to one or several particular articles. The convention decided nothing in relation to jurisdiction, but left the question just as it found it, and naturally, this point, in the state in which it then was, must be judged by facts and by the laws connected with its preceding history.

After 1650 other numerous attempts, more or less serious, were made on both sides to establish a jurisdiction over the contested territory, but in the opinion of the undersigned they do not possess a sufficiently conclusive character to affect the case materially either one way or the other, and we must refer for a decision to the rights of the parties, such as they were at the time of the Convention of 1650.

Recapitulation.—The evidence of the title of Italy consists in the acquisition of the soil previous to 1500 by communes now belonging to the Kingdom of Italy, or in the incontestable possession of the territory by these same communes up to the present day; in certain acts of jurisdiction which are said to have been accomplished by the official authorities of Domodossola relative to the soil of the Alp, acts which are alleged to be not only conclusive in their nature, but which are also considered to afford strong presumptive evidence of the fact, so long as they are not refuted; in the proceedings of 1554, 1555 and 1556, which treat of the definition of the limits by a territorial and jurisdictional delimitation, and which were accepted as such by both governments for nearly a century without protest; and finally in the absence of any claim of high dominion or jurisdic-

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1641, quando l' Alpe era in possesso dei comuni italiani per interi secoli.

Il diritto della Svizzera è fondato: sopra considerazioni di convenienza; sull' allegato principio di geografia politica, secondo il quale i limiti degli Stati limitrofi nei paesi montuosi sono determinati dallo spartiacqua; sulla conquista del 1513 e sul trattato del 1516 riconoscente il Val Maggia, di cui fa parte l' Alpe di Cravairola, come appartenente alla Svizzera; e sui provvedimenti per lo stabilimento dei limiti tra l' Alpe di Cravairola ed il comune di Campo.

Dietro considerazioni di tutti quei punti, il sottoscritto è di parere:

In primo luogo: Che il titolo dell' Italia al territorio in questione è stabilito *prima facie* dalle considerazioni sovranotate e quindi valevole, ammenochè sia confutato da prove addotte dalla Svizzera.

In secondo luogo: Benchè ragioni di convenienza e di mutuo interesse consiglino la cessione dell' Alpe di Cravairola alla Svizzera, pur nondimeno per le ragioni già espresse gli arbitri non sarebbero giustificati nell' assegnare quel territorio alla Confederazione sopra questa sola base.

In terzo luogo: Che il principio geografico della divisione politica dei territori dietro lo spartiacqua o displuvio non è abbastanza generalmente riconosciuto dalle leggi pratiche internazionali Europee per costituire un fondamento indipendente di decisione nei casi contestati. Egli è vero che geograficamente una grande vallata include i suoi rami minori, ma nel discorso ordinario il nome di valle, quando si tratta di un fiume considerevole, è generalmente ristretto al ramo principale, le valli laterali tributarie avendo al solito i loro propri

tion from Switzerland or its dependencies previous to the year 1641, when the Alp had been possessed by Italian communes for whole centuries.

The right of Switzerland is founded: on considerations of convenience; on the alleged principle of political geography, according to which the limits of bordering States in mountainous regions are determined by the watershed; on the conquest of 1513 and on the treaty of 1516, which recognizes Val Maggia, of which the Alp of Cravairola is part, as belonging to Switzerland; and its provisions for the establishment of the limits between the Alp of Cravairola and the Commune of Campo.

Considering all these points, the undersigned is of opinion:

Firstly: That the title of Italy over the said territory is established *prima facie* by the above considerations and therefore valid, unless it is refuted by proofs adduced by Switzerland.

Secondly: Though reasons of convenience and of mutual interest advise the cession of the Alp of Cravairola to Switzerland, nevertheless, for the reasons already expressed, the arbitrators would not be justified in assigning that territory to the Confederation merely on this basis alone.

Thirdly: That the geographical principle of the political division of territories according to the watershed is not generally enough recognized in the practical international law of Europe to constitute an independent basis of decision in contested cases. It is true that geographically a large valley includes its minor basins, but in ordinary parlance the word "valley," when used with reference to a large river, is generally restricted to the principal basin, the lateral tributary valleys having usually their own

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nomi; quindi una tale designazione non include necessariamente le valli minori, ma dev' essere interpretata secondo il possesso od altre circostanze se queste esistono. Come fu detto non v' è prova di alcun reclamo formale per parte della Svizzera relativamente alla sovranità sull' Alpe, come parte del Val Maggia, prima dell' asserto di giurisdizione di Oswaldo nel 1641, e se nel periodo mediovale, attraverso il quale si estende la storia dell' Alpe di Cravairola, è stato ricevuto come principio di legge che le valli tributarie debbono seguire la giurisdizione della corrente principale delle acque, non si può spiegare perchè il Comune di Campo non ha reclamata la sovranità di Cravairola come appartenente al suo proprio territorio, nel periodo, in cui i Comuni italiani l' acquistarono. Ma non vi è indizio di simile reclamo in nessun tempo sino a un secolo dopo la definizione dei limiti del 1554.

In quarto luogo: Che sebbene in un senso scientifico la valle principale di un fiume abbracci quelle dei suoi tributari, pure questi termini, quando sono usati in istromenti pubblici, specialmente in quelli di antica data, debbono essere interpretati secondo il senso e l' uso contemporanei. Il sottoscritto non vede nessuna prova che alcuna delle parti del trattato del 1516, quindi di nessun periodo susseguente prima del 1641, considerasse l' Alpe di Cravairola come incluso nella denominazione di Val Maggia, e che al contrario la mancanza di ogni reclamo di sovranità della Svizzera e del Comune di Campo sul suolo situato geograficamente nel Val Maggia, ma posseduto e goduto da corpi morali forestieri *prima facie* mostra all' evidenza che la Confederazione ed il Comune di Campo non si ritenevano investiti di tale sovranità, in alcun tempo, prima che siffatto reclamo fosse assunto da un ufficiale Svizzero nel 1641.

proper names; hence such a designation does not necessarily include minor valleys, but must be interpreted according to possession and other circumstances if any exist. As stated, there is no proof of any formal claim on the part of Switzerland, relative to the sovereignty over the Alp, as part of Val Maggia, previous to the assertion of jurisdiction by Oswaldo in 1641; and if in the mediæval period, through which the history of the Alp of Cravairola extends, it was accepted as a principle of law, that tributary valleys must follow the jurisdiction of the principal current of the waters, it cannot be explained why the Commune of Campo did not claim the sovereignty of Cravairola as belonging to its own territory, at the time when the Italian Communes acquired it. But there is no trace of such a claim at any time till a century after the definition of the limits in 1554.

Fourthly: That although, in a scientific sense, the principal valley of a river embraces those of its tributuries, yet these words, when used in public documents, especially in those of ancient date, must be interpreted according to the contemporaneous use and sense. The undersigned sees no proof that any of the parties to the treaty of 1516, or of any subsequent period previous to 1641, considered the Alp of Cravairola as included in the denomination of Val Maggia; but, on the contrary, the absence of any claim of sovereignty by Switzerland or by the Commune of Campo over the soil geographically situated in Val Maggia, but possessed and enjoyed by foreign moral bodies, shows *prima facie*, that the Confederation and the Commune of Campo did not consider themselves invested with the right of such sovereignty at any time before such claim was put forward by a Swiss official in 1641.

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In quinto luogo: Che i procedimenti del 1554, che il sottoscritto è costretto d' interpretare in armonia coi correlativi documenti ufficiali del 1555 e 1556, tendono piuttosto a negare che non a stabilire il diritto della Svizzera alla sovranità del territorio in questione, ed a mostrare, che i limiti da essi stabiliti erano considerati dalle parti immediatamente interessate e dai loro rispettivi governi come una delimitazione territoriale e giurisdizionale.

Sull' insieme della questione il sottoscritto è di parere che per usare le espressioni del *Compromis:* "La ligne frontière qui sépare le territoire italien du territoire de la Confédération Suisse (Canton Tessin), au lieu dit Alpe de Cravairola, doit quitter la chaîne principale des montagnes au sommet désigné Sonnenhorn, pour descendre vers le ruisseau de la Vallée de Campo et en suivant l'arête secondaire nommée Creta Tremolina (ou Mosso del Lodano sur la carte suisse) rejoindre la chaîne principale au Pizzo del Lago Gelato" * * * ed egli pronunzia sentenza conforme.

In conclusione, il sottoscritto si onora d' esprimere il suo alto apprezzamento per l' abiltà, la moderazione e l' imparzialità spiegate da tutti i componenti l' arbitraggio, come pure i suoi sinceri ringraziamenti per la continua cortesia e considerazione manifestategli da tutti coloro con cui il suo ufficio lo pose in contatto.

Dato in Milano in duplicato 23 Settembre 1874.

(Fto.) GEORGE P. MARSH.

Fifthly: That the proceedings of 1554, which the undersigned is obliged to interpret as in harmony with the corresponding official documents of 1555 or 1556, tend rather to negative than to establish the right of Switzerland to the sovereignty of the territory in question, and to show that the limits established by the parties immediately interested were considered by them and their respective governments as a territorial and jurisdictional delimitation.

On the whole question, the undersigned is of opinion that, using the expressions of the Agreement: "The frontier line that divides the Italian territory from that of the Swiss Confederation (Canton Tessin), at the spot called the Alp of Cravairola, must leave the principal chain of mountains at the summit called Sonnenhorn, and descend towards the stream of the Valley of Campo and following the secondary ridge called Creta Tremolina (or Mosso del Lodano on the the Swiss map) to meet the principal chain at the Peak of the Frozen Lake," * * * and he pronounces his decision accordingly.

In conclusion, the undersigned has the honor to express his high appreciation of the ability, moderation and impartiality displayed by all the members of the arbitration, and also his sincere thanks for the continued courteousness and consideration manifested towards him by all with whom his office brought him into contact.

Given at Milan in duplicate September 23, 1874.

Signed: GEORGE P. MARSH.

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La presente copia è conforme all' originale conservato nell' archivio del ministero degli affari esteri del Regno d' Italia.
Roma, 6 Dicembre 1894.
Il direttore degli archivi.
[S.] G. GORRINI.

Execution of the Award.

January 4, 1875, the Swiss Federal Council made the following decree:

"LE CONSEIL FÉDÉRAL SUISSE.

"Vu le Compromis passé entre le Conseil fédéral et le Gouvernment Italien, du 31 Décembre 1873, relatif à le frontière Italo-Suisse au lieu dit 'Alpe de Cravaïrola;'

"Vu la sentence du sur-arbitre, Mr. Marsh, Ministre des Estats-Unis à Rome, en date du 23 Septembre 1874, qui porte: 'La ligne frontière qui sépare le territoire Italien du territoire de la Confédération Suisse (Canton du Tessin) au lieu dit "Alpe de Cravairola," doit quitter la chaîne principales des montagnes au sommet désigné "Sonnenhorn," pour descendre vers le ruisseau de la valleé de Campo et, en suivant l'arête secondaire nommée Creta Tremolina (ou "Mosso del Lodano" sur la carte Suisse,) rejoindre la chaîne principale au "Pizzo del Lago Gelato;"'

"Arrêté du Cons. féd. conc. la frontière sur l'Alpe de Cravaïrola.

"Vu l'art. 2 du Compromis arbitral,[1] qui statue: 'Les hautes parties contractantes admettront la sentence arbitrale qui interviendra et reconnaîtront comme définitive la ligne frontière qui elle aura déterminée;'

"Et l'art. 8 du même Compromis en ces termes: 'Les hautes Parties contractantes s'engagent à procéder aussitôt que faire se pourra à l'exécution du jugement arbitral,'

"ARRÊTE:

"Art. 1er. La ligne frontière déterminée par la sentence arbitrale de M. Marsh, du 23 Septembre 1874, est reconnue comme définitive, cette sentence étant admise et devant entrer en rigueur dès ce jour.

The present copy conforms with the original, preserved in the archives of the Ministry of Foreign Affairs of the Kingdom of Italy.
Rome, December 6, 1894.
The director of the archives.
[Seal Min. of For. Af.] G. GORRINI.

[1] Voir Recueil officiel des lois, tome XI, page 516.

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"Art. 2eme. Le présent arrêté sera inséré au Recueil Officiel, et l'original de la sentence arbitrale déposé aux archives fédérales.

"Berne, le 4 Janvier 1875.

"Au nom de Conseil Fédérale Suisse,

"Le Président de la Confédération:

"SCHERER

"Le Chancelier de la Confédération:

"SCHIESS."

May 17, 1875, the President of the Swiss Confederation and the Italian minister at Berne signed the following protocol to carry the award into effect:

"Les Soussignes, Monsieur le Sénateur L. A. Melegari, Ministre d'Italie en Suisse, et Monsieur J. Scherer, Président de la Confédération Suisse, à cela dûment autorisés, reconnaissent et déclarent, au nom de leurs Gouvernements respectifs, que la sentence arbitrale, rendue à Milan, le 23 Septembre 1874, par Monsieur Marsh, Ministre des Etats-Unis d'Amérique à Rome, surarbitre nommé, en la forme convenue dans le compromis signé à Berne le 31 Decembre 1873, pour fixer définitivement la frontière Italo-Suisse au lieu dit 'Alpe de Cravairola,' sentence dont suit le dispostif:

"'La ligne-frontière qui sépare le territoire du Italien du territoire de la Confédération Suisse (Canton du Tessin) au lieu dit "Alpe de Cravairola" doit quitter la chaîne principale des montagnes au sommet désigné "Sonnenhorn," pour descendre vers le ruisseau de la vallée de Campo, et, en suivant l'arête secondaire nommée "Creta Tremolino" (ou "Mosso del Lodano" sur la carte Suisse), rejoindre la chaîne principale au "Pizzo del Lago Gelato:"'

"Est devenue, en vertu de l'Article II. du dit compromis, obligatoire pour les deux Etats contractants, lesquels, par conséquent, s'engagent à faire procéder, dans l'année et aussitôt que faire se pourra, par le moyen de délégués spéciaux, à la collocation des bornes sur la ligne-frontière définitivement tracée dans le dispositif de la sentence arbitrale précitée.

"Fait à Berne, le 17 Mai 1875.

"[L. S.] MELEGARI.

"[L. S.] SCHERER."[1]

[1] When Mr. Marsh rendered his award he stated to Senator Guicciardi, in order to save any possible embarrassment growing out of the provisions of the Constitution of the United States, that he could not accept from the respective governments any compensation, gift, or other material acknowledgment of his services, and begged that none might be offered. (For. Rel. 1875, II. 754.) Both governments, however, afterwards requested him to accept testimonials, the Italian Government offering him an ornamental table, and the Swiss a pocket chronometer. Congress authorized Mr. Marsh to accept these presents (act of February 12, 1876, 19 Stats. at L. 415), and they were duly received by him. (Mr. Marsh to Mr. Fish, March 10, 1876, MSS. Dept. of State.)

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2. CASE OF COTESWORTH & POWELL.

Provisions for Arbitration.

By a convention of December 14, 1872, Great Britain and Colombia agreed to refer to arbitration the claim of Messrs. Cotesworth & Powell, British subjects, against the Government of Colombia, arising out of certain acts connected with the administration of justice in the city of Barranquilla, State of Bolivar, between the years 1858 and 1860. It was provided that the arbitration should be conducted by two commissioners, one to be named by the Government of Colombia and the other by Her Britannic Majesty's chargé d'affaires in Bogotá, or, in his absence, by the British acting consul-general in charge of Her Britannic Majesty's legation. Before proceeding to business the commissioners were required to name some third person to act as umpire, to decide any point on which they might differ in opinion; and if they should be unable to agree on such a person, it was stipulated that the selection should be made by the person in charge of the French legation in Bogotá. The commissioners were specially charged to decide two questions: (1) Whether the Government of Colombia was bound to grant indemnity to the claimants; and if so, (2) what amount should be paid, both principal and interest. The amount so awarded Colombia agreed to pay in "hard cash" within twelve months from the date of the award. The commissioners were to enter upon their duties at Bogotá on the ratification of the convention by the Colombian congress. They were authorized, if they so desired, to hear "one counsel for each party."

Origin of the Claim.

The facts on which the claim in question was based may briefly be stated. It appears that in 1855 Cotesworth & Powell, merchants of London, entered into a contract or contracts with the firm of Powles, Gower & Co., of Barranquilla and Bogotá, consisting of the firm of Powles Brothers & Co., of London, and Samuel J. Gower and Miguel Rivas, of New Granada, for the purchase of tobacco on joint account, Cotesworth & Powell supplying the funds, while Powles, Gower & Co. made the purchases, forwarded the tobacco, and shared the profits. In 1857 Powles Brothers & Co., the London branch of Powles, Gower & Co., failed, and this event was soon followed by the bankruptcy of the house at Barranquilla. Cotesworth & Powell at once dispatched an agent to New Granada to protect their interest. He succeeded in doing so at Bogotá, but not at Barranquilla.

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It was alleged that the judge at Barranquilla having cognizance of the case, one Clemente Salazar, in collusion with the local assignees in bankruptcy of Powles, Gower & Co., made away with the property of the claimants; that he sold 300 cases of the tobacco to his own secretary; that he forced his way into the sick room of the claimants' agent, and, over the protest of the English consul, seized the bills of lading of certain cargoes of tobacco, sent them to England, and received the value for them; and finally, that he disappeared suddenly from Barranquilla, carrying with him all the papers relating to the suit which was then before him and thus rendering it impossible for the claimants to prove their case. It was further alleged that he had previously been arraigned by his own countrymen upon charges of bribery and forgery in similar cases, and that he had been convicted, pardoned, and restored to his place. For his conduct in the present case he was condemned in costs in March 1862, but judgment could not be executed against him, as he pleaded the general amnesty act of March 1860. This plea was admitted on the ground that the amnesty included civil as well as criminal actions, and he was thus relieved of all the consequences of his conduct. Hence, though the supreme court of the State of Bolivar declared the claims of Cotesworth & Powell to the assets of the Barranquilla house well founded, it was impossible to recover anything.

The grounds on which the British Government demanded reparation were (1) the denial of justice by reason of the judge's violent and illegal acts, (2) the condonation of his offense by the amnesty, and (3) the tolerance in official position of a person of his infamous reputation.[1]

Constitution of the Commission.

A commission under the convention of December 14, 1872, was organized at Bogotá in the early spring of 1873. It was composed of Dr. Schumacher, German minister resident at Bogotá, on the part of Great Britain, and Dr. Ancizar, a distinguished citizen of Bogotá, on the part of Colombia. The subsequent transfer of Dr. Schumacher to the United States before any decision had been reached, and the continued ill health and final resignation of Dr. Ancizar, prevented final action on the case, and rendered the appointment of a new commission necessary. Under these circumstances General Salgar, once Colombian

[1] Mr. Scruggs, United States minister at Bogotá, to Mr. Fish, Sec. of State, January 5, 1875, For. Rel. 1875, 417.

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minister to the United States, afterward president of the republic, and at the period in question governor of the State of Cundinamarca, was named as the new commissioner on the part of Colombia; and Mr. Scruggs, minister of the United States at Bogotá, was invited to accept the post of commissioner on the part of Great Britain. Mr. Scruggs, being urgently solicited to do so, accepted the trust and reported the fact to his government.[1] Mr. Fish sanctioned Mr. Scruggs's acceptance, with the statement that it would have been preferable to have awaited the consent of the Department of State before consenting to act. The case as stated involved, said Mr. Fish, important principles, and as the result, whatever it might be, might in the future be made applicable to similar claims of foreigners against the United States, he expressed the hope that Mr. Scruggs would give the subject his best attention. Mr. Fish further stated that, without wishing to bias Mr. Scruggs's judgment in advance, the claim and some of its features resembled that in the case of the *Caroline* againt Brazil. He inclosed a copy of the Attorney-General's opinion in that case.[2] The convention was duly ratified by the Colombian congress, and the arbitrators entered upon their duties.

Award.

In November 1875 Mr. Scruggs reported to his government that the commission had closed its labors on the 5th of that month, and had delivered duplicate copies of its award, which found that the Colombian Government should pay the sum of $50,000, which was supposed to cover the actual loss of the claimants. General Salgar concurred both in the award and in the opinion which Mr. Scruggs had prepared. Both parties appeared to be satisfied with the result.[3] The Colombian minister for foreign affairs expressed the President's high appreciation of the "intelligence, studious care, and known good faith" exhibited by the arbitrators.[4] The British Government made similar acknowledgments and tendered to each of the arbitrators a "silver inkstand, with a suitable inscription from the Queen of Great Britain." This testimonial was accepted by General Salgar, and an application was made by the Department of State to Congress for authority to enable Mr. Scruggs to take

[1] For. Rel. 1875, I. 417.
[2] For. Rel. 1875, I. 423.
[3] Mr. Scruggs to Mr. Fish, Nov. 7, 1875, MSS. Dept. of State.
[4] Dec. 1, 1875, Ibid.

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similar action. The resolution passed the Senate, but in the House, owing, it was stated, to a misapprehension, it was indefinitely postponed.[1]

The decision and award of the commission was published in Spanish in the *Diario Oficial* of Bogotá on December 18 and 21, 1875, and was signed by both commissioners. The original English text, as prepared by Mr. Scruggs, is given in his opinion below. In this opinion the responsibility of Colombia was placed not upon the abuses of judicial authority in which the claim originated, but upon an amnesty by which the offending officials were relieved of personal liability for their wrongful acts. The opinion was as follows:

"This is a demand for indemnity for losses caused by alleged delays in awarding justice, by denials of justice, and by acts of notorious injustice occurring under the judicial administration of Colombia, in the years 1858, 1859, and 1860. The case may be briefly stated as follows:

"In October 1855 the mercantile firm of Powles, Gower & Co., consisting of the firm of Powles Brothers & Co., of London, and Samuel J. Gower and Miguel Rivas, of New Granada, was established in Barranquilla. The Barranquilla house thus constituted subsequently established a branch house in Bogotá.

"Between Powles, Gower & Co., of New Granada; Cotesf worth & Powell, of London, and Powles Brothers & Co., o-London, there were three several contracts, dated respectively January 14, May 2, and May 22, 1856. These contracts, each separate and distinct from the others, were signed in London by Powles Brothers & Co. for and on behalf of their Barranquilla partners, Powles, Gower & Co. Their object was the establishment of a separate business or incidental partnership for the purchase and sale of tobacco; the accounts and transactions of which to be distinct from the ordinary business of the three mercantile houses named, and to be known as 'accounts in participation.'[2]

"Powles Brothers & Co. failed November 1857; and soon thereafter Cotesworth & Powell sent an agent to represent their interests in New Granada. This agent was recognized by the Barranquilla house, who delivered to him the assets pertaining to the incidental partnership.

"Meantime the Barranquilla house failed as a consequence of the failure of its London partners; and on the 13th of February 1858 the judge of the circuit court of Barranquilla took cognizance thereof in proceedings in bankruptcy.

[1] Mr. Fish to Mr. Scruggs, March 22, 1876; Mr. Scruggs to Mr. Fish, May 17, 1876: MSS. Dept. of State.

[2] See Cuaderno 3, p. 155.

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"A series of incidental proceedings followed in which the claimants took part. The circuit and provincial courts of Barranquilla, the superior court of the State of Bolivar, and the supreme court of the Confederation, all took cognizance of the various questions arising therefrom. During its different stages, the alcalde of the district, the prefect of the department of Savanilla, the attorney-general of the State, the governor and the general assembly of the State, all figured in the proceeding.

"In July 1859 a local revolution broke out in the State. The legitimate governor abandoned Carthagena, the capital, and retired to Mompox. One Nieto assumed the prerogatives of chief executive and laid seige to Mompox. In August following the judge of the Barranquilla district absented himself, taking with him the papers relating to the bankruptcy case of Powles, Gower & Co. Many of those documents were never returned.

"The revolution terminated in December 1859. In January 1860 a new state constitution was formed under which the laws of amnesty of March 3, 1860, and January 3, 1863, were enacted. Upon the first was based the decisions of the court of last resort of the State of April 17, 1860, and May 8, 1860, as also that of the provincial court of Barranquilla of May 1, 1860. Upon the second, the sentence of the superior tribunal of the State, of May 11, 1863, was predicated.

"All these judicial decisions affected the interests of the claimants. The first dismissed the proceedings instituted against the judge of first instance for the illegal abstraction and sale of certain goods pertaining to the incidental partnership, pending action for their possession. By the second, or that of May 8, 1860, the criminal prosecution of the same judge, for the alleged crimes of robbery and falsification of documents, was set aside. By the third, or that of May 1, 1860, all proceedings against the assignee (*syndico*), for crimes and irregularities during the period of his office, were dismissed. By the fourth, or that of May 11, 1863, the irregularities and crimes of the judge of first instance, and his abuses of the judicial authority to the prejudice of the claimants, were declared comprehended in the amnesty laws of the State.

"In September 1860 the State of Bolivar entered into a compact of union with that of Cauca against the New Granadian Confederation; and the two States thus confederated adopted the name of 'United States of New Granada.' As the result of these political changes the legislation of the State was frequently changed, resulting in more or less confusion.

"During this confusion the claimants first asked for redress through the British legation in Bogotá.

"In December 1862 their attorney made written representation to the national executive, asking reparation for damages resulting from delays in awarding justice, from denials of justice, and from acts of notorious injustice; alleging that all

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appellate revision of unjust sentences, and all further redress before the legal tribunals, had been taken away by the amnesty laws. To this a response was given promising means of satisfactory redress.

"In March 1864 the attorney for claimants made a third representation in consequence of not having received a final decision upon his former petition. And in April 1865 the national executive decided that Colombia was not obligated to indemnify the claimants for damages and losses sustained by them on account of any misconduct on the part of individuals or subordinate officials in the State Bolivar.

"In January 1867 a fourth representation was made by their attorney, asking a reconsideration of the decision of April 1865. The reconsideration was had; and in October 1871 the minister for foreign affairs announced that the decision of April 1865, would be adhered to.

"In November 1871 a demand for reclamation (*sic*) on behalf of the claimants was made upon the Colombian Government by Her Britannic Majesty's diplomatic agent in Bogotá. The discussion which followed resulted in an agreement to refer the whole matter to arbitration.

"In December 1872 a convention of arbitration was signed by the plenipotentiaries of the two governments. This was sanctioned by a law[1] of the Colombian congress of April 9, 1873.

"Dr. Ancizar, a distinguished citizen of Bogotá, was named arbitrator by the Government of Colombia; the German minister resident, Dr. Schumacher, was appointed on the part of Great Britain; and Drs. Sálas and Rubio were retained as counsel respectively for the governments of Colombia and Great Britain.

"The recall of Dr. Schumacher and the resignation of Dr. Ancizar, before any decision had been reached rendered the organization of a new commission necessary. The new commissioners, consisting of the Honorable Eustorjio Salgar, an ex-President of the republic, as Colombian arbitrator; the undersigned, minister resident of the United States of America, as British arbitrator; and the Honorable Casimir Troplong, chargé d'affaires of France, as umpire, in case of disagreement, were installed some months since. Dr. Rubio appeared as counsel for the claimants, and the Honorable Ramon Gomez, attorney-general of the nation, appeared for the Colombian Government.

"Such, in brief, is the origin of this case; a controversy extending through a period of nearly eighteen years, and contemporary with some of the most notable political events of the country. Many of the most important papers are missing. Others have accumulated which have little relevancy to the

[1] Law 26 of 1873.

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question at issue; and these, together with the voluminous pleadings of counsel, have swelled the mass of documents to a magnitude almost bewildering.

"Before leaving Bogotá, Dr. Schumacher prepared, as the result of his study of the case, a comprehensive abstract of the great mass of documents submitted, as well as a copious index to the local statutes bearing upon the subject. This has been found of incalculable assistance in arriving at a clear and succinct history of the case, and, upon careful comparison with the original documents, to be remarkably accurate. It is to be regretted that one so patient and thorough in research, and so learned and able as Dr. Schumacher, could not have remained to complete a labor for which he is so eminently fitted.

"I.

"The preamble to the convention of December 14, 1872, announces as the object of this arbitration 'the putting of an end to the claim of Messrs. Cotesworth & Powell, British subjects, against the Government of Colombia, arising out of certain acts connected with the administration of justice in the city of Barranquilla, State of Bolivar, between the years 1858 and 1860.' Consequently, the following acts are not the objects of this investigation:

"1. Those not connected with the *administration of justice;* for example, legislative acts not connected with the judicial administration;

"2. Those not connected with the administration of justice in Barranquilla; that is to say, judicial sentences having no connection with the administration of justice in that city; and,

"3. Those not connected with the judicial administration in Barranquilla *during the years 1858, 1859, and 1860;* such, for instance, as may have occurred before or subsequent to the time mentioned.

"The convention, then, involves a consideration of the following proposition, as the primary question to be decided:

"Whether there were acts connected with the administration of justice, in the place and during the time mentioned, which, under the law of nations, obligate the national government of Colombia to indemnify nonresident British subjects for damages and losses suffered by them in consequence thereof?[1]

"To decide this question, the arbitrators, being wholly independent of both governments, must be the sole judges of the evidence presented. They can not, for instance, be expected to take into consideration documents which, in their opinion, do not merit confidence. But all documents and copies of documents deemed worthy of credence should be carefully considered; likewise all incidental writings relating to or in explana-

[1] See preamble to the convention of December 14, 1872; also Article III of same convention.

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tion of the legal papers connected with the history of the case, or which may serve to explain the contents of papers that may have been lost or destroyed without fault of the claimants.

"As mere bad administration of justice is not, in itself, just ground for reparation, it becomes necessary to investigate separately, and one by one, each act alleged in evidence of the *abuse* of the judicial authority; acts alleged in proof of positive *denials* of justice; charges of undue *delays* in awarding justice; sentences and rulings of the courts contrary to the *laws* of the country; and other acts alleged in proof of *notorious injustice.*

"Should these facts be clearly established, it must furthermore appear, in order to make the nation responsible, that the claimants exhausted every means of obtaining redress before the tribunals of the country; and that, all judicial recourse and appellate revision of unjust sentences being closed against them, they appeal as a last resort, through diplomatic channels, against the nation itself.[1]

"In order therefore to simplify the case as much as possible, we shall arrange the allegations preferred under six general heads as follows:

"*First.* Abuse of judicial authority in the bankruptcy proceedings against Powles, Gower & Co.;

"*Second.* Abuse of the judicial authority in regard to certain property claimed as pertaining to the incidental partnership;

"*Third.* Abuse of the judicial authority in depriving the claimants of certain documents pertaining to the incidental partnership;

"*Fourth.* An inquiry into the nature and legal character of this incidental partnership, by which certain 'accounts in participation' were created;

"*Fifth.* The revolution and amnesty, and the bearing of each upon the questions involved in this reclamation; and, lastly,

"*Sixth.* The rules of international law and precedents applicable to the case under consideration.

"We shall proceed to the examination of each in the order named.

"II.

"ABUSE OF THE JUDICIAL AUTHORITY IN THE BANKRUPTCY PROCEEDINGS AGAINST POWLES, GOWER & CO.

"This charge may be considered in the following order:

"1. Failure to cite the absent creditors;

"2. Failure to publish sentence of classification;

"3. The sentence excluding the claimants;

"4. The appeal therefrom, and its consequences;

[1] Phillimore, Law of Nations, vol. 2; see also opinion of United States Attorney-General, in the case of the *Caroline.*

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"5. Inutility of the new proceedings ordered; and,
"6. Criminal proceedings against the judge and the assignee.
"We shall consider:

"1. *The failure of the judge to cite absent creditors.*

"The first stage of the bankruptcy proceeding against Powles, Gower & Co., of Barranquilla, comprehends the time from its commencement, on the 13th of February 1858, to that in which the attorney of Cotesworth & Powell took part therein, November 4, 1858, a period of over eight months. The facts are as follows:

"Clemente Salazar, judge of the Barranquilla district, took cognizance of the bankruptcy of Powles, Gower & Co., *February 12, 1858.* On the next day he declared the firm in a state of bankruptcy, and nominated an assignee (*syndico*) and a treasurer (*depositario*). On the 1st of July following he cited the creditors to meet on the 12th day of the same month.

"The meeting of creditors took place on the day named, and Manuel Suarez Fortoul was elected assignee. No steps were taken, however, looking to the collection and placing of the assets of the bankrupt estate under bond. In default of such action, this became the duty of the judge,[1] who nevertheless failed to do so. On the same day the judge issued a decree opening the proceedings to proof.

"*September 7, 1858:* The time when the judge is said to have ordered publication of proofs, setting the time, 20 days, for pleadings, etc. There is no evidence, however, that this writ was made known by means of an edict as provided by the laws[2] of New Granada then in force. On the 12th of October following the judge approved the accounts of the treasurer, Mr. E. A. Isaacs, and on the 4th of November following the attorney of Cotesworth & Powell presented his authority in court, asking to be considered a party to the bankruptcy proceeding.

"With regard to the citation of creditors, only the following facts are adduced:

"On the 5th March 1859 Cotesworth & Powell's attorney wished to enter appeal from a sentence of the court, but found the office closed.[3] Subsequently the appeal was entered by the parties interested, and in consequence of this appeal on the 30th of December 1861 the superior tribunal of the State annulled all the proceedings in bankruptcy, for want of citation of absent creditors.[4]

"(A) With regard to complaints made by the claimants of acts occurring prior to November 4, 1858, the counsel for Colombia says they are unjust, because previous to that time

[1] Art. 39, Law of June 14, 1844.
[2] Art. XL. of June 13, 1843.
[3] Cuaderno, 11, p. 18.
[4] Cuaderno 11, p. 92.

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they were not parties to the suit.[1] Dr. Sálas contends furthermore, that the claimants were not interested parties until April 1862, the time when the new proceedings were opened.[2] The honorable the attorney-general of Colombia maintains substantially the same opinion.[3]

"Great deference is due to the opinions of both the learned counsel named; but the position here assumed by them can not be admitted as correct. The administration of justice, guaranteed to all persons living in a civilized country, interests all. It especially interests all parties who are either mediately or remotely affected by it. To illustrate: If the sentence of a judge, given in a suit of A versus B, be illegal or manifestly unjust, and in its consequence directly affecting the interests of C, the latter may ask a revision of the proceeding; and this although he may not have had previous occasion or necessity to take part in the suit. In the present case, the claimants were not bound to take part in the proceeding which led to the decision. Therefore if irregularities had taken place, in the bankruptcy proceeding, before the date mentioned, they directly affected the interests of the claimants; and for this reason they had a right to demand that justice be administered according to the laws of the country.

"Moreover, if in the present case positive crimes had not been committed, very great irregularities had taken place—irregularites involving the liability of the judge. Such, in fact, was the opinion of the superior court of the State of December 30, 1861. That tribunal not only pronounced the whole bankruptcy proceeding null *ab initio*—mentioning, among other causes of nullity, the failure to cite absent creditors—and ordered a new convocation of creditors and a new proceeding *de novo*, but likewise condemned the judge who made the unjust sentence of classification to the payment of costs. It is clear, therefore, that the want of citation in this case affected all the creditors of the bankrupt estate, and especially those who had not presented themselves.

"It is admitted by the Colombian minister for foreign affairs, the Honorable R. Rocha Gutierrez, in his reply to the first demand by claimants for reparation, that in the decree opening the proceedings in bankruptcy the absent creditors were not notified as provided by the law.[4] He insists, however, that such informality does not incur responsibility to the government further than its duty to annul the proceedings for the purpose of correcting the evils referred to.

"This opinion of the distinguished gentleman would be correct, were the evils reparable in the manner indicated. But

[1] Dr. Sálas, Alegato, p. 54.
[2] Dr. Sálas, Alegato, p. 77.
[3] Dr. Gomez, Alegato, pp. 41-2.
[4] Art. IV. L. 13, R. G. p. 142.

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this was not the case with respect to the claimants. The property in dispute had been sold, and the proceeds either done away with or else illegally portioned among the few favored creditors. In either case, there was no redress, as subsequent decisions of the higher tribunals show.

"2. *Failure to publish sentence of classification.*

"The second stage of the bankruptcy proceeding comprehends the time from the day in which the attorney for claimants took part therein, to that in which the sentence of classification was decreed, a term of nearly one month. The facts are as follows:

"On the 4th of November 1858 Cotesworth & Powell's attorney presented his credentials in court and asked to be considered a party to the proceeding. The next day, becoming party to the suit, he entered claim for £2,618 16s. 9d., complaining that the writ announcing classification of creditors had not been published; that there had been provided no safe deposit of bankrupt assets, as required by law;[1] that the records of the court did not contain the monthly statements of the assignee, as provided by law, etc.[2]

"The sentence of classification of creditors is dated *November 19, 1858.* Three days thereafter claimants' attorney asked that publication of proofs be made. The judge's decision thereon, if ever rendered, is missing. Five days later the judge declared the sentence of November 19th executed, or is said to have done so. There are no proofs, however, of the time of the publication of this decree. In December following the clerk of the court exhibited to claimants' attorney what purported to be a copy of an edict said to have been published, declaring the sentence of November 19th executed.

"The above facts appear to be established, although the evidence is somewhat conflicting. There is no proof that the decree of September 7, 1858, ordering publication of proofs, setting time for pleadings, etc., was ever published. On the contrary, there is circumstantial evidence that it was not published as the law required, and this is supported by the affidavits of José Luis Leon, Arriola, Macias, and Duncan.

"3. *Sentence excluding the claimants.*

"Even if the writ of September 7th had been published, it is questionable whether, at that stage of the proceeding, the judge could issue a sentence excluding the claimants as common creditors of the bankrupt estate. If, however, the writ had not been legally notified, the sentence of November 19,

[1] Art. 1025, Codigo de Comercio, of 1853.

[2] Art. 1026, Codigo de Comercio, of 1853.

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1858, was so much the more notoriously unjust, since the attention of the judge had been called to this defect.

"The sentence of November 19th referred to declared that, although the attorney of Cotesworth & Powell had petitioned to be considered a party to the bankruptcy proceedings, and had solicited the payment of £2,618 16s. 9d., as common creditors, such claim could not be recognized, because besides having been made after the term for the convocation of creditors, the claim itself was unsupported by proof.

"(B) The first reason here given for excluding the claimants, to wit, that 'the application had been made after the time fixed for the meeting of creditors,' is not admissible. Article 43 of the law of June 13, 1843, then in force, provided for the admission of any and all creditors in whatever stage the case might be found when presenting themselves.

"The second reason given for the exclusion of claimants, to wit, that their demand 'was destitute of all documentary proofs,' is equally fallacious. It is clearly provided, in Article 28 of the law above cited, that proofs may be presented up to the time of citation for sentence. This citation, although said to have been made November 2, 1858, was in all probability never made. Such, in fact, is the presumption, supported by circumstantial evidence. Consequently, the reasons given for the decision of November 19, 1858, failed to show that the judge had the right to exclude the claimants.

"It is said that the sentence above referred to was published the day after its delivery. But no evidence exists that the publication was ever made. The counsel for Colombia seems to attach little or no importance to this point. He evidently overlooked the fact that the law already cited [1] provides expressly that all such sentences shall be made public by means of an edict; and that such edict must be posted on the court-house door for the term of at least five days.[2]

"That such publication was never made scarcely admits of doubt. All the circumstances of the case, as well as much of the direct evidence, render any other opinion impossible. The disorderly condition of the tribunal at the time;[2] the great confusion in which all the papers were found;[3] the fact that many of the most important documents had been taken away by the judge, and left at other places;[4] that the prefect of the department had warned the judge to desist from such practices;[5] and that the judge's salary had been suspended, because he refused to comply with a plain official duty,[6] are circumstances unfavorable to any other presumption. Moreover these circumstances derive additional significance from the fact that the attorney for claimants, on the 12th January

[1] Art. 13, L. June 13, 1843.
[2] Art. 10, Law, June 13, 1843.
[3] Cuaderno 7.
[4] Cuaderno 7, pp. 53, 49. 7.
[5] Cuaderno, pp. 53, 49, 7.
[6] Cuaderno 11, p. 23.

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following, asked that investigation be made respecting the publication of all the decrees relating to the bankruptcy case of Powles, Gower & Co. from September 7th to November 20th, 1858; that accordingly, two unsuccessful efforts were made by the prefect to make this investigation; that these efforts were unsuccessful because the judge practically defeated them;[1] and that the prefect finally declared such investigation impossible by reason of the continued absence and perversity of the judge.[2]

"All these circumstances, almost conclusive of themselves that publication was not made at the time and in the manner indicated, are corroborated by the affidavits of Goenaga, the clerk of the court, Benavidez, Ramon, and others.[3]

"It is contended by the counsel of Colombia that these affidavits are worthless. In support of this position, article 36 of the law of December 31, 1857, is cited. That article says only that 'no one can be compelled to testify against himself;' it does not say that testimony *already* given, voluntarily against himself, has no value.

"4. *The appeal from the sentence of November 19, 1858.*

"The claimants' attorney petitioned for appeal from the sentence above named, January 15, 1859. Up to June 21st of the same year, the court took no action upon this petition. The judge had issued a decree, but its contents were unknown;[4] and the attorney asked in vain that this decree (whatever it was) be made known to the assignee. In July of the same year, the attorney complained that his representation of January preceding had been wholly disregarded.[5] In August following, he prayed decision upon his petition of June 21, 1859. Two days afterwards, the judge, without giving any decision, absented himself from his office and duties.

"Subsequently, the superior court of the State admitted an appeal, by certain creditors of the bankrupt estate, against the sentence of November 19, 1858. In this appeal, claimants' attorney cooperated, presenting his papers in court, and asking, in consequence of the appeal which had been admitted, that all previous adjudications made to various creditors be declared null.[6]

"This resulted in the decision of December 30, 1861, which, as we have already seen, annulled the entire proceeding in bankruptcy from its very commencement; ordered a new proceeding, a new convocation of creditors, and condemned Judge

[1] Cuaderno 12, p. 21.
[2] Cuaderno 12, p. 22.
[3] Cuaderno 7, p. 21.
[4] Cuaderno 8, p. 71.
[5] Cuaderno 8, p. 68.
[6] Cuaderno 8, p. 85.

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Salazar to the payment of costs. This was after a lapse of three years, ten months and seventeen days from the time of the bankruptcy[1] of Powles, Gower & Co.

"5. *Inutility of the new proceeding.*

"In order to sustain the case at this stage, it should be premised that the assignee, Manuel Suarez Fortoul, had resigned in August 1859; that his resignation had been accepted; and that one year thereafter, that is to say, in August 1860, the attorney for claimants petitioned the court to appoint a new assignee, since the creditors had failed to elect one.

"On the 12th March 1862, the provincial court of Barranquilla ordered a new convocation of creditors.[2] On the 26th of the same month, the clerk of the court certified that there were no first accounts of the late assignee, Manuel Suarez Fortoul.[3] The meeting of creditors took place June 12, 1862; nearly four years after the first meeting, under the former proceeding.[1] On the 18th July 1862, the new assignee, Mr. Jacobo A. Correa, made affidavit that he neither had in his possession nor knew who did have, any sums of money or assets belonging to the bankrupt estate; that there were no goods, assets or effects of any kind in his possession pertaining to said estate, nor had he ever received any; and that he never received any statement, account or explanation of the disappearance of any goods, assets or effects pertaining to said bankrupt estate from his predecessor.[4] This affidavit referred to the assets of the incidental partnership or 'joint account,' as well as to those pertaining to the bankrupt estate proper of Powles, Gower & Co.[4]

"After October 2, 1862, when the new assignee presented a statement of the general condition of the assets, or rather the absence of all assets, it does not appear that there was ever another meeting of creditors. All the objects of litigation having disappeared, with no one to render an account of, or to be held responsible for their disappearance, the proceeding seems to have been abandoned as useless.

"6. *Criminal charges and proceedings.*

"Meantime, criminal proceedings had been instituted against Judge Salazar and the clerk of his court for falsehood and deception in posting the edict announcing the sentence of November 19, 1858.[1] These charges were preferred in due form, December 2, 1858, by claimants' attorney, before the Honorable

[1] See *post*.
[2] Cuaderno 4, p. 4.
[3] Cuaderno 9, p. 92.
[4] Cuaderno 11, p. 133.

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Buenaventura Salgado, then judge of the second district. The attorney, it appears, held himself in readiness to establish the truth of these charges.[1] Subsequently, José A. Benavidez and Luis Ramon made affidavits to the same effect. Very soon thereafter, Judge Salazar's salary was suspended.

"In February 1859 claimants' attorney petitioned the judge of the second district to continue the criminal investigation.[2] He had previously asked for certified copies of the affidavits of Benavidez and Ramon;[3] and some days after this he announced that alterations had been made in those affidavits by the clerk of the court in collusion with Judge Salazar.

"This resulted in a commission by the prefect to the alcalde, to ascertain the whereabouts of the clerk who had the custody of the papers referred to. The clerk was found concealed in a private house, under a bed, and wrapped up in a counterpane. From thence he was conducted to the court room, where he delivered certain papers, but refused to deliver up the affidavits. When the last-named documents were delivered, some days later, the attorney-general and the claimants' attorney noted certain alterations which had been made in them.[4]

"The judge of the second district opened proceedings against Judge Salazar and the clerk for the crimes of altering and falsifying public documents;[5] but three days thereafter, that is on the 20th December 1858, the judge of the second district, who had cognizance of the case, was separated from the discharge of his official duties. Meantime, all the papers in the case had been delivered by him to the accused, Judge Salazar of the circuit court, who had reclaimed them.[6] The attorney-general protested before the governor of the State, and very soon thereafter Judge Salazar, who still had possession of the papers, absented himself.

"Claimants' attorney appealed to the governor of the State. This seems to have been unheeded. In June 1860 the attorney-general and the tribunal of the second district declared that the papers had been lost.[7] Nine days later the governor commissioned an officer to demand the papers of Judge Salazar; but Salazar made affidavit that they were not in his possession.[8] The result was that they were never produced.[7]

"(6) It is apprehended that there can be but one opinion respecting the judicial conduct above described. It seems to be almost without precedent in the modern annals of judicial

[1] Cuaderno 7, p. 25.
[2] Cuaderno 8, p. 28.
[3] Cuaderno 7, p. 88.
[4] Cuaderno 7, pp. 10, 74–75 *et seq.*
[5] Cuaderno 7, p. 121.
[6] Cuaderno 11, p. 11; and Cuaderno 7, pp. 47, 48 to 55.
[7] Cuaderno 7, p. 122.
[8] Cuaderno 11, p. 56.

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corruption. That there was a clear violation of the penal code of the State, by the judge of the second district in delivering the papers to one of the accused parties, admits of no doubt.[1]

"III.

"ABUSE OF THE JUDICIAL AUTHORITY IN REGARD TO CERTAIN PROPERTY CLAIMED AS PERTAINING TO THE 'JOINT ACCOUNT' OR INCIDENTAL PARTNERSHIP.

"We have seen[2] that, in consequence of the incidental partnership, created by the three several contracts[3] between Powles Brothers & Co., of London; Powles, Gower & Co., of Barranquilla, and the claimants, the Barranquilla house delivered to the agent of the latter certain goods pertaining to the 'joint account.'

"These goods were afterwards embargoed, first by certain creditors of the bankrupt house in New Granada, and then by the assignee of the bankrupts, as belonging to the common mass of assets. This gave rise to an action for their possession; and it is of the judicial proceeding connected with this action that complaint is made, and which forms the main basis of this reclamation. We shall, therefore, consider,

"1. The embargo by certain creditors;
"2. The embargo by assignee of the bankrupts;
"3. The action for possession; and,
"4. Pending such action, the illegal abstraction and sale of the embargoed goods by the assignee.

"1. *Embargo by certain creditors.*

"And first, with reference to the embargo by certain Granadian creditors, the facts are as follows:

"On the 23d February 1858, E. A. Isaacs & Co., of Barranquilla, pointed out or libelled, upon their own responsibility, certain quantities of tobacco which had been delivered to Cotesworth & Powell's agent as belonging to the incidental partnership, but which the informants claimed as belonging of right to the common mass of bankrupt assets. The informants took the usual oath provided in such cases, thereby subjecting themselves to the usual liabilities, should their embargo not be made good. The court admitted this action; and, in March following, others of the New Granadian creditors became sureties to the informers.[4]

"In January 1859, Isaacs & Co. withdrew their embargo, asked that the goods be released, and that they themselves be

[1] Articles 98-1-137 and 138 Penal Code.

[2] Supra.

[3] Cuaderno 3, pp. 1 to 4.

[4] Cuaderno 6, p. 52, and Cuaderno 11, p. 123.

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exonerated from all liability incurred in consequence of the procedure. This petition was granted by the judge, without hearing the other parties interested.[1]

"On the 5th March following, the attorney for claimants went to the tribunal for the purpose of entering appeal from this sentence, but found the office closed.[2] He subsequently asked that the informants be put under bond etc., according to legal usage in such cases. On the 1st of June thereafter, Isaacs & Co. entered exceptions to the authority of claimants' attorney.[3] The attorney answered the exceptions on the 10th of the same month.

"On the 20th of June of the same year, Judge Salazar, decided that the attorney for claimants had no power to interfere; because, as he said, his power as attorney comprehended only the ordinary and indispensable acts for the transaction of business; but not cases requiring more diligence, such as the present. This sentence was not notified.

"On the 3d August 1859 the attorney for claimants asked decision (*sic*) of the court respecting the exception to his powers, made in this case. He asked this in order that his clients might follow the legal course prescribed in such cases.[4] Two days afterward, the judge ceased to discharge his official duties, and no decision had been rendered.

"On the 30th January 1860 the claimants' attorney petitioned the prefect of the department to institute measures for compelling Judge Salazar to deliver up the documents pertaining to the case.[5] On the 10th June, of the same year, the sentence of June 19, 1859, was notified; that is, *one year after its delivery!* On the 8th March 1861 the superior court of the State revoked this sentence.

"In February 1862 claimants' attorney entered suit against Isaacs & Co., before the provincial court of Barranquilla, for damages resulting from their embargo of certain goods pertaining to the incidental partnership.[6] In March following, that tribunal decided that the attorney had no power to institute such proceedings. The attorney took an appeal to the superior court of the State. The last-named tribunal confirmed the sentence of the court below, April 2, 1862, without giving any reason therefor. The supreme court rendered a similar decision, June 30, 1862.

"(D) In regard to the proceeding above related, it may be noted,

"1. That the sentence exonerating Isaacs & Co., without hearing the parties interested, was illegal and notoriously

[1] Cuaderno 11, pp. 13 to 31.
[2] Cuaderno 11, p. 18.
[3] Cuaderno 11, p. 126.
[4] Cuaderno 8, p. 70.
[5] Cuaderno 8, p. 82.
[6] Cuaderno 6, p. 2; Cuaderno 6, p. 23.

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unjust. This is admitted by the Honorable R. Rocha Gutierrez, in one of his official notes, as minister for foreign affairs. He insists, however, that inasmuch as the attorney for the claimants was finally admitted under the decision of the superior court revoking the sentence of the inferior judge, justice was not denied.[1] But the question here raised is technically whether there had been an abuse of the judicial authority, resulting in damages unremediable by ordinary legal process. There was, moreover, a delay of nearly one whole year in notifying an important sentence, thus showing the claimants to have been kept in ignorance of the proceeding which directly affected their interest; and,

"2. That between the sentence of the superior tribunal of March 8, 1861, and that of April 2, 1862, by the same tribunal, there is a direct and irreconcilable contradiction. One recognized the authority of the claimants' attorney to bring action; the other as expressly denied it. Dr. Sálas, one of the counsel for Colombia, insists that this contradiction is more apparent than real; but his opinion is evidently based upon a mistake respecting the date of the first sentence, which is 1861, and not 1862.

"2. *Embargo by the assignee.*

"In January 1859, when Isaacs & Co. had withdrawn their embargo, Manuel Suarez Fortoul, as assignee of the bankrupt estate, pointed out the same and other lots of tobacco, demanding their embargo as pertaining to the bankrupt estate. This embargo was admitted by the judge, Clemente Salgar. The attorney for claimants protested, declaring that an assignee had no such authority under the commercial code of New Granada.[2]

"This protest appears to have been totally disregarded by the judge. In consequence, he was charged by the attorney with wilful neglect of duty. On the 10th of April following, the attorney renewed his protest, and asked decision of the court upon the proposition whether an assignee could legally make such an embargo.[3] This petition being likewise disregarded by the judge, the attorney repeated it on the 5th June following.[4] No action was still taken, and on the 19th July following the attorney renewed his petition, which being yet disregarded by the judge, was again renewed on the 3d of August of the same year.[5] Indeed, it does not appear that the court ever decided the point raised, or took any serious notice of the claimants' petition.

[1] Cuaderno 11, pp. 12 to 120; Cuaderno 1, p. 16.

[2] Cuaderno 8, p. 67; Cuaderno 10, p. 12.

[3] Cuaderno 10, p. 12.

[4] Cuaderno 8, p. 67.

[5] Cuaderno 8, pp. 67 to 69.

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"(E) The honorable the attorney-general of Colombia deduces[1] that, because assignees are charged with the defense of all the rights of the bankrupts, as prescribed in article 1005 of the *Codigo de Comercio* of 1853, they are therefore competent to embargo goods and effects not embraced in the mass of assets.

"This deduction does not seem to be supported by the spirit of the law cited; because,

"1. Neither in the law of June 13, 1843, nor in the *Codigo de Comercio* of 1853, is there found among the attributes of the assignee (*syndico*) any authority to make such embargoes. On the contrary, that authority is clearly reserved to the creditors themselves, who, in all such cases, must proceed upon their own responsibility; and,

"2. The article of the code cited by the attorney-general says only that 'es atribucion del sindico la defensa de todos los derechos de la quiebra, y el ejercicio de las acciones y excepciones que le competan;' but this is conceived to refer to the goods and assets actually pertaining to the bankruptcy, and not to those out of the common mass of assets; and finally, because,

"3. An assignee can not institute any species of judicial proceedings whatever for the business or interests of the bankrupt estate without previous authority from the judge;[2] and, in the case under consideration, this condition was not complied with.

"Consequently the undersigned is of opinion that the decision of the court admitting the embargo by the assignee, and the failure or refusal of the judge to hear the claimants, or to decide upon their petition challenging the authority of the assignee to make such embargo, involved in its consequences a denial of justice.

"3. *The action for possession.*

"In consequence of the embargo above referred to, the claimants entered action for possession February 24, 1859.[3] Meantime, some of the New Granadian creditors of the bankrupt house solicited the exportation and sale of the embargoed tobacco, then stored in Barranquilla.[4] Without hearing the claimants, the judge decreed the sale of certain lots of tobacco, likewise under embargo, then stored in the districts of Sambrano, Carmen, and San Juan Nepomuceno; goods pertaining to the Incidental Partnership, and consequently the object of a possessory action by the claimants.[4]

[1] Dr. Gomez's Alegato, pp. 35 and 38.

[2] Art. 1022, Codigo de Comercio.

[3] Cuaderno 8, p. 60; Cuaderno 11, p. 37.

[4] Cuaderno 8, p. 47.

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"The claimants entered appeal in March 1859. In June following, they notified the superior court of the State that their appeal had not been permitted to take regular course.[1] This notification was repeated in July of the same year.[2]

"The provincial court of Barranquilla decided January 27, 1862, that the goods and assets of the 'joint tobacco account' were the exclusive property of the incidental partnership; and that this partnership owed Cotesworth & Powell, of London, the sum of £6,682 2s. 3d., with interest thereon from the date of the failure of Powles, Gower & Co.[3]

"The assignee appealed, which was however withdrawn eight days afterwards;[4] and on the 17th of February the sentence was declared executed.

"4. *Illegal abstraction and sale of the embargoed goods, pending action for their possession.*

"Many of the documents relating to this stage of the suit, are missing. Those submitted prove the following facts:

"In September 1858, the attorney for claimants asked that Vicente Palacio make oath relative to the sale of certain tobacco, pertaining to the joint account then under embargo, at the instance of the assignee. Two weeks afterward, Señor Palacio made affidavit, affirming that such sales had been made.

"On the 12th of February 1859, Dr. José E. Bermudez made affidavit that he had held in his possession 4,792 pounds of the tobacco which had been embargoed by the assignee; but that subsequently he had placed the same to the order of Juan Cotren, by direction of the assignee.[5]

"On the 8th of February of the same year the assignee asked that the sale of this tobacco be authorized;[6] on the same day he took from the warehouse in Barranquilla several packages of tobacco, then the object of the possessory action, and shipped them to Santa Martha. On the day following, the judge ordered the assignee to take care to maintain in security, and in good condition, all the goods pertaining to the bankrupt estate.[7] This is alleged to have been a false or feigned decree.

"A few days later, the claimants' attorney informed the alcalde of the district of this abstraction and removal by the assignee;[8] and five days later he also notified the attorney-general of the district to the same effect.[9] In March following, he complained to the attorney-general of the delay in the administration of justice on the part of the alcalde.[10] Up to the 8th of April of the same year, 1859, the alcalde had taken no

[1] Cuaderno 8, p. 62.
[2] Cuaderno 8, p. 66.
[3] Cuaderno 11, p. 93.
[4] Cuaderno 11, p. 101.
[5] Cuaderno 10, p. 29.
[6] Cuaderno B, p. 2.
[7] Cuaderno B, p. 3.
[8] Cuaderno 6, p. 56.
[9] Cuaderno 8, p. 34.
[10] Cuaderno 8, p. 23.

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action upon the information given, although he had been repeatedly urged to do so.[1]

"On the 21st May 1859 the attorney-general of the State delivered an opinion that the abstraction and removal of the tobacco, pending action for its possession, was a fraudulent act on the part of the assignee; that for this act Judge Salazar was responsible as an accomplice; that both he and the assignee ought to be suspended from their respective functions; and that the offices of both should be opened to inspection by the prefect of the department. The attorney-general closes his opinion in this language: 'This is not the first time that the chief public minister of justice has been under the necessity of demanding the punishment of Judge Clemente Salazar for crimes in the execution of his judicial functions.'[2]

"The investigation here recommended was ordered by the superior court of the State on the 10th of June following.[3]

"An attempt at investigation was made in July of the same year; and in January 1860 the prefect returned the papers relating to the case to the superior court of the State.

"In February 1860 an order was issued by the last-named tribunal, at the instance of the attorney-general, for the investigation of the circumstances connected with the abstraction and removal of the tobacco named;[4] and, pending this investigation, the amnesty law of March 3, 1860, was enacted.[5]

"On the 17th April 1860 the superior court decided that the act of abstraction and removal of the tobacco from Barranquilla to Santa Martha, pending action for its possession, was a criminal offense and punishable as such; that for such offense both Judge Salazer and the assignee, Suarez Fortoul, were responsible; that whether both were principals, or whether one was the accomplice of the other, in either case the penalties were embraced in the law of amnesty of March 3, 1860; and hence that all proceedings against the judge be dismissed.[6]

"It is said that the tobacco thus abstracted from the warehouse in Barranquilla and removed to Santa Martha was sold to the highest bidder, although the judge had not caused such sale to be advertised.[7] Many creditors of the bankrupts protested against the illegality of this sale.[8] James Wilson, one of the creditors, protested before the British consul at Barranquilla.[9] Diogenes E. de Castro, the reputed purchaser, testified that 338 packages of tobacco had been sold, July 22, 1859.[10] The attorney for claimants asked for authenticated copies of the papers relating to this sale. He was told by the clerk of the court that all the papers were missing.[11] In January 1860

[1] Cuaderno 10, p. 11.
[2] Cuaderno B, p. 4.
[3] Cuaderno 8, p. 75.
[4] Cuaderno 10, pp. 13 and 14.
[5] *Post.*
[6] Cuaderno 11, p. 66.
[7] Cuaderno 10, p. 52.
[8] Cuaderno 10, p. 63.
[9] Cuaderno 10, p. 50.
[10] Cuaderno 10, p. 53.
[11] Cuaderno 10, p. 66

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the reputed purchaser, De Castro, testified to the sale, saying that the tobacco had been shipped on account of his mercantile firm 'De Castro & Son.'[1]

"(F) One of the counsel for Colombia[2] intimates quite plainly that the loss of the papers pertaining to this transaction was not in consequence of the judge's absence, neglect, or official corruption; but that the claimants were interested in their loss, in the hope of recovering damages, etc. The counsel, however, fails to adduce any proof showing probable ground for this suspicion. Indeed, there does not appear the slightest foundation for the insinuation made by him.

"It is also maintained by the counsel for Colombia,[3] first, that the removal of the tobacco was a legitimate act in the administration of the bankrupt estate; and, second, that even though it were not, it was at most an irregular act of the assignee, who is not a government official in a strict technical sense.

"Besides being in the very face of the sentence of the superior court of the state of April 17, 1860,[4] this opinion is fallacious for the following reasons:

"1. The tobacco in question was embargoed in Barranquilla; and in consequence there was pending an action for its possession. The very gist of the controversy was, whether this tobacco belonged to the bankrupt estate, and therefore to the common mass of assets; or whether it was the property of the claimants exclusively, and therefore to be delivered to them. Until this question was decided, the property in dispute could not be treated by the assignee as other goods pertaining to the mass of bankrupt's assets.

"2. This tobacco ought to have been deposited in some secure place, under lock and key; the judge should have had one of the keys in his possession, and the treasurer the other.[5] If the former failed in his duty in this respect, by not demanding one of the keys; or if, having the key, he permitted the illegal abstraction, shipment, and sale, he thereby became an accomplice.

"According to the opinion[6] of the Honorable R. Rocha Gutierrez, minister for foreign affairs, it is only necessary to consult the memorials and other documents issued previous to the sale of the 338 packages of tobacco, and the commercial code,[7] in order to be satisfied that the sale was not clandestine. We find, however, upon examination of the vouchers,[8] that the contrary is proven.

[1] Cuaderno 8, p. 78.
[2] Dr. Sálas, p. 144.
[3] Both Dr. Sálas and Dr. Gomez.
[4] See *post*.
[5] See Art. 978, Codigo de Comercio of 1853.
[6] Cuaderno 1, p. 17.
[7] Art. 1016, Codigo de Comercio, 1853.
[8] Cuaderno 10, pp. 29 to 34.

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"The honorable the attorney-general of the nation excuses, if he does not justify, this abstraction and sale on the ground that the tobacco was in a damaged condition.[1] But, admitting the goods to have been in a condition liable to damage, their removal and sale should have been according to the legal formalities provided in such cases. So far from this having been the case, the removal was without the knowledge or consent of the parties most interested, and over the repeated protests of other; whilst an examination of the papers relating to what little is known of the sale, shows that transaction to have been more or less clandestine; nor were the proceeds ever satisfactorily accounted for.

"IV.

"ABUSE OF THE JUDICIAL AUTHORITY IN ORDER TO DEPRIVE CLAIMANTS OF CERTAIN DOCUMENTS PERTAINING TO THE INCIDENTAL PARTNERSHIP, ETC.

"This charge comprehends,

"1. The illegal dispossession of the documents; and,

"2. Injustice in refusing to restore them.

"With regard to the first, the facts are as follows:

"Julian Osorio represented to the court, December 21, 1858, that Cotesworth & Powell's attorney was in possession of certain documents which related to him, and he therefore demanded their exhibition.[2] Without hearing the defendant, the judge on the same day ordered the documents to be produced.[3] The defendant represented that he had not received them through Osorio, nor from any other person in his name; but that about September 1, 1858, he had received various papers from a Señor Sansum, an employee of the Cármen establishment of Powles, Gower & Co.

"The judge, however, ordered the defendant to exhibit the documents.[4] This was on the 15th January 1859. A few days later, Tiberius C. Araujo was named clerk of the court *ad interim*. The defendant entered objection, under the then existing law.[5] He also entered an appeal from all the proceedings, had up to that time, in reference to the documents in question. The decision of the judge, if ever given, is missing.[6]

"On the 15th of February of the same year, the defendant submitted a memorandum of the documents then in his possession.[7] In March following, Osorio represented that he was the owner of the documents named. Two days afterwards, the judge

[1] Dr. Gomez, Alegato.

[2] Cuaderno 9, p. 26.

[3] Cuaderno 9, p. 28.

[4] Cuaderno 9, p. 29.

[5] See Art. 32, L. of March 23, 1843, R. G. p. 139.

[6] Cuaderno 9, p. 44.

[7] Cuaderno 9, pp. 32 to 47.

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decreed that defendant submit the documents mentioned in his memorandum of February 15 preceding.[1]

"This decree was notified to the defendant two days afterwards, when he entered written refusal and exceptions. The decision of the court on these points is missing. Afterwards, it seems that the defendant presented some of the documents; the judge asked for the others. Defendant appealed; the judge said he would decide upon the motion for appeal at some future time, but that the documents must be delivered beforehand. Defendant then asked to be protected in the possession of those already presented; the judge said he would decide that point some other time. Finally, in compliance with the order of the judge, the defendant presented the others; whereupon the court immediately adjourned. Defendant refused to sign the record, because the documents had not been returned to him. He also protested before the public notary. The documents, however, remained in Judge Salazar's possession;[2] and on the day following, the defendant published a card charging him with spoliation and robbery.

"It also appears that on the day after Osorio's original representation, that is to say, on the 22nd December 1858, the assignee, Suarez Fortoul, informed the court that Cotesworth & Powell's attorney was in possession of various documents which Osorio had given in pledge to the bankrupt house; he therefore asked that they be embargoed and deposited in his possession.[3] The judge said he would decree the embargo when the documents should be specified.

"On the 17th March 1859, Osorio represented that the documents in question had been in his possession; that he had been violently deprived of them, etc., and he therefore petitioned their return to him.[4] In support of this representation, he produced the affidavits of Bustillo, Hilario Rivas, and Adolfo Perez, made in San Juan Nepomuceno March 2, 1859. The judge, without hearing the defendant, issued the following decree:

"'*March 18, 1859:* The court considering that, inasmuch as Osorio had been violently dispossessed of the documents in question, decrees their delivery to him "without appeal by the defendant,"' etc. The judge then delivered them to Osorio.

"2. *The action for their restitution.*

"The claimants' attorney, who had petitioned the return of the documents, charged the judge before the prefect of the department with the crimes of falsification, spoliation, and robbery. Criminal proceedings were instituted against him before

[1] Cuaderno 9, p. 33.

[2] Cuaderno 8, p. 9, etc.

[3] Cuaderno 9, p. 7; Cuaderno 11, p. 14.

[4] Cuaderno 9, p. 44.

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the superior court. That tribunal decided that the crimes alleged had not been committed.

"In the civil action for restitution, an appeal was finally admitted before the superior court. In its sentence of April 16, 1861, that tribunal held that, since the circuit court of Barranquilla had reserved its decision respecting the right of possession until after the documents in dispute should be exhibited, the question should be referred.

"This resulted in a decision by the provincial court of Barranquilla, May 16, 1861, that the attorney of Cotesworth & Powell could not be protected in the possession of the documents. The court was, however, of opinion that Judge Salazar had unlawfully dispossessed the attorney of his papers; and that, when the object of their exhibition in court should be subserved, they should be returned to the defendant; nevertheless, the decision of March 18, 1859, should be respected regardless of the consequences, etc.

"From this singular sentence, an appeal was taken to the superior court; and, in a decision rendered June 18, 1861, that tribunal affirmed the opinion of the court below.

"This led to the accusation of the judge of the superior court, a Señor Nuñez, before the general assembly of the State. Charges were preferred under article 561 of the code of New Granada,[1] but the general assembly declared the accusation unsupported.[2]

"An effort was next made to appeal from the sentence of June 18, 1861. This was unavailing; the motion for appeal being admitted by neither the supreme court of the State, nor that of the Confederation.

"(G) The preceding facts show three distinct actions with respect to the documents in dispute, namely: one for the exhibition in court, one for possession by the assignee, and a counter action for possession by Osorio. The first, though an ordinary process, prepared the way for the reclamatory action. Hence the decision of March 18, 1859, if connected with the exhibitory action, was unjust. There was also an abuse of the judicial authority in deciding an important question without hearing the defendant. There was a denial of justice in the judge's refusal to consider [a] motion for appeal by the defendant. The attorney's challenge of the clerk *ad interim* was legally made; yet it was illegally disregarded.

"The action for possession interposed by the assignee invests the case with little or no additional importance. We have already seen that all such actions by an assignee are of very doubtful legality.[3]

"The possessory action brought by Osorio was not notified to the defendant; this was an act of notorious injustice. It

[1] See Recopilacion Granadina, p. 208.

[2] Cuaderno 9, p. 80.

[3] Arts. 1005 and 1028 Codigo de Comercio; see *post.*

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appears, moreover, that the affidavits produced by Osorio referred not to facts but to mere legal opinions; the case was not therefore made out as alleged in the declaration. In addition to this, Osorio contradicts one demand by the terms of another subsequently made. It is even doubtful whether the documents referred to in the affidavits named were the same which had been produced in court, in consequence of the exhibitory action.[1]

"Both the provincial court of Barranquilla and the superior tribunal of the State, denied justice to the defendant by declaring it impossible to protect him in the possession of his papers; because the sentence appealed from, based as it was upon the interdictory action, was irregular and unjust for want of citation.

"V.

"THE INCIDENTAL PARTNERSHIP.

"The contracts establishing this partnership, as we have already seen,[2] were dated in London, January 14, May 2, and May 22, 1856.[3] They were signed by Powles Brothers & Co., of London, for and on behalf of their New Granadian partners, Messrs. Powles, Gower & Co.[4] Each contract was drawn up in the form of a 'Memorandum of agreement,' and was duly registered by a public notary in London, November 14, 1857.[5]

"In accordance with these agreements, large quantities of tobacco had been purchased on joint account, by the Barranquilla house, with funds supplied by Cotesworth & Powell. By the terms of the agreement, the profits and losses resulting from this transaction were to be shared in equal moieties by the two contracting parties.[6]

"When the Barranquilla house failed in consequence of the failure of their London partners, this tobacco, as we have already seen, was turned over to an agent of Cotesworth & Powell. The judicial proceedings growing out of the embargo of this property, first by certain Granadian creditors, and then by the assignee of the bankrupt house, have been detailed at length in the preceding pages. But, as those proceedings form perhaps the principal ground for this reclamation, it may be well to examine briefly the nature of the incidental partnership itself. We shall therefore consider,

"1. Whether the contracts were *bona fide;*

"2. Whether they were legal; and,

"3. When and how the partnership formed by them was dissolved.

[1] See Cuaderno 9, pp. 8 to 95.

[2] Introduction.

[3] Cuaderno 3, pp. 1 to 4.

[4] Cuaderno 3.

[5] Cuaderno 3, pp. 1 to 6.

[6] Cuaderno W., 3 and 11.

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"1. *Were the contracts bona fide?*

"One of the counsel for the Colombian Government[1] intimates, in many places, that these contracts were feigned for the purpose of defrauding the Granadian creditors. In support of this insinuation, he asserts that the claimants made registration of them only the evening before the failure of the London partners of the Barranquilla house. He also adduces the circumstance that certain bills of exchange, drawn by Edward Ross as agent of Powles, Gower & Co. in Jiron, were against Powles Brothers & Co., instead of Cotesworth & Powell.[2]

"The undersigned must be permitted to express surprise that such an argument as this should have been advanced by the learned counsel. There does not appear the slightest foundation for his suspicions. He is even mistaken respecting the time of registration, which was two days prior to the failure of the London partners of Powles, Gower & Co., and not the evening before that event. And when it is borne in mind that the books of the bankrupt house, the contracts and the correspondence between the parties and the other papers submitted all show that Cotesworth & Powell had real and practical interests in possession, the notarial act referred to is of easy explanation without involving any presumptions of fraud.[3] The claimants had advanced large sums of money with which tobacco had been purchased in New Granada upon joint account. It was natural, therefore, that from the moment of any intimations of failure by Powles Brothers & Co., the claimants should have taken every reasonable precaution to protect their interests.

"In regard to the bills of exchange drawn by Ross, we fail to perceive in that circumstance any evidences of a fraudulent transaction. The contracts under consideration gave the Barranquilla house the authority to draw from time to time upon Cotesworth & Powell; but they certainly did not prohibit them from drawing upon their own partners in London; nor were they obligated by the agreement to execute all their drafts against Cotesworth and Powell.

"2. *Were the contracts legal?*

"The laws[4] of New Granada then in force expressly provided for just such contracts of incidental partnership as those under consideration. But the counsel for Colombia[5]

[1] Dr. Sálas, see his Alegato.

[2] See also Dr. Gomez's Alegato.

[3] See Dr. Rubio's argument on this point, No. 2, No. 9.

[4] Arts. 315, 316, 317, 318, Codigo de Comercio, 1853.

[5] Dr. Sálas.

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maintains that they were not binding upon the Barranquilla house; first, because the firm name of Powles Brothers & Co. had not been used; and second, because there is no written evidence of a commission to Powles Brothers & Co. from Powles, Gower & Co.

"These reasons are not well founded; because,

"1. The firm of Powles, Gower & Co. was formed, as we have seen,[1] by Powles Brothers & Co., of London, of the one part, and by Samuel S. Gower and Miguel Rivas, of New Granada, of the other part, under written agreement dated October 22, 1855, and in accordance with the laws of New Granada.[2] It was both legal and natural, therefore, that, in London, Powles Brothers & Co., as the only resident partners, should use the firm name there in the same manner that the managing partner in New Granada, Samuel S. Gower, used it in Barranquilla.

"2. A special commission, from one to the other, was not necessary to enable the respective partners to use their firm name. Their acts are binding upon the firm without this, under the laws of New Granada.[3]

"3. *When and how the incidental partnership was dissolved.*

"This incidental partnership ceased, of course, from the date of the bankruptcy of Powles Brothers & Co. and of their Barranquilla partners. This appears from the sentence of a New Granadian court[4] which declares:

"1. That between Powles, Gower & Co., of New Granada, and Cotesworth & Powell, of London, there had existed an incidental partnership since the date of January 14, 1856; and

"2. That this incidental partnership was dissolved in December 1857, in consequence of the failure of Powles Brothers & Co.

"This decision was in accordance with the commercial laws of New Granada, as may be seen by reference to articles 319 and 290 of the Codigo de Comercio of 1853.[5]

"VI.

"THE REVOLUTION AND THE AMNESTY.

"These have a most important bearing upon the questions submitted in this case. The first because it has been made a ground of defense by the counsel for Colombia, the second

[1] Introduction.

[2] Art. 252, Codigo de Comercio, 1853.

[3] Art. 234, Codigo de Comercio.

[4] Provincial Court of Barranquilla, January 27, 1862.

[5] See also Story's Commercial Law.

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because it forms the chief if not the only reason for making this reclamation an international question. We shall therefore consider,

"1. *The revolution.*

"The counsel for Colombia[1] characterises the revolution in Bolivar, as a 'political situation which exempts the national government of Colombia from all responsibility, for want of those obligations which bind it to other nations,' etc., and as rendering the national government 'irresponsible for damages suffered by strangers voluntarily within the belligerent territory,'[2] etc.

"These opinions of the learned counsel are applicable to a state of war between the two nations interested; but, in the present case, there was no such war. Pacific relations between Colombia and Great Britain had not been interrupted. But if they had been, British subjects in Colombia would have still retained all their rights under existing treaties[3] and international polity, until official publication of war had been made.[4] And such publication, we may as well remember, could have been made only by the national authorities. The State of Bolivar, even had it been so inclined, which however does not appear to have been the case, could not have changed the relationship between the two countries; because Bolivar was an integral member of the national entity of Colombia, without any international character or any species of foreign relations whatever.

"Moreover, the points raised by Dr. Sálas are inapplicable; because,

"1. Even admitting that, between the months of July and December 1859, the condition of political affairs in Bolivar was such as to render the administration of justice uncertain or impossible, this could only have delayed justice until the restoration of peace and order. This took place, as we have already seen, in December 1859; after which time, the war could be no longer alleged as an excuse for delay in awarding justice, still less in mitigation of positive denials of justice, or for acts of notorious injustice.

"2. The frequent and illegal[5] absence of the judge can not be excused under the plea of political disorder; because, at the time, there was no direct peril to life in Barranquilla, nor was that judicial circuit in a state of war.

"And it may be added in this connection, that the absence of the judge from his place of official duty, without providing

[1] Dr. Sálas, Alegato.

[2] "Esposicion en Derecho Publico," pp. 13, 33, 35.

[3] Art. 9, Treaty of 1825 between Colombia and Great Britain.

[4] Vattel, "State of War" etc.; see also Phillimore and Kent.

[5] Art. 162, Recopilacion Granadina; Art. 77, Law of Bolivar November 30, 1857; and Art. 16, Law of May 10, 1855.

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any substitute, was aggravated by the fact that he carried with him many important documents pertaining to the suit, and never returned them, nor deposited them in a place of safety; thus depriving the claimants of the ordinary and necessary means of obtaining justice.

"2. *The amnesty.*

"The amnesty laws of the State, of March 3, 1860, and January 3, 1863, resulted in judicial sentences, as we have seen, which virtually closed the courts of appellate revision against the claimants. The facts are as follows:

"1. By the decree of April 17, 1860, the superior tribunal for the State released both the judge of first instance and the assignee from the consequences of their crimes and misdemeanors; declaring the acts of both comprehended in the amnesty of March 3, 1860.[1]

"2. By its sentence of May 1, 1860, the provincial court of Barranquilla dismissed all the proceedings against the assignee, Suarez Fortoul, for the same reason.[2]

"3. In like manner, the same tribunal by its sentence of May 8, 1860, dismissed the action brought against ex-Judge Salazar for robbery and falsification of documents. But, in this case, the court held that the accused was not necessarily released from civil responsibility, under the law of March 3, 1860. Hence, on the 30th December 1861, the same tribunal condemned ex-Judge Salazar to the payment of costs and damages caused by his illegal and corrupt decisions and rulings which led to the nullity of the whole bankruptcy proceeding. From this sentence an appeal was subsequently taken by Salazar; and,

"4. On the 11th of May 1863 the superior tribunal of the State decided that the sentence condemning Salazar to the payment of costs and damages was 'in consequence of his violations of law;' that, whether such violations be considered as veritable crimes or as mere irregularities, they were, in either case, comprehended in the amnesty of January 3, 1863. The court, therefore, decreed his release from all civil responsibility.

"(H) It is asserted by one of the counsel for Colombia[3] that the amnesty laws upon which these judicial sentences were predicated, were enacted by the State legislature while in 'open rebellion against the public order; to which (rebellion) the national government succumbed before it could be suppressed,' etc. To which we observe,

"1. That the rebellion terminated in December 1859. This was two months before the first, or more than two years before the last, amnesty law was passed.

[1] Cuaderno 11, pp. 66, 67.

[2] Cuaderno 11, p. 131.

[3] Dr. Sálas, Alegato as printed, p. 15.

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"2. If the learned counsel's assumption be admitted with respect to the amnesty of March 3, 1860—which however is not possible—then that of January 3, 1863, upon which the main decision rests, still remains.

"3. If it were possible to waive this point, and admit the assumption of the counsel with respect to both laws, we should be confronted by the proposition, whether it was not the duty of the national government to annul all illegal acts committed in 'open rebellion against public order,' whenever its authority was reestablished.

"It has been well said by Dr. Rubio,[1] the counsel for Great Britain, that 'the rebellion triumphed; that the national constitutional convention acknowledged as valid all the acts of the revolutionary legislature of Bolivar; and the amnesty laws of the State were among the acts thus recognized and adopted.' The undersigned quite agrees with him, therefore, that the nation accepted all the consequences of those acts.

"But it is maintained both by Dr. Salas and by the honorable the attorney-general of the nation,[2] that the sentence of May 11, 1863, does not necessarily prove that the amnesty laws deprived the claimants of any right to institute civil actions for damages against individuals who may have wrought them injury.

"This opinion seems to be supported by the reasons given for the decision of the provincial court of May 8, 1860. It should be borne in mind, however, that that decision was based upon the law of March 3, 1860; whilst that of May 11, 1863, was founded upon the new law of January 3, 1863; that one decision, which was not appealable, construed the law of 1863 to embrace the civil consequences of the crime; that the same tribunal has never so construed the law of 1860; and hence that the reasons given for the one can have no application with respect to the other.

"With regard to the decision of April 17, 1860, exempting the judge and assignee, the counsel for Colombia[3] contends that it was appealable. This opinion is erroneous, because,

"1. There is no higher tribunal within the State, to which appeal might be taken;

"2. There was no national court of appellate revision at that time, so far as the State of Bolivar was concerned, in consequence of the political changes; but,

"3. If there had been, an appeal would have been wholly useless; because we have just seen that the national tribunal, under the terms of the reorganized government, would have had no other alternative than in recognizing both the amnesty laws of Bolivar as legitimate and in full force.[4]

[1] Alegato, Serie 2, No. 9.

[2] "Esposicion en Derecho Publico;" also Dr. Gomez's Alegato.

[3] Dr. Salas' "Esposicion," etc.

[4] See *post;* see also, Constitution of Rio Negro.

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"VII.

"THE RESPONSIBILITY.

"Having examined at some length the leading facts connected with the administration of justice, in the locality and during the period named in the convention,[1] in cases in which the claimants were interested, it only remains to determine whether the facts proven render the national government of Colombia responsible. We should therefore, consider:

"1. The conditions under which one government becomes responsible to another for wrongs occurring under its judicial administration; and,

"2. Whether, in the present case, the facts proven fulfil these conditions.

"First, then, with regard to the rights and duties of foreigners, the undersigned deduces the following principles:

"1. If a nation annexes any special condition to the permission to enter its territory, it should take measures to acquaint foreigners with the fact when they present themselves at the frontier. But when admitted, strangers should obey the laws of the place; and, in return for such obedience, they are entitled to the protection of the laws. All disputes, therefore, between themselves or between them and the natives, should, where such provision is made, be determined by the tribunals, and according to the laws of the place.[2]

"2. Every nation should provide just and reasonable laws for the administration of justice; and it is equally a duty to provide means for their prompt and impartial execution. Reasonable diligence should be exercised in securing competent and honest judges. This done, the nation has no further concern than to see that they do not neglect their duties.[3]

"3. The judiciary of a nation should be respected, as well by other nations as by foreigners resident or doing business in the country.[4] Therefore, every definitive sentence of a tribunal, regularly pronounced, should be esteemed just and executed as such. As a rule, when a cause in which foreigners are interested, has been decided in due form, the nation of the defendants can not hear their complaints. It is only in cases where justice is refused, or palpable or evident injustice is committed, or when rules and forms have been openly violated, or when odious distinctions have been made against its subjects, that the government of the foreigner can interfere.[5]

"4. The granting of amnesty and pardon is one of the attributes of sovereignty, resulting from the very nature of gov-

[1] Convention of Arbitration, December 14, 1872; see Preamble, etc.

[2] Vattel's Law of Nations, Chitty's 4th ed., p. 172; Phillimore's Law of Nations, vol. 2, ch. 2.

[3] Vattel, Law of Nations, pp. 77, 78.

[4] Wheaton, Elements of International Law, pp. 196, 197.

[5] Vattel's Law of Nations, p. 165.

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ernment. But in the exercise of this prerogative, there should be no other object than the greater good to society. Justice should be reconciled with clemency; pity for the unfortunate should never banish care for the public safety.[1]

"5. One nation is not responsible to another for the acts of its individual citizens, except when it approves or ratifies them. It then becomes a public concern, and the injured party may consider the nation itself the real author of the injury.[2] And this approval, it is apprehended, need not be in express terms; but may fairly be inferred from a refusal to provide means of reparation when such means are possible; or from its pardon of the offender, when such pardon necessarily deprives the injured party of all redress.[3]

"6. According to the old authorities,[4] a judicial sentence notoriously unjust, to the prejudice of a stranger, entitles his government to interfere for reparation even by reprisals. The authority of the judge was not considered to be of the same force against strangers as against citizens, because the latter were concluded by the sentence, though it be unjust; they could not lawfully oppose its execution nor by reprisals recover their rights 'by reason of the controlling efficacy of the authority under which they live;' whereas strangers had the power of reprisal, although it was considered unlawful to exercise it so long as their rights might be obtained by the ordinary course of justice.[5]

"7. This doctrine, however, has been greatly modified.[5] According to modern standard authorities,[6] the nation to which a foreigner belongs may interfere for his protection only when he receives positive maltreatment, or when he has been denied ordinary justice in a foreign country. 'In the former case, immediate reparation may be insisted upon. In the latter, the interference is of a more delicate character;' and, in order to be justifiable, all means of legal redress 'afforded by the tribunals of the country in which the injury occurred,' must have been exhausted.[7] The ground for interference is fairly laid when those tribunals are unable or unwilling to entertain and adjudicate the grievance. But even then 'it behooves the government interfering to have the greatest care, *first*, that the commission of wrong be clearly established; and, second, that the refusal of the tribunals to decide the case at issue, be no less clearly established.'[8]

[1] Vattel, p. 83.

[2] Vattel, pp. 162, 163.

[3] See the case of Joy, cited in this case.

[4] Grotius *de Jure Bel. ac. Pac. Lib.* 3, ch. 2.

[5] See Wheaton, Elements of International Law.

[6] Phillimore, Law of Nations, vol. 2, ch. 2.

[7] Attorney-General of the United States in the case of brig *Caroline*.

[8] Phillimore, vol. 2, chs. 1 and 2.

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"8. No demand can be founded, as a rule, upon mere objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein.[1] Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice.

"9. Nations are responsible to those of strangers, under the conditions above enumerated, *first*, for denials of justice; and *second*, for acts of notorious injustice. The first occurs when the tribunals refuse to hear the complaint, or to decide upon petitions of complainant, made according to the established forms of procedure, or when undue and inexcusable delays occur in rendering judgment. The second takes place when sentences are pronounced and executed in open violation of law, or which are manifestly iniquitous.

"10. With respect to the case under consideration, the undersigned concludes that the Government of Colombia is responsible to that of the claimants, if justice had been denied them, or if they have been the victims of notorious injustice, in cases admitting of no doubt; provided all modes of appellate revision were exhausted, and the executive power, representing the nation (irrespective of its internal distribution of governmental functions) to foreign powers, had notice of the fact and refused redress. We should therefore consider:

"2. *Whether the facts proven fulfil the above conditions.*

"That there were, in the locality and during the time mentioned in the convention of arbitration[2] undue delays, many irregularities, repeated refusals to hear the parties or to decide upon their petitions; positive violations of law in dictating sentences, and even gross criminal conduct on the part of the judge, in certain lawsuits in which the claimants were interested, and greatly to the detriment of their rights and interests, appears from the foregoing investigation. But for the sake of convenience, the facts may be briefly summed up as follows:

"1. In the first stage of the proceeding in bankruptcy against Powles, Gower & Co., the failure of the judge to cite the absent creditors was among the irregularities which, four years afterwards, caused the nullity of the whole proceeding *ab initio*.

"2. In the same proceeding, the sentence of classification, besides being itself illegal, was never legally notified. As a consequence, the sentence of November 19, 1858, was unjust for illegally excluding the claimants as common creditors; even if it had been legally notified, which was not the case.

[1] Phillimore, vol. 2, chs. 1 and 2.

[2] Preamble to Convention of December 14, 1872.

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"3. The nullification of the entire proceeding in bankruptcy, nearly four years after its commencement, and after all the assets had been either squandered or illegally partitioned, and when there were no means of their recovery, involved undue delay, positive denials of justice and gross criminal conduct on the part of the judge and assignee.

"4. In the first criminal proceeding against this judge and his secretary, for falsification of legal documents, the sumarios were lost or destroyed, and the investigation defeated, in consequence of an open violation of law by the judge having cognizance of the case.

"5. The sentence releasing Isaacs & Co. from all responsibility, resulting from their embargo of goods pertaining to the incidental partnership, was a denial of justice; because made without hearing the claimants as plaintiffs in the suit The delay of nearly one whole year in notifying an important judicial sentence, was inexcusable. The exclusion of claimants' attorney, or rather the judge's refusal to decide upon his petition, was a denial of justice. The conflict between the decisions of the same tribunal is not accounted for; nor has it ever been attempted, except under misapprehension as to dates.

"6. The sentence recognizing the pretensions of the assignee, to embargo goods not among the bankrupts' assets, was of very doubtful legality. This, however, could never have arisen among the causes of complaint, had not the judge refused to hear the parties interested, on their petitions repeatedly and formally made, thus denying them ordinary justice. The decree of sale of certain embargoed goods stored out of Barranquilla, pending action for their possession, and without hearing the parties, was a denial of justice if not notorious injustice.

"7. The secret abstraction, appraisement, removal, and sale of certain embargoed goods stored in Barranquilla, pending action for their possession, was at least an irregular and illegal act on the part of the assignee and the judge, if not grossly criminal on the part of both; especially as this was done over the protest of such of the parties interested as happened to suspect the fact, and as the proceeds of the sale were never satisfactorily accounted for.

"8. In the exhibitory action by Osorio, the sentence of March 18, 1859, was unjust; because the documents should have been previously returned. The judge's refusal to hear the defendant was a denial of justice. The same is true of his failure to notify the defendant of Osorio's counter action for possession, whilst the objects of litigation were yet in possession of the court.

"9. The judge's absence from his place of official duty, at the times and under the circumstances named, was a violation of the New Granadian laws. Nor can such absence be excused or mitigated on the ground of political disorder, because life was not in peril in the Barranquilla district at the time. His absence was especially prejudicial to the claimants, since he

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carried with him the most important papers relating to their suit, and neither deposited them in a place of safety nor ever returned them; thus depriving the claimants of the ordinary and necessary means of obtaining their rights before the tribunals.

"10. The amnesty laws of the state took away from the claimants all appellate recourse, and all means of redress before the authorities at Bolivar. By subsequently adopting those laws, the national government of Colombia rendered recourse to its tribunals equally useless. The chief executive of the nation was duly informed of these facts; but, after considerable delay, finally refused to provide means for reparation.

"The undersigned considers, therefore, that the facts proven in this case clearly fall within the conditions which render one government responsible to another for wrongs occurring under its judicial administration. Hence, in regard to the preliminary question propounded in Article III. of the convention of December 14, 1872, he is left no [other] alternative than to decide it in the affirmative. He places this responsibility of Colombia solely upon the consequences of the amnesty, thus adhering, as he conceives, to the well-established principle in international polity, that, by pardoning a criminal, a nation assumes the responsibility for his past acts.

"This involves no humiliation to the Colombian people and nation, because every nationality, however enlightened may be its people, however admirable and just its political and judicial systems, is far from being sufficiently perfect to prevent exceptional cases of judicial corruption, or gross criminal conduct on the part of its high officials. History, both ancient and modern, abundantly attests that every nation, from the humblest to the greatest, has had its experiences in this line; and, whilst Colombia has been justly noted for its generous hospitality to strangers, it would be remarkable indeed were it to claim exemption from the ordinary frailties of common humanity. On the contrary, to her credit and honor, both at home and abroad, Colombia has fully recognized the principle here involved by her decree of 1868, awarding indemnity, under precisely similar circumstances, to a foreigner residing in Barranquilla.[1]

"BOGOTÁ, *August 1875.*"

3. CHILEAN-PERUVIAN ACCOUNTS.

By a protocol signed at Lima March 2, 1874, Chile and Peru agreed to submit to arbitration the controversy pending between them in relation to the accounts of their expenditures on account of the allied squadron during the war with Spain

[1] Executive decree of December 7, 1868, awarding Mr. Joy, a British subject, indemnity [for losses] resulting from the amnesty laws of 1863.

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of 1865. Under this protocol Mr. C. A. Logan, then minister of the United States at Santiago, was requested to act as arbitrator.[1] His government having given its consent,[2] he entered upon the discharge of his duties in the following October.[3] He rendered his award April 7, 1875.[4] It was as follows:

"SENTENCE AND AWARD OF THE ARBITRATOR IN THE MATTER OF THE CHILE-PERU ALLIANCE.

"TREATY OF ALLIANCE, OFFENSIVE AND DEFENSIVE, BETWEEN CHILE AND PERU.

"'Whereas the respective plenipotentiaries have stipulated at this capital, on the 5th day of December 1865, between the republics of Chile and Peru, the following treaty of alliance, offensive and defensive, viz:

"'In the name of Almighty God, the republics of Chile and Peru, in presence of the danger by which America is menaced and of the violent aggression and unjust pretensions with which the Spanish Government has begun to attack the dignity and sovereignty of both, have agreed to enter into a treaty of alliance, offensive and defensive; for which purpose they have nominated plenipotentiaries, *ad hoc:* thus, on the part of Chile, Señor Domingo Santa Maria; and on the part of Peru, the secretary of foreign affairs, Señor Toribio Pacheco; who, having deemed their respective powers sufficient, proceeded to frame the present preliminary treaty:

"'ART. I. The republics of Chile and Peru stipulate between themselves the most intimate alliance, offen ive and defensive, in order to repel the present aggression of the Spanish Government, as well as any other from the same government that may be directed against the independence, the sovereignty, or the democratic institutions of both republics, or of any other of the South American continent; or that may have originated in unjust claims deemed such by both nations, and which may not be advanced according to the principles of international law, or which may be disposed of in a way contrary to said law.

"'ART. II. For the present and by the present treaty, the republics of Chile and Peru oblige themselves to unite such naval forces as they have or may in future have disposable, in order to oppose with them such Spanish maritime forces as are to be or may be found on the waters of the Pacific, whether blockading the ports of one of said republics, as now happens, or of both, as it may happen, or in any other way committing hostilities against Chile or Peru.

[1] Mr. Logan to Mr. Fish, No. 57, April 1, 1874, MSS. Dept. of State.

[2] Mr. Fish, Sec. of State, to Mr. Logan, May 8, 1874.

[3] Mr. Logan to Mr. Fish, No. 112, October 9, 1874.

[4] For. Rel. 1875, I. 185, 186

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"'ART. III. The naval forces of both republics, whether they operate together or separately, shall obey, while the present war provoked by the Spanish Government lasts, the government of that republic on whose waters said naval forces be stationed.

"'The officer of highest rank, and in case of there being many of the same rank, the senior among them, who may be commanding any of the combined squadrons, will assume command of them, provided such squadrons operate together.

"'Nevertheless, the governments of both republics may confer command of the squadrons, when they operate together, upon the native or foreign officer they may think most skillful.

"'ART. IV. Each one of the contracting republics on whose waters the combined naval forces may happen to be, on account of the present war against the Spanish Government, shall defray all kinds of expenses necessary for the maintenance of the squadron or of one or more of its ships; but at the termination of the war, both republics shall nominate two commissioners, one on each side, who shall make the definite liquidation of the expenses incurred and duly vouched, and shall charge to each of the republics half of the total amount of said expenses. In the liquidation, such partial expenses are to be comprised for payment, as may have been made by both republics in the maintenance of the squadron or one or more of its ships.

"'ART. V. Both contracting parties pledge themselves to invite the other American nations to adhere to the present treaty.

"'ART. VI. The present treaty shall be ratified by the governments of both republics, and the ratifications shall be exchanged at Lima within forty days, or sooner if possible.

"'In faith whereof the plenipotentiaries of both republics sign and seal the present treaty.

"'Done at Lima on the 5th day of December, 1865.

"'DOMINGO SANTA MARIA.
"'TORIBIO PACHECO.

"'Therefore the present treaty having been approved by decree of this date, I have ratified it, holding it as a national law, and pledging for its observance the national honor.

"'In faith whereof I sign the present ratification, sealed with the seal of the republic and countersigned by the secretary of state for foreign affairs, at Lima, on the 12th day of January 1866.

"'MARIANO IGNACIO PRADO.
"'TORIBIO PACHECO.

"ACT OF EXCHANGE OF RATIFICATIONS.

"'The undersigned, Domingo Santa Maria, envoy extraordinary and minister plenipotentiary of the Republic of Chile, and Toribio Pacheco, secretary for foreign affairs for the Republic of Peru, having met in the office of the bureau of

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foreign relations at Lima, for the purpose of exchanging the ratifications of the treaty of alliance, offensive and defensive, done at Lima on the 5th of December 1865, and after exhibiting their respective full powers, which were found to be in good and due form, they carefully compared the two texts of said treaty, and finding them exact and agreeing between themselves and with the original, they effected said exchange.

"'In faith whereof, the undersigned sign the present act of exchange, and seal it with their seals, at Lima, on the 14th of January 1866.

"'DOMINGO SANTA MARIA.
"'TORIBIO PACHECO.'

"BASES OF THE LIQUIDATION OF THE ALLIED ACCOUNTS.

"Upon a careful consideration of the terms of the treaty of alliance, offensive and defensive, between Peru and Chile, hereto prefixed, the arbiter is of the opinion that the liquidation of the accounts of the allies must be made upon the following bases:

"First. To consider the treaty of alliance as operative from the 5th of December 1865, and the vessels then and thereafter placed at the disposal of the allied governments, as being under the common expense from that date, to the cessation of their service.

"Second. To place only such vessels upon the common expense as formed the allied fleet proper, viz: The *Amazonas*, *Apurimac*, *Union*, *América*, *Huáscar*, *Independencia*, *Esmeralda*, *Maipú*, *Covadonga*, *Abtao*, *Valdivia*, *Arauco*, and *Nuble*.

"Third. To regard a vessel as being upon the common expense as soon as she was fitted to serve the cause, and was entered so to serve it, upon the prescribed field of operations, viz: the waters of the Pacific, bordering the coasts of Peru and Chile.

"Fourth. To regard all kinds of expenses (apart from those of original equipment) necessary for the maintenance of the allied vessels in a condition of effective service as belonging to the common expense, including therein the sums paid for proper transport service.

"Fifth. To regard as valid the Calvo-Reyes liquidation of September 15, 1870, in so far as it rests upon the bases herein set forth.

"Sixth. To regard the 31st of October 1867 as terminating the common expense for such vessels as remained in service up to that period; and the date when a vessel was withdrawn, by capture or entire disability for further service, as the date when the common expense shall cease as to the said vessel.

"Seventh. To regard nothing as being due from one party to the other, upon account of prize-captures made by either, except in the case of the *Thalaba*.

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"Eighth. To regard nothing as being due from one party to the other upon account of interest, until a balance of indebtedness is determined and default of payment occurs.

"Ninth. To regard the decision of minor incidental questions as resting upon the general principles of law and equity, these being fully treated of in another portion of this judgment.

"In accordance with the foregoing bases the allied service must be computed as follows:

"*Peruvian vessels.*

"Frigate *Amazonas*, from December 5, 1865, to January 16, 1866.

"Frigate *Apurimac*, from December 5, 1865, to October 31, 1867

"Corvette *Union*, from December 5, 1865, to October 31, 1867.

"Corvette *América*, from December 5, 1865, to October 31, 1867.

"Monitor *Huáscar*, from the 6th of June 1866 (the time of reaching Chiloé) to October 31, 1867.

"Frigate *Independencia*, from the 6th of June 1866 to October 31, 1867.

"*Chilean vessels.*

"Corvette *Esmeralda*, from December 5, 1865, to October 31, 1867.

"Steamer *Maipú*, from December 5, 1865, to October 31, 1867.

"Schooner *Covadonga*, from December 5, 1865, to October 31, 1867.

"Steamer *Abtao*, from November 20, 1866.

"Steamer *Valdivia*, from April 5, 1867, to October 31, 1867.

"Steamer *Arauco*, from April 5, 1867, to October 31, 1867.

"Steamer *Nuble*, from June 1, 1867, to October 31, 1867.

"In conformity with the preceding bases of liquidation, it has been found that the Government of Peru is indebted to the Government of Chile, upon account of the expense of the allied fleet, in the sum of $1,130,000.

"The arbiter, not having been furnished with an exact statement of the amount of money paid by the Peruvian Government to the Government of Chile, in abatement of its indebtedness, it must be understood that the foregoing statement of indebtedness is to be reduced to the extent of the payments upon account made by the Government of Peru to the Government of Chile.[1]

"It would have been more in accordance with the desire of the arbiter, if the allies had been able to agree, in a formal

[1] It seems that the payments on account by Peru amounted to $654,000, thus leaving a balance in favor of Chile of $476,000. (For. Rel. 1875, I. 188.)

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manner, upon a few briefly stated interrogatories, which should embrace the questions at issue between them, and have required his simple opinion thereon.

"From the singularly intricate nature of the case, however, with its very numerous ramifications, this was found to be impossible; and in the protocol agreeing to the reference to arbitration, the arbiter was invested with the additional faculties of a judge, and requested to give his opinion in the formal manner of a legal sentence. This he has endeavored to do, as briefly as possible, consistently with a fair expression of the reasons which have moved him to the formation of his opinions, and with the expressed desire of the parties; together with an act of simple justice to himself, which is, that in the discharge of duties so extensive, so responsible, and so very delicate in character, he sufficiently acquit himself of any possible imputation of being dogmatic, arbitrary, or careless, in the making of his sentence.

"With these remarks the following observations are submitted as the bases upon which the arbiter's conclusions have been reached:

"OBSERVATIONS.

"The treaty of alliance, offensive and defensive, between Chile and Peru as against Spain, was signed on the 5th day of December 1865, and was ratified, according to the requirements of the instrument, on the 14th of January 1866.

"In reference to the alliance, it is to be observed that it was equal; and to the treaty, that, embarking the allies in a common cause, and requiring them to act with all their actual strength, however unequal their real strength, it was also equal. (Vattel, 6th Am. ed. 198.)

"Considering the treaty in reference to its validity, it is to be remarked that it has all the elements, and is accompanied with all the requisite formalities, of a valid international contract, no allegation to the contrary being made by either party.

"Considered in reference to its construction, it may be said to be indefinite, and in one sense incomplete, and therefore somewhat ambiguous. It is indefinite or incomplete for several reasons; the principal of which are, that no specific mention is made as to how many vessels and how many men each ally shall furnish; when they shall be furnished; what class of expenses shall be considered as common to the allies and what as special; when these common expenses shall begin to accrue, &c.; and it is both incomplete and ambiguous in Article IV. providing for the ultimate settlement of the accounts between the allies.

"As to the principal points of difference growing out of the differences of construction of the treaty, it appears to the arbiter they may be comprised under the following heads:

"First, as to the full scope and precise date of becoming operative, of the treaty ratified January 14, 1866, as bearing

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upon the question, *when* the expense attached to each vessel began to accrue as common expense; as well as the number of vessels employed in the alliance.

"Second, as to the particular class of expenses which should be borne by the parties in their separate and in their allied capacity.

"Third, as to the exact character and full powers of the commissioners appointed by the allies, and under the provisions of Article IV.

"Fourth, as to the validity of the agreements made April 8th and 12th, 1869, by the commissioners Calvo and Reyes, fixing the bases of liquidation, together with the partial adjustment of September 15, 1870.

"Fifth, as to when the period of common expense, pertaining to the individual vessels of the alliance, terminated.

"Sixth, as to the division of the prize-spoils."

"FIRST.

"*As to the full scope and precise date of becoming operative of the treaty ratified January 14, 1866, as bearing upon the question when the expense attached to each vessel began to accrue as common expense, as well as the number of vessels embraced in the alliance.*

"A. AT WHAT PRECISE DATE DID THE TREATY BECOME OPERATIVE?

"It was signed by the plenipotentiaries December the 5th 1865, and the ratifications were formally exchanged January 14, 1866.

"It therefore became operative from the former date. ('The exchange of ratifications has a retroactive effect, confirming the treaty from its date.' Lawrence's Wheaton, page 326.)

"B. WHAT WAS THE SCOPE OF THE TREATY IN RELATION TO EMBRACING ACTS OF THE PLENIPOTENTIARIES ANTECEDENT TO ITS ACTUAL DATE?

"This question, raised by one of the parties with the view of computing the common expense from a much earlier date than the formation of the treaty, viz, the 17th of October 1865, would become of importance under a certain state of facts. On the 16th of October 1865 Señor Don Domingo Santa Maria, as confidential agent of Chile in Peru with full powers, addressed a note to the minister of foreign relations of Peru, Señor Don Juan Manuel La Puente, stating his desire to procure the assistance of the naval and land forces of Peru against Spain, which latter had already declared hostilities against Chile, by blocking its ports; and soliciting a personal audience, to lay the matter of his mission before him.

"It appears by the record that this interview took place on October 17; that, as a result of the interview, the Peruvian Government, through its minister, issued orders that four of

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its vessels should *at once* proceed to Chilean waters, under order of that government, to assist in repelling the Spanish attack; that the Peruvian minister addressed Señor Santa Maria with an official note, dated October 17, 1865, advising him of the fact, and inviting the latter, if he desired to frame any treaty with Peru, to state it, and concluded by remarking upon 'this note, together with the documents referred to,' (meaning the order placing the vessels named at the disposition of the Chilean Government with the decree of war against Spain,) 'being the preliminary of the intimate alliance, defensive and offensive, which is established henceforth between both nations.'

"On October 18, 1865, Señor Santa Maria addressed an official note to the Peruvian minister, acknowledging the patriotism of Peru; accepting the order and the assistance, and concluding as follows: 'The undersigned perfectly understands that the first foundation of the treaty of alliance, offensive and defensive, for opposing Spain, which ought to exist between Peru and Chile, is already stipulated; but, nevertheless, he thinks it would be convenient to frame some other stipulations to render the proceedings of both governments during the war they are engaged in, more expeditious.'

"On the 5th of December 1865 Señor Santa Maria, upon the part of Chile, and Señor Toribio Pacheco, upon the part of Peru, formally framed and signed the treaty of that date.

"The conclusion from this statement of facts is clear. The official preliminaries recited are to be considered as part of the treaty, and under it the vessels *Amazonas*, *Apurimac*, *América*, and *Union* would be considered upon the common expense from October 17, 1865. ('All mere verbal communications'—and, by unavoidable corollary, written communications—'preceding the final signature of a written convention, are considered as merged in the instrument itself.' Lawrence's Wheaton, 6th Am. ed., page 318.) ('All communications, written or verbal, between the parties to a treaty, preceding its signature, and relating to the subject thereof, are merged in the treaty.' Field, Outlines of an International Code.)

"But the records show that, however good the intention in the matter of dispatching the vessels named may have been, it was not done by reason of internal difficulties connected with a change of government by that republic; that the said vessels did not become 'disposable' for the purposes of the treaty until a much later date. There having been no actual compliance with the spirit or letter of the treaty until the date of its signature, the latter must be considered as the true starting point of the alliance.

"C. WHAT WERE THE VESSELS EMBRACED IN THE ALLIANCE?

"It is unfortunate for both governments that the treaty did not specify, in an exact manner, the number of vessels which were to be considered as constituting the alliance at its forma-

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tion, together with provisions as to the means of entry of new vessels, as from time to time then became available. The omission to do so proper a thing can only be explained by considering the great and alarming danger the allies were threatened with in the presence of so large and powerful a fleet as Spain then had upon their coasts.

"In the face of such an opponent all considerations of mere money were sunk by the allies before the inexorable necessity of pressing every available means into service to avert the common danger.

"The question raised in this connection is one of the two so widely separating the allies, and upon its decision rests the issue of a very large sum of money. It is proper, therefore, to consider it with the utmost care and under all the lights possible to be thrown upon it. An attentive reading of the treaty will justify the following analysis:

"Article 1 stipulates an alliance for a certain purpose, viz, 'In order to repel the present aggression,' etc.

"Article 2 prescribes the means for the effective carrying out of the purposes of the alliance. It is agreed that both republics shall unite such 'naval forces' as at the time (i. e., the date of the treaty) they had 'disposable' (*disponibles*), or might in future (i. e., during the life of the treaty) have 'disposable,' for a definite purpose (i. e., 'to oppose with them such Spanish maritime forces), etc.

"The simple language of the text of the two articles would seem to settle the whole question. The allies were threatened with the devastation of their seaports by a powerful Spanish fleet as a measure 'of aggression of the Spanish Government.' In the inability of either republic to cope alone with so powerful a foe, it was agreed to make common cause against the maritime forces of Spain upon the waters of the Pacific, and unite certain 'naval forces,' which are exactly defined by the treaty (all those which were *disposable*), for the purpose of opposing with them these 'maritime forces,' etc. In this the maxim of strength in union was intended to be illustrated and its benefits achieved.

"The idea involved comprehends two points: First, to unite the *disposable* vessels of the republics; and second, with such *disposable* vessels so united, to 'oppose the Spanish maritime forces, whether blockading their ports, or in any other way committing hostilities against them.' The logical conclusion is that the allies contemplated the formation of a *fleet*, which might successfully cope with the Spanish fleet and thwart its designs. This interpretation gives a force to the alliance which, by creating a substantial entity, makes the article operate to a greater extent than the mere resolution to *unite their efforts* by contributing all their forces as the incidents of the war might successively call them into action. This general idea of contributing an effective fleet seems plainly indicated by the treaty in its parts and in its entirety. If, however, there might be a reasonable doubt from the text as to whether

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it was contemplated forming a fleet to act in concert against the Spanish forces, or whether it purposed to unite *all* of the vessels of each country and place them upon the common expense during the war, it must be dispelled by one word in the article—the word *disposable* (*disponibles*).

"This word is restrictive in its signification. No other 'naval forces' than those which are *disposable* are to be united by the allies. Two distinct classes of naval forces are recognized—those disposable and those not disposable. Those disposable are to be united under the treaty for a certain purpose; while the undisposable are reserved for another purpose. What can that purpose be? Is it not manifestly for the individual protection of each country? What other consideration could render them undisposable for the purpose of the alliance? Why unite only the *disposable* 'naval forces,' if it were intended to embrace all of the naval forces of both countries and place them upon the common expense?

"If the reference to the disposable 'naval forces' thus united be followed through the treaty, it appears to confirm the above construction in a conclusive manner.

"Article III prescribes that the naval forces referred to in article second shall obey that government upon whose waters they be stationed, and this whether they operate together or separately; thus providing for the contingency of the fleet, before combined, being required to separate by the exigencies of the war, and act upon different waters. This article also provides for the assumption of the supreme command of the united squadron or naval forces of both republics by the officer of the highest rank, in case they operate together; but reserves the right to confer command upon any officer the government may think most skillful when they act in combination; thus preserving the idea of a single body directed by a single officer, except in the event of their not operating together.

"Again, article fourth prescribes that 'each government upon whose waters the *combined* naval force may happen to be shall defray all kinds of expenses,' etc. The adjective *combined* has here a specific meaning, relating to the act of aggregation, and consistently preserves the idea of the treaty.

"It can not signify an *ideal* union, while physical distinctness exists. A material thing is treated of, the maintenance of 'the combined naval forces.' It were superfluous to say that a government would naturally pay the expenses of its own ships on its own waters; and the provision must be intended, to meet the case of the ships of one of the republics on the waters of the other; and this consideration, coupled with the obvious import of the word *combined*, carries the whole question with it and calls into existence a substantial and material fleet of war vessels, which in their operations may find themselves upon the waters of one or the other of the republics whose government is to provide for their maintenance.

"To gather the fragments of the different articles and put

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them in a sentence so they shall tell their own story, it may be said that the *disposable* naval forces of both republics shall be united for the purpose of opposing the maritime forces of Spain on the waters of the Pacific; their command shall be intrusted to a certain officer when they act in combination; and, by inference, to the person naturally commanding them when they do not; and the cost of maintaining these combined naval forces shall be borne by that government upon whose waters they may happen to be. No warrant is to be found in the treaty for the division of expenses upon any other basis than this.

"The disposable and combined naval forces of both republics shall be maintained by that government upon whose waters they happen to be, and the division of expenses is to be made at the termination of the war. No other expense is common.

"Though possessing only a corroboratory value, but tending to show the intention of the parties to the treaty, it may be said, in general terms, that every document of the government officials of the time, presented to the arbiter, bears out the construction of a single combined fleet, created by the allies, for the purpose of opposing the Spanish fleet.

"Señor Pacheco, one of the makers of the treaty, writes a note to the minister of Peru in Chile, under date of November 2, 1867, in which the character of the *Callao*, as an allied vessel, is denied; and the allied squadron, which, it is stated, was stationed at Chiloe, in May 1886, is designated by the specific mention of the vessels at that time composing it; thus plainly giving the allied squadron a 'local habitation and a name.' And in this connection, another fact may be referred to. The *Callao* and *Sachaca* were, by decree of the Peruvian Government, transferred to a private company, on the 31st of December 1866, for the purpose of 'facilitating the coasting trade' of one of the allies. Had these vessels constituted part of the allied fleet, whose expenses were to be borne in common by the allies, the act of withdrawing them by one ally without the consent of the other could hardly be considered proper. The treaty of alliance was a pact between two powers, whereby, for certain mutual interests at stake, it was stipulated that the parties should unite their disposable naval forces for their common defense. Each relied upon the assistance and good faith of the other, and neither party could violate his agreements without annulling the contract. An alliance constituted upon the right to withdraw one or more of the contributed elements whenever the interests or caprice of either party might dictate, would have no strength, moral or physical. It is not probable that either of the enlightened nations, parties to the contract, would place itself and its fortunes at the hazard of such a chance. Quite as specific as the note of Señor Pacheco before referred to, is the expression contained in an agreement between the minister of foreign relations of Chile and the envoy extraordinary of Peru, under date of April 17,

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1866, by which a distinguished vice-admiral is intrusted with the 'command in chief of the naval forces which the governments of Chile and Peru now control, or may be able to dispose of, during the actual war.'

"Again, a prize convention was held by the representatives of the two republics, on the 26th of December 1866, by which certain rules for the distribution of prizes were agreed upon, the following words forming part of article fourth: 'Provided, the capturing vessel makes a part of the allied squadron; but if the capturing vessel do not belong to the allied squadron, but have remained detached to the private service of one of the contracting parties,' etc; thus, at once, preserving the distinct entity of the allied squadron, and the retention of certain vessels for the private service of either party under the head of *undisposable*. This convention was not ratified through non-necessity, but has an importance as showing understanding and intention at the time.

"Further, in the protocol signed by the minister of foreign relations of Chile, and the envoy extraordinary of Peru in Chile, under direction of their respective governments, dated October 5, 1867, it was plainly agreed to dissolve the allied squadron by placing the Peruvian division forming part of it under command of its own government.

"Of this protocol four leading points are to be observed:

"1. That the alliance itself should remain intact.

"2. That placing the Peruvian division under orders of its own government should operate to dissolve the common expense.

"3. That, should the enemy again call the allies into action, the mutual expense arrangement for the naval divisions of Peru and Chile under consideration should form the subject of a new agreement.

"4. That profound silence is maintained as to the common expense ceasing in regard to vessels not under the orders of Chile; and hence, if *all* the naval vessels of one of the allies had been under the common expense, as claimed, they would still remain so, no modification of the treaty in regard to them having ever been made.

"This agreement between Señores Pardo and Fontecilla, whereby the common expense was considered terminated, has an important significance, as showing the interpretation given to the treaty in this respect by those gentlemen. This interpretation is only individual opinion, to be sure, and therefore is in no sense conclusive; but nevertheless it has corroborative value, as showing the understanding of the makers of the treaty by those who were co-actors in the events of the time.

"The sole subject of the agreement, it is admitted, was to terminate the common expense account of the allies; and it will be observed that this was done, not by a direct agreement to terminate said common account, but by the stipulation that, as it was unnecessary for 'the Peruvian naval division incorporated into the allied squadron to continue longer under orders

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of the Chilean Government,' the said division should, from the date of the agreement, be considered as under orders of the Peruvian Government; but, for reasons which do not appear, it was further stipulated that, notwithstanding the said division was placed under orders of its own government, its expenses should be common until the first day of November following.

"There can be no mistake as to the understanding of the makers of the agreement in regard to the constitution of an allied squadron proper, whose expenses only were to be common. The placing of the 'Peruvian naval division incorporated in the allied squadron,' under orders of its own government, terminated the common expense at a certain date.

"No other common expense is provided for; the designation of those vessels whose expense had been common is specific, viz: 'The Peruvian naval division incorporated into the allied squadron, under orders of the Chilean Government.' This construction *must* be accepted; there is but one alternative—that of considering the common expense account as *existing to this day.* The latter proposition, as involving a conceded absurdity, leaves only the former for adoption.

Further, the documents are copious, proving that the commissioners, Calvo and Reyes, acted constantly under instructions from their governments, in the liquidation made by them; while their work shows conclusively that they entertained no idea of creating a community of expense in regard to any other vessels than those specifically defined in their joint liquidation.

"Finally, no claim to the contrary by either party anywhere appears, until the supreme decree of the Government of Peru, June 3, 1869.

"These considerations convey to the mind of the arbiter the unavoidable conviction that the treaty of alliance substantially established only two things: First, that the two republics entered into a league to defend themselves, and back each other to the extent of their ability, against Spain; and second, that as the contest was expected to be of a naval character, and neither of the allies possessed a fleet large enough, or strong enough, to cope with the Spanish fleet, they stipulated to put such vessels together as they could dispose of compatibly with their individual interests and safety, to oppose the Spanish fleet; and that the expense account of the vessels composing the allied fleet should be borne by the allies in common.

"D. AT WHAT TIME DID THE COMMON EXPENSE BEGIN TO COVER VESSELS WHICH ENTERED THE ALLIANCE SUBSEQUENTLY TO THE DATE OF THE TREATY?

"In the absence of specific mention upon this point recourse must be had to the general structure and spirit of the treaty. In the solution of the question two points must be kept prominently in view: First, the vessels which were to be embraced

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in the alliance; and second, the field of operations prescribed by the treaty.

"As regards the first, it appears that such naval forces as the republics then had, or might in the future have at their disposal, were to be embraced in the alliance; and accordingly vessels were added to the combined forces by both parties, as from time to time they became available.

"As regards the second point, it must be carefully observed that those naval forces were to be united for a particular purpose, about which there can be no doubt whatever—this purpose being 'in order to oppose with them such Spanish maritime forces as are to be or may be found on the waters of the Pacific, whether blockading,' etc. Here the field of hostile operations is limited to *the waters of the Pacific*, and, by fair and logical induction from the concluding sentences of the article, to those portions of the Pacific bordering the coast of the allies. Therefore, except through the most extensive interpretation, it would not be within the terms of the treaty to transfer the allied fleet to the coast of Spain or the waters of the Atlantic; nor could any vessel properly belong to the alliance until she was not alone ready for service, but ready for service upon the field of action, so plainly prescribed by the treaty. Whenever, therefore, a vessel belonging to either of the allies was ready for service upon such parts of the waters of the Pacific as rendered her of substantial aid to the common cause, and brought her under the direction of the naval chief of the allied fleet, she became an allied vessel under the stipulations of the treaty.

"SECOND.

"*As to the particular class of expenses which should be borne by the parties in their separate and in their allied capacity.*

"The language of article fourth of the treaty seems plainly enough to interpret the meaning of its makers. The particular government upon whose waters the naval forces united or combined in a mutual cause, under article second, may happen to be, shall defray *all kinds of expenses necessary for the maintenance* of the squadron or one or more of its ships. The word maintenance has no technical signification in this relationship, meaning simply the upholding, supporting, and keeping up of each particular vessel, that it might sustain its attitude of belligerency. Hence, its provisions, the pay of its men, its fuel, its ammunition, the repairs necessary to maintain it in its belligerent capacity, etc., are legitimate items belonging to the common expense. It must be remarked, however, that while the warrant is sufficiently extensive to cover every item necessary to the accomplishment of the purpose named, there appears no authority for levying expense upon the common treasury, which did not go the maintenance above spoken of.

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Neither would it be proper to compute the expenses of original equipment, outfitting, etc., of such vessel as common expense, these being considered the contribution of each nation to the common cause, and in furtherance of the common safety, under the treaty, which regarded the strength of both republics as being equal, though in fact it may not have been so. As no sharp line of division can be drawn as to the class of expenses which, while necessary under the head of maintenance, at the same time added a permanent value to a particular vessel, the determination as to such cases must fall within the domain of equity.

"Nor can it be inferred from the treaty that the loss of the exclusive property of one or the other, in conflicts with the enemy, was to be reimbursed by the allies. The alliance was considered equal in that no mention was made of the respective vessels each was to furnish, the forces being considered equal for the purposes of the alliance, as before remarked. The vessels of each, such as they were, and however acquired, were embarked in the common cause; and the danger to each republic being equal, as repeatedly stated in the papers accompanying the formation of the treaty, and by the treaty itself, each nation assumed the risks and casualties of the war from necessity, the only expenses which were considered as common between them being those connected with the maintenance of the squadron, or one or more of its ships.

"THIRD.

"*As to the exact character and full powers of the commissioners, appointed by the allies, under the provisions of Article IV.*

"The difference between the allies upon this point seems radical and irreconcilable; but, it would appear from a careful consideration of the language of article fourth, taken in its usual and accepted sense, together with the established usage pertaining to such agents, that there should be no difficulty in arriving at the true solution of the question.

"The word commissioner (Latin, *comittere*, to intrust to) is usually applied to an agent, who has a commission or warrant to perform some special business, or particular branch of duty. When employed by one government, in the transaction of business with another, it usually falls within this definition; and in such cases, the warrant or power of the officer should exactly express the nature and extent of his commission.[1] Vattel

[1] "*Les commissaires, envoyés à l'étranger, ont dans cette qualité aucune des prerogatives des ministres publics, mais le titre de ministre leur peut être conferé* ainsi que cela la pratique quelque fois pour des commissaires ayant mission de regler de delimitations de frontiers ou de proceder à des liquidations. C'est donc à leur constituant a préciser le caractere official dont il entend les revêtir." Martens' Guide Diplomatique, p. 62.

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contends that an agent sent with credentials on public business becomes a public minister, his title, whether it be deputy, commissioner, or other, making no difference in the case. The real question between the allies, however, is not as to the precise diplomatic character of the commissioners, provided for in article fourth, but the exact power conferred upon them by that article. It is a fair construction of the article that, having ascertained the amount of the expense incurred, they were to make report to the two republics, for approval or ratification; or did the article invest them with authority to make a final settlement between the parties?

"There can be no question that it was the intention of the allies to bear each an equal portion of the expense of the allied fleet, and the appointment of the commissioners was a simple provision for arriving at the total amount of the legitimate expense, that each of the republics might pay the one-half. Their whole duty was to make the definite liquidation of the expenses incurred and duly vouched, and charge to each republic half of the total amount of said expenses. ('Los cuales practicarán la liquidacion definitiva de los gastos hechos y debidamente justificados y cargarán a cada una de ellas la mitad del valor total a que estos gastos asciendan.')

"The commissioners were authorized by the article to do two things, and only two things: First, to make the definite liquidation of the expenses incurred and duly vouched, and second, to charge each of the republics one-half of the total amount of said expenses.

"As regards the first duty, there can be no double interpretation. Bouvier in his Law Dictionary defines liquidation as 'a fixed and determinate valuation of things, which before were uncertain.' They were, then, to ascertain the expenses incurred, according to the proper vouchers. After having done this, as the second branch of their duties, they were *to charge* one-half of the amount of the expenses so ascertained to each republic. The verb *to charge* has here no technical meaning in the absence of other stipulations, and must be taken in its usual sense. According to Webster, it signifies 'to place to the account of, as a debt; to make responsible for.'

"The commissioners, then, were expressly authorized by the treaty to ascertain the whole expense, and to put one-half the total to the account of each republic, as a debt. These were their specific duties as commissioners, and the absence of any other conditions in the treaty shows that their acts were to be considered final. If the words 'shall charge' have not this meaning, they have none; and, having none, there can be no resulting effect. Hence, according to a recognized rule of interpretation, that signification should be adopted which will permit the provision to operate.

"Indeed, it does not appear that any contrary understanding was entertained by either party, until the protocol of the conference between the Chilean chargé, Señor Godoi, and the

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Peruvian minister of foreign relations and of finance, was signed on November 6, 1869, when Señor Angulo made the statement, apparently acquiesced in by Señor Godoi, that the liquidation of the commissioners required the final approbation of both governments. This, however, was some seven months after the commissioners, Calvo and Reyes, had signed the agreements fixing the basis for the regulation and liquidation of the accounts; in the second of these agreements, dated April 13, 1869, it appears that Señor Calvo had been under instructions from his government as to what items should be allowed; while subsequent papers show that both commissioners in their settlement referred continually to their respective governments.

"In the interpretation of this portion of the treaty, usage, as to the officials denominated commissioners, may also have a corroborative bearing.[1] Without going further than the example of the United States, in its relations with other powers, it may be said that the resort to commissioners has been a frequent method of settling differences as to boundaries, the determination of amounts of money to be paid, etc. (See the treaty with Great Britain of October 28, 1795, providing for the appointment of three sets of commissioners, whose awards, on the different subjects submitted to them, were to be final; the treaty of Ghent, February 17, 1815, appointing commissioners to decide the boundary lines, whose award was to be final; with Great Britain, January 10, 1823, to ascertain amount of indemnity to be paid for loss of slaves, under the decision of the Emperor of the Russias, the award of the commissioners to be final; the claims convention with Denmark, June 5, 1830, the treaty not specifying that the award should be final, but being so regarded; the claims convention with Mexico, April 7, 1840; the claims convention with Mexico, February 1, 1869; the boundary convention with Mexico, May 30, 1848, the award of the commissioners in all being final; the claims convention with Great Britain, July 26, 1853; with New Granada, November 5, 1860; with Costa Rica, November 9, 1861; with Ecuador, July 27, 1864; with Venezuela, April 17, 1867; and the celebrated treaty of Washington, June 17, 1871; all of these providing for the appointment of commissioners whose award was to be considered final.)

"Reference may also be made to a claims convention between the United States and Peru, April 18, 1863; and one July 4, 1869; both providing for the appointment of commissioners whose award was to be considered final.

"These examples certainly go far toward establishing a clear usage of submitting questions of difference to the decision of commissioners, whose decisions have always been accepted as final—in all instances, save one, by a special article, however,

[1] "A clear usage is the best of all interpreters between nations." Phillimore, vol. 2, p. 72.

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which does not appear in the treaty of alliance of December 5, 1865. In the face of such precedent, and in consideration of the simple duties of the allied commissioners, as mere *auditing* officers, the omission can not be material.[1]

"The expectation that the duties of the allied commissioners were to be simply those of an auditory and arithmetical character is legitimately inferable from the spirit of the treaty as a whole, and the failure to make any provision for the appointment of an umpire to decide cases of disagreement, while the omission to insert a reservation that their acts should be subject to the approval of both governments shows that they were invested with full and final power to audit the indebtedness and specify the balance of money due from one to the other of the allies.

"FOURTH.

"*As to the validity of the agreements made April 8th and 12th, 1869, by the commissioners, Calvo and Reyes, fixing the basis of liquidation; together with the partial adjustment, September 15, 1870.*

"From the foregoing consideration it must be clear that these acts of the commissioners must be considered valid, but with a most important reservation. It is a well-established principle of international law that after a treaty, possessing all of the elements of validity, has been formally executed, it can only be altered or amended before its proper expiration by the same authority and under the same formality of procedure, as the original; and especially is it not permissible for either party to interpret its provisions according to his own fancy. In the discharge of their duties under article fourth, the commissioners must, of necessity, keep themselves strictly within the scope of the treaty, in doing which their acts must be held binding upon the allies; but in departing from which their acts are null to the precise extent of the departure. In the difficulties of settlement which presented themselves the commissioners, in a spirit of mutual concession, highly creditable to their desire for amity and fair dealing, saw fit to make certain arbitrary arrangements, as, for instance, that a certain class of expenses of particular vessels should begin at a certain time, and certain others at a certain other time; all of which, as being outside of the proper construction of the treaty, could only be made valid by a submission to and ratification by the principals. Hence, the partial liquidation by the commissioners of the date September 15, 1870, can only be held good so far as it conforms itself to what is believed to be the true interpretation here laid down.

[1] "The rule, that the influence and authority of *usage* in the interpretation of private covenants is such that customary clauses, though not expressed, are held to be contained therein, is, in its spirit, applicable to international covenants." Phillimore, vol. 2, p. 77.

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"FIFTH.

"*As to when the period of common expenses pertaining to the individual vessels of the alliance terminated.*

"The withdrawal of the Spanish forces from the contest without the execution of a formal treaty of peace, led the allies to the conclusion of a convention, fixing the 31st day of October 1867 as a date whereupon the common expense account should cease. Hence, those vessels serving the allied cause continuously up to that date are to be considered upon the common expense until it was reached; while those serving only a portion of the time could be so reckoned only to the cessation of their service.

"SIXTH.

"*As to the division of the prize spoils.*

"Under this construction of the treaty, the allies derived no common benefit from the captures in the Atlantic by the ironclads *Huascar* and *Independencia*, because these vessels had not reached the Pacific, and hence could not belong to the allied fleet.

"Neither did the *Callao* belong to the allied fleet when she captured the *Guiding Star*, and therefore the actual captors were alone entitled to the prize.

"As regards the *Thalaba*, captured by the *Covadonga*, the capture must be considered joint. The allied fleet was at anchor in the bay of Valparaiso, and the *Covadonga* was dispatched by the commander to make the capture, which, although it did not occur within actual sight of the rest of the fleet, yet clearly falls within the general laws of prize entitling the whole squadron to joint participation, when a capture is made by one or more of its vessels, not upon a separate and detached service, and close enough to the squadron to be considered as but one of the outstretched arms of the latter.[1]

"THE DECISION OF MINOR INCIDENTAL QUESTIONS.

"*The Paquette del Maule.*—This vessel was a transport, and though chartered by one of the allies prior to December 5, 1865, the date of the treaty, she passed into service as a transport to the allied fleet, as near as can now be determined, about December 30, 1865. No evidence, at least, has been presented to the arbiter that she served the common cause prior to that date. As a transport to the combined fleet, the division of her expenses is legitimate, the transport service being absolutely necessary under the head of maintenance, as defined in the treaty. The documentary evidences are sufficiently copious to show that, when captured, she was on a service directly beneficial to one of the allies, with the full knowledge and at least

[1] Phillimore, 3d, 498.

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tacit consent of its representative. No objection was made by him at the proper time, either to the terms or service of the vessel, and the right of objection is therefore lost. The expenses of the vessel, as well as her loss, are divisible by the allies from December 30, 1865.

"*Enlistments.*—These can not be considered divisible under the head of maintenance. The spirit of the treaty contemplates a contribution, by each nation, of certain efficient warlike elements. Ships unmanned can not be so considered; and recruiting at the common expense was not provided for by the treaty. This item is thrown out of the liquidation, and each ally charged with his own expenses in this direction, so far as it has been possible to ascertain them.

"*Expenses of repairing at Chiloe.*—The note of Señor Galvez, dated December 4, 1865, promising to repay, immediately, the expense of repairing the four vessels sent to Chiloe, must be considered part of the treaty, by a rule before stated. Hence, the ally owning the ships must bear the expenses exclusively. Had the account been presented, and default of payment occurred, interest could have been claimed upon the amount. Under the circumstances, it can not be allowed.

"*Surplus supplies.*—If a surplus of supplies was drawn by one of the allies, it was by the knowledge and act of the other, who, failing to object or protest at the proper time, has lost the remedy.

"*Wages of court-martialed officers.*—When these left the service of the principal (the allied fleet) by their own act, they had no claim to recompense for services unrendered. The local law of one of the allies, allowing half-pay to court-martialed officers, can not bind the other in the absence of a mutual agreement.

"*Difference in coin.*—If one of the allies paid the salaries of the men of the other in a coin twenty-five per cent more valuable than the home coin of the latter, it does not appear that the latter had any agency or direction in it; and, as being the act of the former, he can not take advantage of his own wrong. The difference has not been allowed.

"*Voyage of a minister from one country to another.*—This had no connection contemplated by the treaty with 'the maintenance of the allied squadron, or one or more of its ships,' and has not been allowed.

"*The Apurimac, after leaving the allied fleet.*—This vessel was sent to Peru for repairs, which could not be made in Chile, with the knowledge and consent of both parties. Under the plain provisions of the treaty a vessel was not compelled to be bodily present with the allied fleet in order to constitute a part of it, the contingency of separation being expressly provided for; nor can any claim against her seaworthiness lie at this late day. She was accepted as an allied vessel by both parties, sent to Peru for repairs, and the objection now urged

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should have been made at that time. The failure to do this places the objectors in the position of taking an advantage after the fact. Her expense is computed as common to October 31, 1867.

"*The coal account.*—The expense of maintenance in the way of fuel is common. No human intelligence could have foreseen the exact amount of fuel to be required during an undetermined period and by an unknown number of consumers. The provision must be large enough to cover the contingency. As both parties incurred a joint expense in the amount purchased, both should share the profits of the residue. It is therefore so computed in this liquidation, the result being arrived at as accurately as circumstances have permitted. Coal consumed in the private use of one of the parties has been put to his exclusive account.

"*The matter of cannon received by one ally from the other.*—This question, carrying with it a large claim, has received the serious attention of the arbiter, and, from a most careful perusal of the document from which he derives his powers, he can arrive at no other conclusion than that it is not within his faculties to decide the question. His whole authority is 'to adjust the pending questions on which the Peruvian and Chilean commissioners are not agreed in the arrangement and liquidation of the accounts of the allied squadron, referred to by the pact of alliance of the 5th of December 1865;' and further, 'to decide all the rest which may exist, or which, in the course of judgment, may arise from the same accounts' (i. e., the accounts of the allied squadron). The transactions referred to had no connection with the allied squadron or its accounts, which were to be borne in common; but seem to the arbiter to involve a question of international ethics, easily arranged, with which, under his present authority, he can not intervene, or pronounce a binding judgment, should he do so.

"*The General Lerzundi.*—So far as this vessel is connected with the transaction of the cannon between the allies, the arbiter, as before stated, can give no valid judgment; but as it plainly appears that she 'was afterward sunk at the mouth of the Huito Channel by the common agreement of a council of war, composed of Chilean and Peruvian officers, in order to save the life of the squadron,' she certainly falls within the scrutiny of the arbiter, and strict equity would demand that her loss be imputed to the common account, which is accordingly done in this liquidation.

"*The Callao as a transport.*—Though this vessel did not belong to the allied fleet, yet it has been conclusively shown that she performed important transport service to the fleet, and compensation as such, while actually engaged in the service, has been allowed in this liquidation.

"C. A. LOGAN."

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4. British-Honduranean Mixed Commission.

By the convention between Great Britain and Honduras, signed by Sir Charles Lennox Wyke and Señor Don Francisco Cruz at Comayagua, November 28, 1859, by which Great Britain recognized the sovereignty of Honduras over the Bay Islands and over the district occupied by the Mosquito Indians within the frontier of Honduras, whatever that frontier might be, it was agreed (Art. IV.) that as British subjects had by grant, lease, or otherwise theretofore obtained from the Mosquito Indians interests in various lands situated within the district in question, the Republic of Honduras should respect and maintain such interests; and further that the contracting parties should, within a year after the exchange of the ratifications of the convention, each appoint a commissioner in order to investigate the claims of British subjects "arising out of such grants or leases, or otherwise." All British subjects whose claims the commissioners should pronounce to be valid, were to be "quieted in the possession of their respective interests in said lands." It was stipulated (Art. V.), besides, that the commissioners should "also examine and decide upon any British claims upon the Government of Honduras that may be submitted to them other than those" above described "and not already in the train of settlement;" and the Republic of Honduras agreed "to carry into effect any agreements for the satisfaction of British claims already made but not yet carried into effect."[1] But as the commissioners might be unable to agree, it was provided that, upon their meeting, which was to take place in Guatemala city, they should, after making a prescribed declaration, but before proceeding to any other business, "name some third person to act as arbitrator or umpire in any case or cases in which they may themselves differ in opinion." If they should be unable to concur in the selection, each side was to name a person and a lot was to be cast in each case of difference.[2]

In a dispatch of July 6, 1862,[3] Mr. E. O. Crosby, minister of

[1] Br. and For. State Papers, XLIX. 13.

[2] Similar provisions for the adjustment of the claims of British subjects were incorporated in the treaty between Great Britain and Nicaragua, signed by Sir Charles Lennox Wyke and Señor Don Pedro Zeledon at Managua, January 28, 1860, by which the sovereignty of Nicaragua was recognized over the district occupied by the Mosquito Indians "within the frontier of that republic." (Br. and For. State Papers, L. 96.)

[3] MSS. Dept. of State.

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the United States to Guatemala, reported that the joint commission authorized by the treaty of November 28, 1859, was then in session at Guatemala city, and that the commissioners, Mr. James Macdonald on the part of Great Britain and Mr. Leon Alvarado on the part of Honduras, had jointly invited him to act as umpire. He suggested that he be authorized to comply with their request. Mr. Seward replied that the President cheerfully consented to his assuming the functions of umpire;[1] and Mr. Crosby, having received this permission, accepted the trust and entered upon the performance of its duties.[2] His only report to his own government of his proceedings as umpire was made while he was still acting in that capacity. In that report, which bore date November 21, 1862,[3] he said:

"Since my last communication to your department[4] I have been engaged as umpire in deciding important claims submitted to me by the mixed commission between Honduras and Great Britain, now sitting here.

"One of these clams embraces a tract of land of about eight million acres, and supposed to be in the Olancho district of Honduras. I have found this claim so fraudulent and unworthy that I have felt constrained to declare it to be void."

5. The Dundonald Claim.

In 1869 the British minister at Rio de Janeiro presented to the Government of Brazil a claim of the Earl of Dundonald for services which his father, Admiral Lord Cochrane, had rendered to Brazil during her war of independence. The Brazilian Government had paid considerable sums to Lord Cochrane, as well as to his widow and son; but some of his claims remained unsettled. Among these were demands for prize money, as well as for interest on arrears of pension, the arrears themselves having been paid. On these matters, which were embraced in the claim presented by the British minister, the two governments were unable to agree. The British minister then proposed arbitration. The Brazilian Government assented, and suggested the envoys of the United States and Italy at Rio de Janeiro—Mr. James R. Partridge

[1] Mr. Seward, Sec. of State, to Mr. Crosby, August 7, 1862. (MSS. Dept. of State.)

[2] Mr. Crosby to Mr. Seward, September 21, 1862. MSS. Dept. of State.

[3] MSS. Dept. of State.

[4] October 21, 1862.

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and Baron Cavalchini—as arbitrators, with power to name an umpire in case they should be unable to agree.[1] Mr. Partridge asked the consent of his government to accept the trust, and it was granted.[2] In October 1873 the two arbitrators agreed upon and rendered an award. The claim as presented to the arbitrators, with the compound interest demanded by the agent of the claimant, amounted to about £1,200,000. The claimant had offered to settle in 1860 for £44,000. The arbitrators allowed him £38,675.[3]

[1] Mr. Partridge to Mr. Fish, No. 112, May 21, 1873, MSS. Dept. of State.

[2] Mr. Fish, Sec. of State, to Mr. Partridge, June 23, 1874, MSS. Dept. of State.

[3] For. Rel. 1874, pp. 70, 72, 73.

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CHAPTER L.

GENERAL ARBITRATION.

From time to time in the history of the United States various propositions have been made looking toward the establishment of a system for the amicable adjustment of all differences between nations. The senate of Massachusetts in February 1832 adopted, by a vote of 19 to 5, resolutions expressive of the opinion that "some mode should be established for the amicable and final adjustment of all international disputes, instead of resort to war." In 1837 a resolution of similar purport was passed by the house of representatives of the same State unanimously, and by the senate by a vote of 35 to 5. About this time an agitation began for the convoking of a congress of nations, for the purpose of establishing an international tribunal for the adjustment of differences.[1] A resolution recommendatory of this idea was adopted by the legislature of Massachusetts in 1844, and by the legislature of Vermont in 1852.[2] In February 1851 Mr. Foot, from the Committee on Foreign Relations, reported to the Senate of the United States the following resolution:

"Whereas appeals to the sword for the determination of national controversies are always productive of immense evils; and whereas the spirit and enterprises of the age, but more especially the genius of our own Government, the habits of our people, and the highest permanent prosperity of our republic, as well as the claims of humanity, the dictates of enlightened reason, and the precepts of our holy religion, all require the adoption of every feasible measure consistent with the national honor and the security of our rights, to prevent, as far as possible, the recurrence of war hereafter: Therefore,

[1] See Prize Essays on a Congress of Nations, Boston, 1840.

[2] See, for various memorials, resolutions, and legislative expressions, Poore's Descriptive Catalogue of Government Publications, 336, 341, 342, 366, 367, 372, 376, 377, 388, 404, 487, 523, 526, 598, 622, 627.

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"*Resolved*, That in the judgment of this body it would be proper and desirable for the Government of these United States, whenever practicable, to secure in its treaties with other nations a provision for referring to the decision of umpires all future misunderstandings that can not be satisfactorily adjusted by amicable negotiation, in the first instance, before a resort to hostilities shall be had."

Two years later Senator Underwood, from the same committee, reported a resolution of advice to the President—

"To secure, whenever it may be practicable, a stipulation in all treaties hereafter entered into with other nations, providing for the adjustment of any misunderstanding or controversy which may arise between the contracting parties, by referring the same to the decision of disinterested and impartial arbitrators, to be mutually chosen."

May 31, 1872, Mr. Sumner introduced in the Senate the following resolution:[1]

"Whereas by international law and existing custom war is recognized as a form of trial for the determination of differences between nations; and

"Whereas for generations good men have protested against the irrational character of this arbitrament, where force instead of justice prevails, and have anxiously sought for a substitute in the nature of a judicial tribunal, all of which was expressed by Franklin in his exclamation, 'When will mankind be convinced that all wars are follies, very expensive, and very mischievous, and agree to settle their differences by arbitration?'[2] and

"Whereas war once prevailed in the dermination of differences between individuals, between cities, between counties, and between provinces, being recognized in all these cases as the arbiter of justice, but at last yielded to a judicial tribunal, and now, in the progress of civilization, the time has come for the extension of this humane principle to nations, so that their differences may be taken from the arbitrament of war, and, in conformity with these examples, submitted to a judicial tribunal; and

"Whereas arbitration has been formally recognized as a substitute for war in the determination of differences between nations, being especially recommended by the congress at Paris, where were assembled the representatives of England, France, Russia, Prussia, Austria, Sardinia, and Turkey, and afterward adopted by the United States in formal treaty with Great Britain for the determination of differences arising from depredations of British cruisers, and also from opposing claims with regard to the San Juan boundary; and

"Whereas it becomes important to consider and settle the true character of this beneficent tribunal, thus commended and adopted, so that its authority and completeness as a substitute for war may not be impaired, but strengthened and upheld, to the end that civilization may be advanced and war be limited in its sphere: therefore,

"1. *Resolved*, That in the determination of international differences arbitration should become a substitute for war in reality as in name, and

[1] Sumner's Works, XV. 82.

[2] 9 Sparks' Works of Franklin, 476.

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therefore coextensive with war in jurisdiction, so that any question or grievance which might be the occasion of war or of misunderstanding between nations should be considered by this tribunal.

"2. *Resolved*, That any withdrawal from a treaty recognizing arbitration, or any refusal to abide the judgment of the accepted tribunal, or any interposition of technicalities to limit the proceedings, is to this extent a disparagement of the tribunal as a substitute for war, and therefore hostile to civilization.

"3. *Resolved*, That the United States, having at heart the cause of peace everywhere, and hoping to help its permanent establishment between nations, hereby recommend the adoption of arbitration as a just and practical method for the determination of international differences, to be maintained sincerely and in good faith, so that war may cease to be regarded as a proper form of trial between nations."

In 1874 a resolution in favor of general arbitration was passed by the House of Representatives.

Of all the memorials and petitions presented to Congress on the subject of international arbitration, the most remarkable were those submitted in 1888, in connection with the communication made to the President and the Congress of the United States in that year by 233 members of the British Parliament urging the conclusion of a treaty between the United States and Great Britain, which should stipulate "that any differences or disputes arising between the two governments, which can not be adjusted by diplomatic agency, shall be referred to arbitration." This communication was reenforced by petitions and memorials from a great number of associations and private individuals from Maine to California. In the city of New York a public meeting was held to welcome a deputation of Englishmen who had come hither to present the communication; and a resolution was adopted, pursuant to which the mayor appointed a committee of five citizens, composed of Messrs. David Dudley Field, Andrew Carnegie, Morris K. Jesup, Charles A. Peabody, Dorman B. Eaton, and Abram S. Hewitt, to urge upon the President and Congress the making of such a treaty as that described. The committee had an interview with the Committee on Foreign Relations and prepared a memorial which was laid before Congress.[1]

On June 13, 1888, Mr. Sherman, from the Committee on Foreign Relations, reported to the Senate a joint resolution requesting the President—

"To invite, from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising

[1] S. Mis. Doc. 141, 50 Cong. 1 sess.

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between the two governments which can not be adjusted by diplomatic agency may be referred to arbitration, and be peaceably adjusted by such means."

Colonel Frey, then Swiss minister to the United States, on April 1, 1883, addressed to Mr. Frelinghuysen, Secretary of State, a confidential inquiry as to the possibility of concluding between the two countries a general treaty of arbitration. Mr. Frelinghuysen replied that, while sharing the conviction of the President of the Swiss Confederation, that recourse to such a measure for the settlement of differences between the two countries would probably be unnecessary, the President, inasmuch as "such a treaty would respond in principle to the general policy of this country in past years," was "disposed to consider the proposition with favor."[1] September 5, 1883, Colonel Frey submitted a draft of a treaty, the receipt of which was acknowledged by Mr. Frelinghuysen on the 26th of the same month. This draft, which was adopted by the Swiss Federal Council July 24, 1883, was as follows:

"1. The contracting parties agree to submit to an arbitral tribunal all difficulties which may arise between them during the existence of the present treaty, whatever may be the cause, the nature or the object of such difficulties.

"2. The arbitral tribunal shall be composed of three persons. Each party shall designate one of the arbitrators. It shall choose him from among those who are neither citizens of the state nor inhabitants of its territory. The two arbitrators thus chosen shall themselves choose a third arbitrator; but if they should be unable to agree, the third arbitrator shall be named by a neutral government. This government shall be designated by the two arbitrators, or, if they can not agree, by lot.

"3. The arbitral tribunal, when called together by the third arbitrator, shall draw up a form of agreement which shall determine the object of the litigation, the composition of the tribunal and the duration of its powers. The agreement shall be signed by the representatives of the parties and by the arbitrators.

"4. The arbitrators shall determine their own procedure. In order to secure a just result, they shall make use of all the means which they may deem necessary, the contracting parties engaging to place them at their disposal. Their judgment shall become executory one month after its communication.

"5. The contracting parties bind themselves to observe and loyally to carry out the arbitral sentence.

"6. The present treaty shall remain in force for a period of thirty years after the exchange of ratifications. If notice of its abrogation is not given before the beginning of the thirtieth year, it shall remain in force for another period of thirty years, and so on.

[1] Mr. Frelinghuysen to Colonel Frey, April 11, 1883.

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The pendency of these negotiations was referred to in the President's annual message of 1883, but they were never brought to a conclusion.[1]

November 29, 1881, Mr. Blaine, as Secretary of State, addressed an instruction to the ministers of the United States to the various American nations, directing them to invite the governments of those countries to participate in a congress to be held in the city of Washington November 24, 1882, "for the purpose of considering and discussing the methods of preventing war between the nations of America."[2] Owing to the condition of affairs in a part of South America and to the fact that no provision had been made for the payment of the expenses of such a conference, the invitation was afterward withdrawn.[3] The project, however, was afterward revived and enlarged in Congress,[4] and an act was passed authorizing the calling of the International American Conference, which assembled in Washington in the autumn of 1889. Among its various acts this conference on April 18, 1890, adopted the following report of the committee on general welfare:

"I. PLAN OF ARBITRATION.

"The delegates from North, Central and South America, in conference assembled:

"Believing that war is the most cruel, the most fruitless, and the most dangerous expedient for the settlement of international differences;

"Recognizing that the growth of moral principles which govern political societies has created an earnest desire in favor of the amicable adjustment of such differences;

"Animated by the conviction of the great moral and material benefits that peace offers to mankind, and trusting that the existing conditions of the respective nations are especially propitious for the adoption of arbitration as a substitute for armed struggles;

"Convinced by reason of their friendly and cordial meeting in the present conference that the American republics, controlled alike by the principles, duties and responsibilities of popular government, and bound

[1] "We have granted a subsidy of 1,000 francs, for the year 1894, to the International Bureau of Peace at Berne on the ground of the humane object which it pursues. Upon the request of the bureau the political division has procured for it official documents relating to international arbitrations which have taken place since the commencement of this century." Rapport du Département des Affaires Étrangères [of Switzerland], 1894, p. 38.

[2] For. Rel. 1881, 13.

[3] Mr. Frelinghuysen, Sec. of State, to Mr. Osborn, August 9, 1882.

[4] See Report of Mr. McCreary, from the Committee on Foreign Affairs, April 15, 1886, H. Rep. 1684, 49 Cong. 1 sess.

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together by vast and increasing mutual interests, can, within the sphere of their own action, maintain the peace of the continent, and the good will of all its inhabitants;

"And considering it their duty to lend their assent to the lofty principles of peace which the most enlightened public sentiment of the world approves,

"Do solemnly recommend all the governments by which they are accredited to conclude a uniform treaty of arbitration in the articles following:

"ARTICLE I.

"The republics of North, Central, and South America hereby adopt arbitration as a principle of American International Law for the settlement of the differences, disputes or controversies that may arise between two or more of them.

"ARTICLE II.

"Arbitration shall be obligatory in all controversies concerning diplomatic and consular privileges, boundaries, territories, indemnities, the right of navigation, and the validity, construction and enforcement of treaties.

"ARTICLE III.

"Arbitration shall be equally obligatory in all cases other than those mentioned in the foregoing article, whatever may be their origin, nature, or object, with the single exception mentioned in the next following article.

"ARTICLE IV.

"The sole questions excepted from the provisions of the preceding articles are those which, in the judgment of any one of the nations involved in the controversy, may imperil its independence. In which case for such nation arbitration shall be optional; but it shall be obligatory upon the adversary power.

"ARTICLE V.

"All controversies or differences, whether pending or hereafter arising, shall be submitted to arbitration, even though they may have originated in occurrences antedating the present treaty.

"ARTICLE VI.

"No question shall be revived by virtue of this treaty, concerning which a definite agreement shall already have been reached. In such cases arbitration shall be resorted to only for the settlement of questions concerning the validity, interpretation or enforcement of such agreements.

"ARTICLE VII.

"The choice of arbitrators shall not be limited or confined to American states. Any government may serve in the capacity of arbitrator which maintains friendly relations with the nation opposed to the one selecting it. The office of arbitrator may also be entrusted to tribunals of justice, to scientific bodies, to public officials, or to private individuals, whether citizens or not of the states selecting them.

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"ARTICLE VIII.

"The court of arbitration may consist of one or more persons. If of one person, he shall be selected jointly by the nations concerned. If of several persons, their selection may be jointly made by the nations concerned. Should no choice be agreed upon, each nation showing a distinct interest in the question at issue shall have the right to appoint one arbitrator on its own behalf.

"ARTICLE IX.

"Whenever the court shall consist of an even number of arbitrators, the nations concerned shall appoint an umpire, who shall decide all questions upon which the arbitrators may disagree. If the nations interested fail to agree in the selection of an umpire, such umpire shall be selected by the arbitrators already appointed.

"ARTICLE X.

"The appointment of an umpire, and his acceptance, shall take place before the arbitrators enter upon the hearing of the questions in dispute.

"ARTICLE XI.

"The umpire shall not act as a member of the court, but his duties and powers shall be limited to the decision of questions, whether principal or incidental, upon which the arbitrators shall be unable to agree.

"ARTICLE XII.

"Should an arbitrator or an umpire be prevented from serving by reason of death, resignation, or other cause, such arbitrator or umpire shall be replaced by a substitute to be selected in the same manner in which the original arbitrator or umpire shall have been chosen.

"ARTICLE XIII.

"The court shall hold its sessions at such place as the parties in interest may agree upon, and in case of disagreement or failure to name a place the court itself may determine the location.

"ARTICLE XIV.

"When the court shall consist of several arbitrators, a majority of the whole number may act, notwithstanding the absence or withdrawal of the minority. In such case the majority shall continue in the performance of their duties until they shall have reached a final determination of the questions submitted for their consideration.

"ARTICLE XV.

"The decision of a majority of the whole number of arbitrators shall be final both on the main and incidental issues, unless in the agreement to arbitrate it shall have been expressly provided that unanimity is essential.

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"ARTICLE XVI.

"The general expenses of arbitration proceedings shall be paid in equal proportions by the governments that are parties thereto; but expenses incurred by either party in the preparation and prosecution of its case shall be defrayed by it individually.

"ARTICLE XVII.

"Whenever disputes arise, the nations involved shall appoint courts of arbitration in accordance with the provisions of the preceding articles. Only by the mutual and free consent of all such nations may those provisions be disregarded and courts of arbitration appointed under different arrangements.

"ARTICLE XVIII.

"This treaty shall remain in force for twenty years from the date of the exchange of ratifications. After the expiration of that period, it shall continue in operation until one of the contracting parties shall have notified all the others of its desire to terminate it. In the event of such notice the treaty shall continue obligatory upon the party giving it for one year thereafter, but the withdrawal of one or more nations shall not invalidate the treaty with respect to the other nations concerned.

"ARTICLE XIX.

"This treaty shall be ratified by all the nations approving it according to their respective constitutional methods; and the ratifications shall be exchanged in the city of Washington on or before the 1st day of May, A. D. 1891.

"Any other nation may accept this treaty and become a party thereto by signing a copy thereof and depositing the same with the Government of the United States; whereupon the said government shall communicate this fact to the other contracting parties

"In testimony whereof, the undersigned plenipotentiaries have hereunto affixed their signatures and seals.

"Done in the city of Washington, in —— copies, in English, Spanish and Portuguese, on this —— day of the month of ———, one thousand eight hundred and ninety.

"II. RECOMMENDATION TO EUROPEAN POWERS.

"*The International American Conference resolves:* That this conference, having recommended arbitration for the settlement of disputes among the republics of America, begs leave to express the wish that controversies between them and the nations of Europe may be settled in the same friendly manner.

"It is further recommended that the government of each nation herein represented communicate this wish to all friendly powers.

"III. THE RIGHT OF CONQUEST.

"Whereas the International American Conference feels that it would fall short of the most exalted conception of its mission were it to abstain from embodying its pacific and fraternal sentiments in declarations tend-

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ing to promote national stability and guarantee just international relations among the nations of the continent: Be it therefore

"*Resolved*, That it earnestly recommends to the governments therein represented the adoption of the following declarations:

"First. That the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law.

"Second. That all cessions of territory made during the continuance of the treaty of arbitration shall be void, if made under threats of war or the presence of an armed force.

"Third. Any nation from which such cessions shall be exacted may demand that the validity of the cessions so made shall be submitted to arbitration.

"Fourth. Any renunciation of the right to arbitration made under the conditions named in the second section shall be null and void."[1]

Mr. Blaine, in his farewell address to the conference, on April 19, 1890, referring to the preceding plan of arbitration, said:

"If, in this closing hour, the conference had but one deed to celebrate, we should dare call the world's attention to the deliberate, confident, solemn dedication of two great continents to peace, and to the prosperity which has peace for its foundation. We hold up this new *Magna Charta*, which abolishes war and substitutes arbitration between the American republics, as the first and great fruit of the International American Conference. That noblest of Americans, the aged poet and philanthropist, Whittier, is the first to send his salutation and his benediction, declaring:

"'If in the spirit of peace the American conference agrees upon a rule of arbitration which shall make war in this hemisphere well nigh impossible, its sessions will prove one of the most important events in the history of the world.'"

July 8, 1895, the French Chamber of Deputies unanimously resolved: "The Chamber invites the government to negotiate, as soon as possible, a permanent treaty of arbitration between the French Republic and the Republic of the United States of America."[2]

The two following arbitrations were completed too late for the insertion of the awards in their proper place:

Case of Cerruti.

Ernesto Cerruti, a native of Italy and a retired officer in the Italian army, went to Colombia in 1868 and settled there. In 1870 he became a consular agent of Italy by appointment of the Italian consul-general at Panama. In 1871 he resigned his

[1] S. Ex. Doc. 224, 51 Cong. 1 sess. pp. 2–6.

[2] For. Rel. 1895, I. 427.

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commission in the Italian army, and in the same year contracted a marriage in Colombia. In 1872 he imported into the country a quantity of arms and munitions of war under a contract made with a special delegate of the State of Cauca, of which Gen. Jeremias Cárdenas was then president *de facto*. Previously to making this contract, but in the same year, Cerruti formed a commercial firm, under the name of E. Cerruti & Co., with Generals Cárdenas, Hurtado, and Landaeta. This firm was continued with some changes in its constitution in 1879 and 1884. During the political troubles in Colombia in 1876 and 1877 Cerruti rendered some services to the government of Cauca, and furnished it with munitions of war and various other articles. In 1882 he ceased to be a consular agent of Italy, and in the same year supported the candidacy of Gen. Tomas Rengifo for the presidency of Cauca.

This and other acts of Cerruti aroused in a part of the population a feeling of antagonism toward him—a feeling inspired by political, religious, and personal differences, and accentuated by the fact that his partners were eminent in political and military affairs. This feeling produced its natural result in the disturbances in Colombia in 1884 and 1885. He was charged with being a partisan in these disturbances, and with giving active support to one party as against the other. The estate on which he lived was occupied and pillaged. The property of his firm was sequestered. His real estate was seized in like manner. He himself was finally arrested and held for trial on criminal charges. A few days afterward, however, he was released upon the peremptory demand of the commander of the Italian war ship *Flavio Gioja*, who supported his demand by landing an armed force. This incident caused a severance of diplomatic relations between Italy and Colombia. The renewal of such relations was brought about through the good offices of Spain, under whose mediation a protocol between Colombia and Italy was concluded on May 24, 1886. By this protocol Colombia agreed to restore to Cerruti his real estate in that country, and it was stipulated that every other claim of his should be submitted to the mediation of the Spanish Government.

The mediator was empowered to decide (1) whether Cerruti had lost his condition as a neutral alien, (2) whether he had lost the rights and privileges belonging to aliens in Colombia, and (3) whether an indemnity was due to him. It was provided that if an indemnity should be found to be due, the

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amount of it, as well as the terms of payment, should be submitted to a mixed commission, to consist of representatives of Italy, Colombia, and Spain, and to sit at Bogotá. With reference to the renewal of diplomatic relations, it was agreed that such renewal should take place on the day on which the protocol should be approved by the two governments; that each should send a diplomatic representative to the other; that the Italian minister should go to Colombia in a naval vessel, between which and the land batteries a salute of twenty-one guns should be exchanged at the port of Cartagena.

The Spanish Government as mediator held it to be practically admitted by the convention that Cerruti had not lost his Italian nationality. Did he lose his rights as an alien by unneutral conduct? There could be no doubt, said the mediator, that an alien had no right to meddle in political affairs, and especially in political rebellions; but the rights of the government might be secured by the expulsion of the alien or the application to him of the penal laws. But if he was allowed to remain in the country unmolested, if his alleged improper or unlawful acts remain unpunished, the question seemed to have become one of politics rather than of law. The authorities of the state of Cauca neither expelled nor condemned Cerruti, but declared him guilty and sequestered his property before submitting his acts to the judicial power. It was under these circumstances that the Italian Government came to his aid. The Government of Colombia, itself, said the mediator, admitted in the diplomatic correspondence that the proceedings against Cerruti in the state of Cauca were not authorized by law, but were undertaken in disregard of the national laws and without legal evidence to sustain the charges made against him. The mediator therefore found that Cerruti was entitled both to the restoration of his property and to damages resulting from illegal procedures.

The opinion of the mediator was rendered January 26, 1888. The Colombian Government accepted the results of the mediation, though it did not admit the correctness of all the mediator's premises, either of fact or of law; and a mixed commission was organized at Bogotá, in accordance with the third article of the proctocol, for the purpose of determining the amount of the indemnities due to Cerruti. His claims, however, were not presented to the commission; and, three weeks before the time fixed for its expiration, it suspended its sessions because there was no business before it to require their continuance. The

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Italian Government excused Cerruti's failure to appear and present his claims on the ground that the agent of Colombia before the tribunal had declared his government's intention not to accept the award. A long diplomatic correspondence ensued. It finally resulted in the conclusion on August 18, 1894, of another protocol by which the governments of Italy and Colombia agreed to submit all the claims of Cerruti for the loss and damage of his property in the state of Cauca during the political troubles of 1885 to the arbitration of the President of the United States. The claimant was represented before the arbitrator by the Messrs. Coudert Brothers, of New York; the Colombian Government by Mr. Calderon Carlisle, of Washington. The arbitrator rendered on March 2, 1897, the following award:

"*Award of the President of the United States under the protocol concluded the eighteenth day of August, in the year one thousand eight hundred and ninety-four, between the Government of the Kingdom of Italy and the Government of the Republic of Colombia.*

"This Protocol, concluded August 18, 1894, between the Kingdom of Italy and the Republic of Colombia, was entered into for the purpose of putting an end to the subjects of disagreement between the two Governments growing out of the claims of Signor Ernesto Cerruti against the Government of Colombia for losses and damages to his property in the State (now Department) of Cauca in the said Republic during the political troubles of 1885, and for the further purpose of making a just disposition of said claims. By the terms of the Protocol each Government agreed to submit to arbitration the matters and claims above referred to for the purpose of arriving at a settlement thereof as between the two Governments, and they joined in asking me, Grover Cleveland, President of the United States of America, to accept the position of Arbitrator in the case and discharge the duties pertaining thereto as a friendly act to both Governments, vesting in me full power, authority, and jurisdiction to do and perform and to cause to be done and performed all things without any limitation whatsoever which, in my judgment, might be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes the agreement is intended to secure.

"Pursuant to the terms of the said Protocol, the two Governments, and the claimant, Signor Ernesto Cerruti, as one of the two parties interested in the suit, have submitted to me within the time specified in said Protocol the documents and evidence in support of their several asserted rights.

"Now, therefore, be it known, that I, Grover Cleveland, President of the United States of America, upon whom the functions of Arbitrator have been conferred as aforesaid, hav-

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ing duly examined the documents and evidence submitted by the respective parties pursuant to the provisions of said Protocol, and having considered the arguments addressed to me in relation thereto, do hereby decide and award:

"1. That the claims made by Signor Ernesto Cerruti against the Republic of Colombia for losses of and damages to the real and personal property owned by him individually in the said State of Cauca, and the claims of said Signor Ernesto Cerruti for injury sustained by him by reason of losses of and damages to his interest in the firm of E. Cerruti and Company, are proper claims for international adjudication.

"2. That the claim submitted to me by Signor Ernesto Cerruti for personal damages resulting from imprisonment, arrest, enforced separation from his family, and sufferings and privations endured by himself and family is disallowed. I therefore make no award on account of this claim.

"3. The claim of Signor Ernesto Cerruti for moneys expended and obligations incurred for legal expenses in the preparation and prosecution of this claim, including former and present proceedings, is disallowed by me.

"4. I award for losses and damages to the individual property of Signor Ernesto Cerruti in the State of Cauca, and to his interest in the copartnership of E. Cerruti and Company, of which he was a member, including interest, the net sum of sixty thousand pounds sterling, of which sum ten thousand having been already paid, the Government of the Republic of Colombia will, in addition, pay to the Government of the Kingdom of Italy, for the use of Signor Ernesto Cerruti, ten thousand pounds sterling thereof within sixty days from the date hereof, and the remainder, being forty thousand pounds, within nine months from the date hereof, with interest from the date of this award at the rate of six per cent per annum, until paid, both payments to be made by draft, payable in London, England, with exchange from Bogotá at the time of payment.

"5. It being my judgment that Signor Cerruti is, as between himself and the Government of the Republic of Colombia, which I find has by its acts destroyed his means for liquidating the debts of the copartnership of E. Cerruti and Company for which he may be held personally liable, entitled to enjoy and be protected in the net sum awarded him hereby, I do, under the protocol which invests me with full power, authority, and jurisdiction to do and to perform and to cause to be done and performed all things without any limitation whatsoever which in my judgment may be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes which the Protocol is intended to secure, decide and adjudge to the Government of the Republic of Colombia all rights, legal and equitable, of the said Signor Ernesto Cerruti in and to all property, real, personal, and mixed in the Department of Cauca and which has been called in question in this proceeding, and I further adjudge and decide that the Government of the Republic of Colombia shall guarantee and protect Signor

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Ernesto Cerruti against any and all liability on account of the debts of the said copartnership, and shall reimburse Signor Ernesto Cerruti to the extent that he may be compelled to pay such *bona fide* copartnership debts duly established against all proper defenses which could and ought to have been made, and such guaranty and reimbursement shall include all necessary expenses for properly contesting such partnership debts.

"In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done in duplicate at the city of Washington on the second day of March, in the year one thousand eight hundred and ninety-seven, and of the Independence of the United States the 121st.

[Seal of the United States.] GROVER CLEVELAND.

"By the President:

"RICHARD OLNEY,
"*Secretary of State.*"

Colombia, while acknowledging her obligation to pay the indemnity found by the arbitrator to be due to the claimant, has protested against that part of the foregoing award which on the one hand adjudges to her the rights of the claimant to property in Cauca, but on the other requires her to guarantee him against liability for partnership debts and to reimburse him for payments and expenses on that score. The protocol provided that the arbitrator, when he should have qualified himself to enter upon his duties, should "become vested with full power, authority, and jurisdiction to do and perform, and to cause to be done and performed, all things without any limitation whatsoever, which in his judgment may be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes which this agreement is intended to secure."

The arbitrator was then required to proceed to examine and decide (1) which, if any, of the claimant's demands were "proper * * * for international adjudication," and (2) which, if any, were "proper * * * for adjudication by the territorial courts of Colombia." As to claims of the first class, he was required to determine "the amount of indemnity, if any, which the claimant * * * is entitled to receive from the Government of Colombia through diplomatic action;" as to any claims of the second class, he was directed, after ascertaining that they belonged in that category, to "take no further action" upon them. By these stipulations Colombia maintained that the powers of the arbitrator were expressly

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limited to the award of a specific indemnity on any international claims, and that he was equally precluded from dealing with any matter cognizable by the Colombia courts or from imposing on the government any contingent liabilities.

Behring Sea Damage Commission.

At page 961, Vol. I., of this work reference was made to the organization of a mixed commission for the settlement of claims growing out of the fur-seal controversy. The commissioners were so fortunate as to reach a decision without resort to an umpire. Their award[1] was as follows:

"Whereas by a convention between the United States of America and Great Britain, signed at Washington on February 8, 1896, it was, among other matters, agreed and concluded that 'all claims on account of injuries sustained by persons in whose behalf Great Britain is entitled to claim compensation from the United States, and arising by virtue of' a certain treaty between the United States and Great Britain, signed at Washington on February 29, 1892, the award and the findings of the tribunal of arbitration constituted thereunder, as also certain additional claims specified in the preamble of the convention first above mentioned, should be referred to two commissioners, one of whom should be appointed by the President of the United States and the other by Her Britannic Majesty, and each of whom should be learned in the law, and it was further agreed and concluded in the convention first herein named, that said commissioners should determine the liability of the United States, if any, in respect of each claim, and assess the amount of compensation, if any, to be paid on account thereof;

"And whereas the President of the United States of America appointed the Honorable William L. Putnam, a judge of the circuit court of the United States for the first circuit, one of said commissioners, and Her Britannic Majesty appointed the Honorable George Edwin King, a justice of the supreme court of Canada, the other of said commissioners; and we, the said commissioners, having met at Victoria, in the province of British Columbia, Canada, on the twenty-third day of November, A. D. 1896, and our respective powers having been found to be duly authenticated, and each of us having duly taken the oath prescribed by the convention, proceeded jointly to the discharge of our duties thereunder; and having heard and examined on oath or affirmation every question of fact not found by the tribunal of arbitration under the treaty between the United States of America and Her Britannic Majesty, signed at Washington on the 29th of February 1892, and having received all suitable authentic testimony concerning the

[1] S. Doc. 59, 55th Cong. 2d sess. The total amount awarded is $473,151.26.

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same, and being attended by counsel on behalf of the United States and by counsel on behalf of Great Britain, who were duly heard before us, and having impartially and carefully examined the questions submitted to us:

"Now therefore we, the said commissioners, do hereby determine, adjudge, and award as follows:

"The rate of interest awarded by us is six per cent per annum, being the statutory rate at Victoria, British Columbia, during the period covered, but being less than the current rate thereat.

"As to the claim in respect of the vessel *Carolina*, it is determined that the United States are liable to Great Britain in respect thereof, and we assess the amount of compensation to be paid on account thereof to Great Britain on behalf of the owner, master, officers, and crew of the vessel, as follows: Thirteen thousand three hundred and forty-one dollars and seventy-two cents ($13,341.72), with interest from September 10, 1886, until this day, amounting to nine thousand and twenty dollars and seventy-one cents ($9,020.71), and making a total of principal and interest of twenty-two thousand three hundred and sixty-two dollars and forty-three cents ($22,362.43).

"As to the claim in respect of the vessel *Thornton*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, thirteen thousand five hundred and twenty-one dollars and ten cents ($13,521.10), with interest from September 10, 1886, until this day, amounting to nine thousand one hundred and forty-two dollars and fifty-three cents ($9,142.53), and making a total of principal and interest of twenty-two thousand six hundred and sixty-three dollars and sixty-three cents ($22,663.63).

"As to the claim in respect of the vessel *Onward*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel (exclusive of the net interest of Alexander McLean, who at the time of the convention was a citizen of the United States and domiciled therein and has so remained), as follows, that is to say, nine thousand three hundred and seventy-six dollars ($9,376), with interest from September 10, 1886, until this day, amounting to six thousand three hundred and thirty-nine dollars and seventy-four cents ($6,339.74), and making a total of principal and interest of the sum of fifteen thousand seven hundred and fifteen dollars and seventy-four cents ($15,715.74).

"As to the claim in respect of the vessel *Favourite*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess

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and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel (exclusive of the net interest of said Alexander McLean) as follows, that is to say, three thousand two hundred and two dollars ($3,202), with interest from September 10, 1886, until this day, amounting to two thousand one hundred and sixty-five dollars and eight cents ($2,165.08), and making a total of principal and interest of the sum of five thousand three hundred and sixty-seven dollars and eight cents ($5,367.08).

"As to the claim in respect of the vessel *W. P. Sayward*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, twelve thousand five hundred and thirty-seven dollars and fifty cents ($12,537.50), with interest from September 10, 1887, until this day, amounting to seven thousand seven hundred and twenty-five dollars and twenty-two cents ($7,725.22), and making a total principal and interest of the sum of twenty thousand two hundred and sixty-two dollars and seventy-two cents ($20,262.72).

"As to the claim in respect of the vessel *Anna Beck*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel as follows, that is to say, twenty-one thousand six hundred and ninety-two dollars and fifty cents ($21,692.50), with interest from September 10, 1887, until this day, amounting to thirteen thousand three hundred and sixty-six dollars and nineteen cents ($13,366.19), making a total of principal and interest of the sum of thirty-five thousand and fifty-eight dollars and sixty-nine cents ($35,058.69).

"As to the claim in respect of the vessel *Alfred Adams*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain on behalf of the owners, master, officers, and crew of the vessel, exclusive of the net interest of Alexander Frank, who at the time of the convention was a citizen of the United States and domiciled therein, and has so remained, as follows, that is to say: Ten thousand one hundred and twenty-four dollars, with interest from September 10, 1887, until this day, amounting to six thousand two hundred and thirty-eight dollars and seven cents ($6,238.07), and making a total of principal and interest of the sum of sixteen thousand three hundred and sixty-two dollars and seven cents ($16,362.07).

"As to the claim in respect of the vessel *Grace*, it is adjudged

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and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, twenty-six thousand two hundred and thirteen dollars and fifty cents ($26,213.50), with interest from September 10, 1887, until this day, amounting to sixteen thousand one hundred and twenty-five dollars and sixty-seven cents ($16,125.67), and making a total of principal and interest of forty-two thousand three hundred and thirty nine dollars and seventeen cents ($42,339.17).

"As to the claim in respect of the vessel *Dolphin*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, thirty-one thousand four hundred and eighty-four dollars ($31,484), with interest from September 10, 1887, until this day, amounting to the sum of nineteen thousand three hundred and ninety-nine dollars and thirty-eight cents ($19,399.38), and making a total of principal and interest of the sum of fifty thousand eight hundred and eighty-three dollars and thirty-eight cents ($50,883.38).

"As to the claim in respect of the vessel *Ada*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, twenty thousand nine hundred and two dollars and sixty-nine cents ($20,902.69), with interest from September 10, 1887, until this day, amounting to twelve thousand eight hundred and eighty dollars and one cent ($12,880.01), and making a total of principal and interest of the sum of thirty-three thousand seven hundred and eighty-two dollars and seventy cents ($33,782.70).

"As to the claim in respect of the vessel *Triumph*, warned or seized August 4, 1887, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, seventeen hundred and fifty dollars ($1,750), with interest from September 10, 1887, until this day, amounting to one thousand and seventy eight dollars and twenty-nine cents ($1,078.29), and making a total of principal and interest of the sum of two thousand eight hundred and twenty-eight dollars and twenty-nine cents ($2,828.29).

"As to the claim in respect of the vessel *Juanita*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and

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award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel as follows, that is to say, eleven thousand four hundred and ninety-three dollars ($11,493), with interest from September 10, 1889, until this day, amounting to five thousand seven hundred and two dollars and forty-four cents ($5,702.44), and making a total of principal and interest of the sum of seventeen thousand one hundred and ninety-five dollars and forty four cents ($17,195.44).

"As to the claim in respect of the vessel *Pathfinder*, seized or warned July 29, 1889, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say: Thirteen thousand seven hundred and ninety-six dollars ($13,796), with interest from September 10, 1889, until this day, amounting to six thousand eight hundred and forty-five dollars and twelve cents ($6,845.12), and making a total of principal and interest of the sum of twenty thousand six hundred and forty-one dollars and twelve cents ($20,641.12).

"As to the claim in respect of the vessel *Triumph*, seized or warned July 11, 1889, it is adjuged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, fifteen thousand four hundred and fifty dollars, with interest from September 10, 1889, until this day, amounting to seven thousand six hundred and sixty-five dollars and seventy-seven cents ($7,665.77), and making a total of principal and interest of the sum of twenty-three thousand one hundred and fifteen dollars and seventy-seven cents ($23,115.77).

"As to the claim in respect of the vessel *Black Diamond*, seized or warned July 11, 1889, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, fifteen thousand one hundred and seventy-three dollars ($15,173), with interest from September 10, 1889, until this day, amounting to seven thousand five hundred and twenty-eight dollars and thirty-two cents ($7,528.32), and making a total of principal and interest of the sum of twenty-two thousand seven hundred and one dollars and thirty-two cents ($22,701.32).

"As to the claim in respect of the vessel *Lily*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to

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Great Britain, on behalf of the owners, master, officers, and crew of the vessel as follows, that is to say, eleven thousand seven hundred and thirty nine dollars ($11,739) with interest from September 10, 1889, until this day, amounting to five thousand eight hundred and thirty-two dollars and forty-eight cents ($5,832.48), and making a total of principal and interest of the sum of seventeen thousand five hundred and seventy-one dollars and forty-eight cents ($17,571.48).

"As to the claim in respect of the vessel *Ariel*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, forty-nine hundred and fifty dollars ($4,950), with interest from September 10, 1889, until this day, amounting to two thousand four hundred and fifty-six dollars and three cents ($2,456.03), and making a total of principal and interest of the sum of seven thousand four hundred and six dollars and three cents ($7,406.03).

"As to the claim in respect of the vessel *Kate*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, three thousand and fifty dollars ($3,050) with interest from September 10, 1889, until this day, amounting to one thousand five hundred and thirteen dollars and thirty-one cents ($1,513.31), and making a total of principal and interest of the sum of four thousand five hundred and sixty-three dollars and thirty-one cents ($4,563.31).

"As to the claim in respect of the vessel *Minnie*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, eighty-four hundred and sixty dollars ($8,460), with interest from September 10, 1889, until this day, amounting to four thousand one hundred and ninety-seven dollars and fifty seven cents ($4,197.57), and making a total of principal and interest of the sum of twelve thousand six hundred and fifty-seven dollars and fifty-seven cents ($12,657.57).

"As to the claim in respect of the vessel *Pathfinder*, seized March 27, 1890, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, eight hundred dollars ($800), with interest from March 27, 1890, until this day, amounting to three hundred and seventy dollars and sixty-seven cents ($370.67), and mak-

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ing a total of principal and interest of the sum of eleven hundred and seventy dollars and sixty-seven cents ($1,170.67).

"As to the claim in respect of the vessel *Wanderer*, it is adjudged and determined that there is no liability on the part of the United States of America in respect of such claim.

"As to the claim in respect of the vessel *Winnifred*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners thereof, as follows, that is to say, three thousand two hundred and eighty three dollars and five cents ($3,283.05), with interest from July 27, 1892, until this day, amounting to one thousand and sixty-one dollars and fifty two cents ($1,061.52), and making a total of principal and interest of the sum of four thousand three hundred and forty-four dollars and fifty-seven cents ($4,344.57).

"As to the claim in respect of the vessel *Henrietta*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain on behalf of the owners, master, officers, and crew of the vessel, as follows, that is to say, nine thousand five hundred and ninety-nine dollars and eighty-five cents ($9,599.85), with interest on twenty-four hundred and thirty-seven dollars from September 2, 1892, until this day, and upon the balance from February 17, 1894, until this day, making the entire interest two thousand four hundred and twenty-one dollars and nineteen cents ($2,421.19), making a total of principal and interest of the sum of twelve thousand and twenty-one dollars and four cents ($12,021.04).

"As to the claim in respect of the vessel *Oscar and Hattie*, it is adjudged and determined that the United States of America are liable to Great Britain in respect thereof, and we assess and award the amount of compensation to be paid on account thereof to Great Britain, on behalf of the owners thereof, as follows, that is to say, two thousand two hundred and fifty dollars ($2,250), with interest from August 30, 1892, until this day, amounting to seven hundred and fifteen dollars and five cents ($715.05), and making a total of principal and interest of the sum of two thousand nine hundred and sixty-five dollars and five cents ($2,965.05).

"As to the personal claims we adjudge and determine that the United States of America are liable on account of the following persons, and assess and award the amount of compensation to be paid to Great Britain on account of each of them, as follows:

"Daniel Monroe, master of the *Onward*, the principal sum of three thousand dollars ($3,000), with interest from September 10, 1886, to this day, making a total amount of five thousand and twenty-eight dollars and fifty cents ($5,028.50).

"John Margotich, mate of the *Onward*, the principal sum of

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twenty-five hundred dollars ($2,500), with interest from September 10, 1886, to this day, making a total amount of four thousand one hundred and ninety dollars and forty-two cents ($4,190.42).

"Hans Guttormsen, master of the *Thornton*, the principal sum of three thousand dollars ($3,000), with interest from September 10, 1886, to this day, making a total amount of five thousand and twenty-eight dollars and fifty cents ($5,028.50).

"Harry Norman, mate of the *Thornton*, the principal sum of twenty-five hundred dollars ($2,500), with interest from September 10, 1886, to this day, making a total amount of four thousand one hundred and ninety dollars and forty-two cents ($4,190.42).

"James Ogilvie, master of the *Carolina*, the principal sum of three thousand dollars, with interest from September 10, 1886, to this day, making a total amount of five thousand and twenty-eight dollars and fifty cents ($5,028.50).

"James Blake, mate of the *Carolina*, the principal sum of twenty-five hundred dollars ($2,500), with interest from September 10, 1886, to this day, making a total amount of four thousand one hundred and ninety dollars and forty-two cents ($4,190.42).

"James D. Warren, master of the *Dolphin*, the principal sum of two thousand dollars ($2,000), with interest from September 10, 1887, to this day, making a total amount of three thousand and two hundred and thirty-two dollars and thirty-three cents ($3,232.33).

"John Reilly, mate of the *Dolphin*, the principal sum of fifteen hundred dollars ($1,500), with interest from September 10, 1887, to this day, making a total amount of two thousand four hundred and twenty-four dollars and twenty-five cents ($2,424.25).

"George P. Fesey, master of the *W. P. Sayward*, the principal sum of two thousand dollars ($2,000), with interest from September 10, 1887, to this day, making a total amount of three thousand two hundred and thirty-two dollars and thirty-three cents ($3,232.33).

"A. B. Laing, mate of the *W. P. Sayward*, the principal sum of fifteen hundred dollars ($1,500), with interest from September 10, 1887, to this day, making a total amount of two thousand four hundred and twenty-four dollars and twenty-five cents ($2,424.25).

"Louis Olsen, master of the *Anna Beck*, the principal sum of two thousand dollars ($2,000), with interest from September 10, 1887, making a total amount of three thousand two hundred and thirty-two dollars and thirty-three cents ($3,232.33).

"Michael Keefe, mate of the *Anna Beck*, the principal sum of fifteen hundred dollars ($1,500), with interest from September 10, 1887, to this day, making a total amount of two thousand four hundred and twenty-four dollars and twenty-five cents ($2,424.25).

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"W. Petit, master of the *Grace*, the principal sum of two thousand dollars ($2,000), with interest from September 10, 1887, to this day, making a total amount of three thousand two hundred and thirty-two dollars and thirty-three cents ($3,232.33).

"C. A. Lundberg, mate of the *Ada*, the principal sum of one thousand dollars ($1,000), with interest from September 10, 1887, to this day, making a total amount of one thousand six hundred and sixteen dollars and seventeen cents ($1,616.17).

"As to 'costs in *Saywards* Case,' it is adjudged and determined that there is no liability on the part of the United States of America in respect of such claim.

"Her Majesty also presented for our consideration the following claims, that is to say, in behalf of the *Black Diamond*, warned by the collector at Unalaska on July 1, 1886, and also in behalf of James Gaudin, master of the *Ada*, as to each of which we determine and award that we have no jurisdiction, and we dismiss the same.

"Made in duplicate and signed by us this seventeenth day of December, A. D. 1897.

"WILLIAM L. PUTNAM,
"*Commissioner appointed by the President of the United States.*

"GEORGE E. KING,
"*Commissioner appointed by Her Britannic Majesty.*

"Respecting the claims mentioned in the award of the commissioners as having been presented on behalf of Great Britain and dismissed as not being within our jurisdiction, namely, the claims of the *Black Diamond*, arising in the year 1886, and the personal claim of James Gaudin, the commissioners, in pursuance of the communication to them from the Secretary of State for the United States and Her Britannic Majesty's ambassador at Washington, dated at Washington, January 26, 1897, and appearing in the protocol of February 2, 1897, beg to report as follows:

"We find that damages were sustained by the owners, master, officers, and crew of the *Black Diamond*, in connection with the notice given by the collector of customs at Unalaska on July 1, 1886, to the amount of five thousand dollars ($5,000), with interest at the rate of six per cent per annum from September 10, A. D. 1887.

"And as to the personal claims of James Gaudin, master of the *Ada* in 1887, we report that the amount of damage sustained by him was one thousand dollars ($1,000), with interest at the rate of six per cent per annum from September 10, 1887.

"December 17, 1897.

"WILLIAM L. PUTNAM,
"*Commissioner appointed by the President of the United States.*

"GEORGE E. KING,
"*Commissioner appointed by Her Britannic Majesty.*"

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